RULES COMMITTEE

- Texas non-judicial foreclosure process governed by Texas Property Code, 51.002, et seq. and contractual documents

- Non-judicial foreclosure process - default under deed of trust triggering power of sale and non-judicial foreclosure

- Texas Supreme Court Order to proceed with foreclosure –

  - Default under deed of trust triggers Application for Order to proceed with foreclosure under Rules 735 and 736

  - Expedited process for obtaining Order to proceed with foreclosure

- After default and granting of Order to proceed with foreclosure –

  - Proceed with non-judicial foreclosure

  - 21 day notice of foreclosure and sale at courthouse steps on first Tuesday of every month at County Courthouse where property is located

- Big picture factors for priority ad valorem tax liens

  - Rules 735 and 736 are working – being applied by the legislature to more foreclosure processes

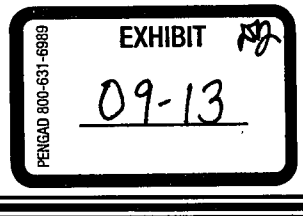
  - Coordinate administration with Court Clerks, Coordinators, and presiding Judges

  - Due process service on all lien holders of record and effect on title companies dealing with lien priority of ad valorem taxes

  - Dealing with ad valorem taxes that previously required judicial foreclosure – must protect all parties – creditor, debtor, lien holder, ad valorem tax governmental entities, consumers, title companies, etc.

  - Long process for adding priority ad valorem liens to Rules 735 and 736

  - Priority – do not disturb 150 years of property title laws – need certainty to keep land titles marketable for all



RULES 735 AND 736 TEXAS RULES OF CIVIL PROCEDURE –

HISTORY

- Texas Supreme Court was originally required to develop an order to proceed with foreclosure when voters of Texas approved home equity loans in the Texas Constitution, 1996

- Texas Supreme Court appointed Foreclosure Task Force to propose Rules

- Diverse Task Force with representation from consumers, bar, pro bono, mortgage companies, title companies, lenders, etc.

- Careful not to interfere with certainty and marketability of real property land titles

- Rules 735 and 736 designed for situations where defendant does not file an answer –

  - only issue is the right of applicant to obtain an order to proceed with foreclosure

  - automatic abatement and dismissal without prejudice, if notice of another district court suit contesting foreclosure is filed in the court where the application is pending

- Rules 735 and 736 presented to Texas Supreme Court Advisory Rules Committee and approved by Texas Supreme Court in 1996

- 1999 – Legislature approved reverse mortgages with direction for Texas Supreme Court to adopt an order for proceeding with foreclosure of reverse mortgages

  - Task Force proposed changes to Rules 735 and 736 to include reverse mortgages

  - Approved by Texas Supreme Court

- 2007 Legislature directed order for foreclosure of property ad valorem tax lien

- Task Force met many times with broad representation of affected interests, including notice to holders of recorded pre-existing first liens on property

- Task Force proposing approval for adding provision to Rules 735 and 736 for obtaining an order to proceed with foreclosure of ad valorem tax liens – additions to Rules 735 and 736 unanimously approved by the Texas Supreme Court Task Force.

FORECLOSURE TIMELINE

Foreclosure Process Starts

30 days after debtor misses a mortgage payment

Month 1

At least six calls and two letters to debtor seeking to cure default status

Month 2

At least six calls and three letters to debtor

Notice of default sent pursuant to TPC 51.002

Month 3

At least eight calls and two letters to debtor to cure default

Month 4

Foreclosure referral to law firm

Fair Debt Collection Practices Act (FDCP) letter sent to debtor

During foreclosure process, mortgage servicer attempts to cure default by various loss mitigation alternatives and foreclosure sale date is postponed if cure is viable

Month 5

TRCP 736 application filed

Debtor is served with the application

Month 6

Debtor's response is due 38 days after service of process

Month 7

Hearing held if a response is filed; otherwise, default order granted

Month 8

Notice of foreclosure sale date sent to the debtor

Posting notice filed with clerk

Month 9 and 10

Foreclosure sale – first Tuesday of the month

Texas Office of Court Administration:
625,961 cases pending as of December 31, 2008

	Texas Loans Serviced	Texas Loans in Foreclosure
Total	3,105,746	140,069
Texas Prime Loans	2,017,919	42,981
Texas Subprime Loans	369,560	51,701

Source: MBA National Delinquency Report 3/31/2009

Most mortgages are 5 months delinquent before file is referred for foreclosure	69 % of all borrowers fail to contact the mortgage servicer prior to the foreclosure sale	Most mortgages are 10 months delinquent before the foreclosure sale

Investor Collection and Default Curative Requirements

Fannie Mae	Freddie Mac	HUD
Phone Calls Begin telephone contact with debtor between the 17th and 20th day of delinquency (earlier contact for habitual delinquents between 2nd and 10th day of delinquency)	**Phone Calls** Begin telephone contact with debtor between the 5th and 15th day of delinquency (earlier contact may be required if alternative arrangements have been made)	**Phone Calls** Begin telephone contact with debtor between the 7th and 10th day of delinquency (earlier contact may be required if alternative arrangements have been made)
Late Payment Notices Sent by the 16th day after it is due (some niche products require earlier notification)	**Late Payment Notices** Sent by the 16th day after it is due (some niche products require earlier notification)	**Late Payment Notices** Sent by the 16th day after it is due
Letters Loss mitigation solicitation letter sent no later than the 50th day of delinquency	**Letters** Must offer counseling no later than the 30th day of delinquency and continue to offer loss mitigation alternatives	**Letters** Must offer counseling no later than the 30th day of delinquency and continue to offer loss mitigation alternatives
Initiation of Foreclosure Must be at least three monthly installments delinquent; must send debtor a demand letter at least 30 days before foreclosure proceedings begin; refer loan to attorney to begin foreclosure proceedings by the 45th day after demand letter is sent; foreclosure proceedings begin by the 120th day of delinquency, unless actively engaged in loss mitigation	**Initiation of Foreclosure** Must be at least three monthly installments delinquent; must send debtor a demand letter no earlier than the 90th day of delinquency; refer loan to attorney to begin foreclosure proceedings by the 120th day after demand letter is sent, unless actively engaged in loss mitigation	**Initiation of Foreclosure** Must be at least three monthly installments delinquent; must send debtor a demand letter no earlier than the 90th day of delinquency; refer loan to attorney to begin foreclosure proceedings within six month from the date of default, unless actively engaged in loss mitigation
Loss Mitigation Must be conducted at all stages of delinquency and until a foreclosure is completed	**Loss Mitigation** Must be conducted at all stages of delinquency and until a foreclosure is completed	**Loss Mitigation** Must be conducted at all stages of delinquency and until a foreclosure is completed

Source: study by Roper Public Affairs & Media for Freddie Mac

Proposed Amendments to Rules 735 and 736 of the Texas Rules of Civil Procedure

PART VII - RULES RELATING TO SPECIAL PROCEEDINGS

SECTION 1. PROCEDURES RELATED TO HOME EQUITY, REVERSE MORTGAGE, HOME EQUITY LINE OF CREDIT, AND TRANSFERRED TAX LIEN OR PROPERTY TAX LOAN FORECLOSURES

RULE 735. Home Equity, Reverse Mortgage, Home Equity Line of Credit, and Transferred Tax Lien or Property Tax Loan Foreclosures.

735.1 Applicability.

This section applies to foreclosure of a:

(a) Home equity loan agreement under Article XVI, Section 50(a)(6), Texas Constitution;

(b) Reverse mortgage loan agreement under Article XVI, Section 50(a)(7), Texas Constitution, that requires a court order under Article XVI, Section 50(k)(11), Texas Constitution;

(c) Home equity line of credit loan agreement under Article XVI, Section 50(a)(6)(F) and (t), Texas Constitution; or

(d) Transferred tax lien or property tax loan agreement as described in Sections 32.06 and 32.065, Tax Code, and Section 351.002(2), Finance Code.

735.2 Foreclosure Proceedings

(a) A person seeking to foreclose a lien described in Rule 735.1, except as provided in 735.2(c), must obtain from a district court or court with equivalent jurisdiction in a county where all or a major portion of the property is located:

(1) a judgment for judicial foreclosure; or

(2) an expedited order under Rule 736.

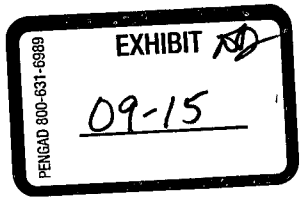
(b) A Rule 736 order resulting from a Rule 736 application may be obtained as part of a counterclaim, cross claim, intervention, probate or decedent related proceeding, or other third party proceeding brought in a district court or court with equivalent jurisdiction.

(c) If the debtor, mortgagor, property owner or owner of the property, or holder of a recorded preexisting first lien on the property is deceased and a personal representative has qualified for letters of administration in a dependent or creditor's probate administration, the judgment or order described in (a)(1) and (2) must be obtained in the probate court where the administration is pending.

(d) After a judgment or order is obtained under Rule 735 or 736, a person may proceed with the foreclosure process under the loan agreement and applicable law.

735.3 Definitions

In this section:



(a) "Account" means the servicing records and documents related to the debtor's loan agreement that are kept in the regular course of business in electronic or any other format.

(b) "Applicant" means the person seeking to obtain a Rule 736 order.

(c) "Commercial delivery service" means a document delivery carrier or enterprise that provides proof of delivery in the regular course of business.

(d) "Declaration" means a statement made by an officer or employee of the mortgage servicer obligated to service the debtor's loan agreement. The statement must be sworn before a notary or made under penalty of perjury.

(e) "Debtor" means the person liable for payment of the debt evidenced by the loan agreement that encumbers the property.

(f) "Heir" means in the context in which the term is used: (a) a person, including the surviving spouse, who is entitled under the statutes of descent and distribution to the property of a decedent who dies intestate; (b) a distributee entitled to the property of a decedent under a lawful will probated in the county where the property is located; or (c) the current personal representative of the decedent's estate.

(g) "Holder of a recorded preexisting first lien on the property" under Section 32.06(c-1), Tax Code, means the current owner or noteholder of a loan agreement secured by a "recorded preexisting first lien" as that term is defined in this rule.

(h) "Investor" means, for a loan agreement that is securitized: (a) a person who suffers the risk of loss if the debtor defaults; (b) a person for whose benefit the mortgage servicer remits the principal and interest received from the debtor's scheduled loan agreement payments; or (c) the legal, beneficial, or equitable owner of the debtor's loan agreement that may be held by a special purpose or government sponsored entity.

(i) "Last known address" means:

(1) For a debtor, mortgagor, property owner or owner of the property:

(i) the property address, if the person's residence is the property encumbered by the loan agreement; or

(ii) if the property encumbered by the loan agreement is not the person's residence, both the property address and the person's most recent address contained in the servicing records of the current mortgage servicer;

(2) For a holder of the current recorded preexisting first lien, the current address for the person described in Rule 736.7, who is to be served with citation; or

(3) For an heir, both the property address and the heir's residence or business address.

(j) "Loan agreement" means the note, security instrument, and any other document or instrument executed contemporaneously that evidences an obligation to pay a loan encumbering the property.

(k) "Mortgage Electronic Registration Systems, Inc." or any derivation of the name to include "MERS" means the book entry system referred to in Section 51.0001(1), Property Code, and may be the mortgagee of record in the official real property records or the nominee of the lender or the beneficiary of the security instrument encumbering the property.

(l) "Mortgage servicer" means:

(1) the last person to whom a debtor has been instructed to send payments for a debt evidenced by the debtor's loan agreement and may be an independent third party or the owner, noteholder, or transferee of the debtor's loan agreement;

(2) a person authorized to administer foreclosure of the property under Section 51.0025, Property Code; or

(3) If the debtor's loan agreement has been securitized, the person who:

(i) is obligated in writing to service the debtor's loan agreement account; and

(ii) remits the principal and interest received from the debtor's scheduled loan agreement payments to a person responsible for distributing the debtor's payments to the investors.

(m) "Mortgagee" means:

(1) the owner, noteholder, or investor of the debtor's loan agreement;

(2) the current grantee, nominee of the lender, beneficiary, or mortgagee of record of the recorded security instrument securing the debtor's loan agreement;

(3) the book entry system described in Section 51.0001(1), Property Code;

(4) the current mortgage servicer of the debtor's loan agreement; or

(5) the transferee of a transferred tax lien or property tax loan agreement.

(n) "Mortgagor" means a person who is the grantor of a security interest evidenced by a security instrument encumbering the property.

(o) "Person" means an individual, corporation, estate, trust, partnership, association, joint venture, limited liability company, limited liability partnership, or any other legal or governmental entity, enterprise, or organization.

(p) "Property" means the real property, fixtures, and improvements encumbered by a loan agreement sought to be foreclosed under Rule 735 or 736.

(q) "Property address" means the street address assigned by the U.S. Postal Service to the property encumbered by a loan agreement and, if the U.S. Postal Service has not assigned a street address, the legal description of the property.

(r) "Property owner" under Sections 32.06 and 32.065, Tax Code, means a debtor who is liable to pay a transferred tax lien or property tax loan agreement that encumbers the property, and the "owner of the property" who must be served with an application under Section 32.06(c-1) and (2).

(s) "Property tax loan" means a loan agreement, as provided for in 32.065(b), Tax Code, and as defined in Section 351.002, Finance Code.

(t) "Recorded preexisting first lien" under Section 32.06(c)(2) and (c-1), Tax Code, means a current contractual lien that encumbered the property at the time the transferred tax lien was recorded, which is evidenced by a recorded security instrument, other than a transferred tax lien, that was recorded first in time to any other contractual lien in the official real property records.

(u) "Respondent" means a person named as a responding party in a Rule 736 application.

(v) "Security instrument" means a deed of trust or other contractual lien document that evidences a security interest encumbering the property.

(w) "Servicing" means activities related to the administration of a debtor's loan agreement in the regular course of business and may include:

(1) accounting, record keeping, escrow administration, and communication with the debtor and third parties;

(2) receiving loan payments from a debtor and remitting to the owner or investor of the debtor's loan agreement the principal and interest less servicing fees received from the debtor; and

(3) administering foreclosure of the property in accordance with Section 51.0025, Property Code.

(x) "Transferred tax lien" or "property tax loan" means a lien, as provided in Section 32.065(b), Tax Code, and as defined in Section 351.002, Finance Code.

(y) "Transferee" or "property tax lender" under Sections 32.06(c) and (c-1) and 32.065, Tax Code, means a person authorized to pay the taxes of another and the person, or the person's successor in interest, who is the owner, noteholder, or investor of a transferred tax lien or property tax loan and a person as defined in Section 351.002, Finance Code.

RULE 736.1 Expedited Court Order Proceeding

(a) Before filing an application under this rule, notices in the sequence and time required by law must be sent to the person liable for the debt and include:

(1) a notice or demand to cure the default and a notice of intent to accelerate the maturity of the debt, which may be combined into one notice or document, unless the loan agreement provides otherwise;

(2) a notice of acceleration of the maturity of the debt, unless the debt has matured; and

(3) any other notice required by law that is a condition precedent for initiating a nonjudicial foreclosure sale prior to acceleration of the maturity of the debt unless the debt has matured.

(b) If a person provides a change of address in writing to the mortgage servicer of the debtor's loan agreement as provided in Section 51.0021, Property Code, all notices required by this section must be sent to the person's new address. Previous notices properly sent to the person's former address are not required to be re-mailed or re-served.

(c) The application, declaration, and order filed with the court shall be the same or substantially the same or similar to the promulgated forms found in Rules 736.2 and 736.15.

(d) All requirements for allegations and statements of fact in a Rule 736.2 promulgated form are made a part of this rule by reference for all purposes.

RULE 736.2 Forms

(a) Home Equity, Reverse Mortgage, or Home Equity Line of Credit Application Form.

Cause No.: [_____]

IN RE [*Identify type of loan agreement – see Rule 735.1*] LOAN AGREEMENT	§	**IN THE [*Type of Court*] COURT**
	§	
	§	
	§	
	§	

APPLICANT: **[** *Name of person seeking to enforce the debtor's loan agreement – see Rule 735.3(b) and (m)(1),(2) and (4)* **] "Applicant"**	§	
	§	**[** *Name* **] COUNTY, TEXAS**
RESPONDENT: **[** *Name of each debtor – see Rule 735.3(e) and (u)* **] "Debtor"** **[** *Name of each mortgagor – see Rule 735.3(n) and (u)* **] "Mortgagor"** **[** *Name of each spouse, heir, or personal representative, if applicable – see Rules 735.3(f) and (u) and 736.8* **] ["Spouse" or "Heir" or "Distributee" or "Personal Representative"]**	§	**[** *Court Designation* **]**

THE APPLICANT IS SEEKING AN EXPEDITED ORDER TO ALLOW A NONJUDICIAL *IN REM* FORECLOSURE TO PROCEED AGAINST THE ENCUMBERED PROPERTY IN ACCORDANCE WITH CHAPTER 51, PROPERTY CODE, AND THE DEBTOR'S [*STATE TYPE OF LOAN AGREEMENT DESCRIBED IN RULE 735.1*] LOAN AGREEMENT AGAINST THE ENCUMBERED PROPERTY.

1. APPLICANT: [*state name of the person seeking to enforce the loan agreement*] ("Applicant"), whose address is [*state street address, city, state, and zip code*], is seeking to enforce a [*state type of loan agreement described in Rule 735.1*] loan agreement against [*state name of each debtor*] ("Debtor").

   The property encumbered by Debtor's loan agreement is commonly known as [*state property address*] ("Property"). With respect to Debtor's loan agreement:
   [*Note: complete (1-a) and (1-b), and, if applicable, (1-c) and (1-d)*]

   (1-a) [*State name of the person and choose as appropriate:* ("Owner"), ("Noteholder"), *or* ("Investor")] of Debtor's loan agreement is the person who has the legal, beneficial, or equitable right to receive the principal and interest received from Debtor's scheduled loan agreement payments.

   (1-b) [*State name*] ("Mortgage Servicer"), whose address is [*state street address, city, state, and zip code*], is the current mortgage servicer responsible for administrating and managing Debtor's loan agreement account for [*state name of Mortgage Servicer's principal, i.e. Owner, Noteholder, or Investor or if Owner or Noteholder is acting as Mortgage Servicer for its own account, state its own account*].

   (1-c) *(Note: if Mortgage Servicer is administering the foreclosure pursuant to Section 51.0025, Property Code, state)* As Mortgage Servicer of Debtor's account, [*state name of Mortgage Servicer*] is administering the

foreclosure of the lien against the property in accordance with Section 51.0025, Property Code.

(1-d) (*Note: If Mortgage Electronic Registration Systems, Inc., MERS, or a similar derivation of the name is the current mortgagee or record, nominee, or the beneficiary of the recorded security instrument, state)* "[The name or derivation of the name used in the security instrument for Mortgage Electronic Registration Systems, Inc., or MERS] ("MERS") is the mortgagee of record of Debtor's security instrument filed in the official real property records of [name of Texas county]. MERS is a book entry system referred to in Section 51.0001(1), Property Code.

2. RESPONDENT:

(*Note: in Paragraph 2 complete each subpart and make a separate sub-paragraph for each person named as a respondent*)

(2-a) [*State name of each person liable for the loan agreement debt sought to be foreclosed*] ("Debtor") is the person liable for payment of the debt evidenced by the loan agreement that encumbers the property sought to be foreclosed and may be served at [*state last known address of each debtor*].

(2-b) [*State name of each mortgagor of the security instrument sought to be foreclosed*] ("Mortgagor") is a grantor of the security instrument that encumbers the property sought to be foreclosed and may be served at [*state Mortgagor's last known address*]. Applicant is not seeking to collect a debt against a mortgagor who is not liable for the loan agreement debt.

(2-c) (*Note: if Debtor or Mortgagor is deceased, state as appropriate*) [*name of surviving spouse*] is the surviving spouse and [*state name of each heir and describe status, i.e., heir, distribute, or personal representative*] of [*state name of each deceased Debtor or Mortgagor*] ("Decedent") who was the [*state whether* Debtor, Mortgagor, *or both* Debtor and Mortgagor] of the loan agreement encumbering the property sought to be foreclosed. [*state name of person*] may be served at [*state the last known address of the surviving spouse, each heir, distribute, or personal representative, as applicable*]. Applicant is not seeking to collect a debt against a surviving spouse or heir who is not liable for the loan agreement debt.

3. PROPERTY: The real property, fixtures, and improvements sought to be foreclosed are commonly known as [*state property address of the encumbered property*] ("Property") and the legal description of the property is: [*state legal description*].

4. DEFAULT: According to Mortgage Servicer's records for Debtor's loan agreement account that are kept in the regular course of business, as of [*state a specific date – the date must be no more than 30 days before the date the affiant executes the Rule 736.2(c) declaration attached to the application*], Debtor breached Debtor's obligations under the terms and conditions of the loan agreement as described in the affidavit or declaration attached to this application and made a part of this application by reference for all purposes. Prior to filing this Application, a notice or demand to cure the default, a notice of intent to accelerate, a notice of acceleration of the maturity of the debt, and any other

notice required by law as of the date of acceleration was sent to each Debtor obligated for the loan agreement debt.

(Note: choose (4-a), (4-b), or (4-c) as appropriate)

(4-a) *(Note: if the default is a monetary default, state:)* "Under the terms of Debtor's loan agreement note, as of [*date stated in 4 above*], Debtor has not cured the default and at least [*state number of payments in arrears*] scheduled loan payments are in arrears. The amount necessary to cure Debtor's default, which includes principal, interest, escrow for taxes, and insurance, if any, and all other fees and expenses payable by Debtor under the terms of the loan agreement note and security instrument is at least [*state reinstatement amount in U.S. dollars*] as of [*date stated in 4 above*]. The amount necessary to pay off Debtor' loan agreement is at least [*state payoff amount in U.S. dollars*] as of [*date stated in 4 above*]. All funds paid by Debtor to Mortgage Servicer have been credited to Debtor's loan agreement account, to include any funds held in a suspense account. As of the filing date of this Application, Debtor has not cured the default.

(4-b) *(Note: if the default is a non-monetary default, state:)* "Debtor has breached Debtor's obligations under the terms of Debtor's loan agreement note and security instrument because [*state with specificity the reason for the non-monetary default*]. To cure the default, Debtor must [*state the acts or omissions necessary to cure the default*]. As of the filing date of this application, Debtor has not cured the default.

(4-c) *(Note: if the security instrument to be foreclosed is a reverse mortgage, state:)* "A default under Debtor's reverse mortgage loan agreement occurred on or about [*state date of default*] under [*state* Article XVI, Section 50(k)(6)(c), Texas Constitution; Article XVI, Section 50(k)(6)(d), Texas Constitution; *or* both Article XVI, Sections 50(k)(6)(c) and (d)]; and

(i) [*State the nature of the default as of the date specified in (4-c) above and state what must be done to cure the default]*;

(ii) [*State how Applicant obtained the information necessary to form an opinion that the debtor was deceased and there was a default*]; and

(iii) The estimated fair market value of the Property as determined by [*state source for obtaining value, e.g. taxing authority, BPO, or other credible source*] was [*state amount in U.S. dollars*] as of [*state date*].

5. EXHIBITS: The originals or true and correct copies of the original documents related to Debtor's loan agreement or account are attached to this application and made a part of this application by reference for all purposes. The documents attached are listed and marked as exhibits in the order set out below:

(5-a) note and evidence of transfer, if any – Exhibit 5-a;

(5-b) the recorded security instrument and current assignment of the security instrument, if any, filed in the real property records with the county clerk's indexing information clearly legible – Exhibit 5-b;

(5-c) the notice or demand to cure the default, notice of intent to accelerate, notice of acceleration of the maturity of the debt, whether combined or in

separate notices, which were sent to Debtor in accordance with Chapter 51, Property Code, and the loan agreement – Exhibit 5-c;

(5-d) proof of mailing by certified mail of all notices described in (5-c) *(A copy of an electronic image obtained from the U.S. Postal Service's official website, a copy of a return receipt or "green card", or a declaration under penalty of perjury by the Mortgage Servicer or its attorney that correlates to a particular 5-c notice sent by certified mail shall be proof of mailing unless a respondent files a specific denial)* – Exhibit 5-d;

(5-e) a statement by an officer or employee of the current mortgage servicer servicing Debtor's loan agreement account as provided in Rule 736.2(c), which must be sworn before a notary or made under penalty of perjury – Exhibit 5-e;

(5-f) in accordance with the Servicemember's Civil Relief Act, 50 U.S.C. App. § 521, a statement made under penalty of perjury that each Respondent who is a natural person is not in military service *(A copy of an electronic image obtained from the official SCRA website of the U.S. Department of Defense Manpower Data Center, at www/dmdc.osd.mil/scra/ or successor website, or a declaration from the mortgage servicer currently servicing the debtor's account that describes the respondent's military service status shall be accepted as true unless a respondent files a specific denial)* – Exhibit 5-f;

(5-g) a statement addressed to the clerk of the court providing: (a) the name and last known address and response date for each Respondent to be served under this rule, and (b) the property address – Exhibit 5-g; and

(5-h) all other notices, declarations, documents, or other instruments of any kind or form required by law and proof of mailing or delivery in any manner required by law up to and including acceleration as a condition precedent for conducting a non-judicial foreclosure against the Property – Exhibit 5-h.

6. OFFSETS AND CREDITS: According to Mortgage Servicer's records, each Debtor received the use or benefit of the funds advanced under the terms of the loan agreement and all lawful offsets, payments, and credits, including amounts held in suspense, if any, have been applied to the Debtor's account as of [*date stated in 4 above*].

7. RELIEF REQUESTED: Because Debtor breached Debtor's loan agreement obligations, Applicant is seeking a court order so that it may proceed with a non-judicial *in rem* foreclosure of the lien encumbering the Property in accordance with Chapter 51, Property Code, and the loan agreement.

[*Signature Block for Applicant in accordance with Rule 57*]

(b) Transferred Tax Lien or Property Tax Loan Application Form.

Cause No.: [_____]

IN RE PROPERTY TAX LOAN AGREEMENT ORDER	§	**IN THE [*Type of Court*] COURT**
	§	
	§	
APPLICANT:	§	

[**Name of person seeking to enforce the debtor's loan agreement** – *see Rule 735.3(b) and (m)(1),(2),(4) and (5)*]	§	
	§	
	§	
	§	
RESPONDENT:	§	
[*Name of each owner of the property who is a debtor – see Rule 735.3(r) and (u)*] **"Debtor"**	§	
	§	
[*Name of each property owner or owner of the property – see Rule 735.3(r) and (u)*] **"Property Owner"**	§	
	§	[*Name*] **COUNTY, TEXAS**
[*Name of holder of the current preexisting first lien – see Rule 735.3(g) and (u)*] **"First Lien Holder"**	§	
	§	
[*Name of each mortgagor – see Rule 735.3(n) and (u)*] **"Mortgagor"**	§	
	§	
[*Name of each spouse, heir, or personal representative, if applicable – see Rule 735.3(f),(g) and (u)*] [**"Spouse" or "Heir" or "Distributee or "Personal Representative"**]	§	[*Court Designation*]

THE APPLICANT IS SEEKING AN EXPEDITED ORDER TO ALLOW A NONJUDICIAL *IN REM* FORECLOSURE TO PROCEED AGAINST THE ENCUMBERED PROPERTY IN ACCORDANCE WITH SECTIONS 32.06 AND 32.065, TAX CODE, CHAPTER 51, PROPERTY CODE, AND THE DEBTOR'S TRANSFERRED TAX LIEN OR PROPERTY TAX LOAN AGREEMENT.

1. APPLICANT: [*state name of the person seeking to enforce the property tax loan agreement*] ("Applicant") whose address is [*state street address, city, state, and zip code*] is seeking to enforce a transferred tax lien or property tax loan agreement against [*state name of each debtor*] ("Debtor").

   The property encumbered by Debtor's loan agreement is commonly known as [*state property address*] ("Property"). With respect to Debtor's loan agreement:

   [*Note: complete (1-a) and (1-b), and if applicable (1-c) and (1-d)*]

   (1-a) [*State name of the person – choose as appropriate:* ("Owner"), ("Noteholder"), *or* ("Investor")] of Debtor's loan agreement is the person who has the legal, beneficial or equitable right to receive the principal and interest received from Debtor's scheduled loan agreement payments.

   (1-b) [*State name*] ("Mortgage Servicer"), whose address is [*state street address, city, state, and zip code*], is the current mortgage servicer

responsible for administrating and managing Debtor's loan agreement account for [*state name of Mortgage Servicer's principal, i.e. Owner, Noteholder, or Investor, or if Owner or Holder is acting as Mortgage Servicer for its own account, state its own account*].

(1-c) [*State name*], whose address is [*state street address*], is the current transferee or property tax lender ("Transferee") of Debtor's loan agreement debt encumbered by the Property.

(1-d) *(Note: if Mortgage Servicer is administering the foreclosure pursuant to Section 51.0025, Property Code, state)* As Mortgage Servicer of Debtor's account, [*state name of Mortgage Servicer*] is administering the foreclosure of the lien against the Property in accordance with Section 51.0025, Property Code.

(1-e) (*Note: If Mortgage Electronic Registration Systems, Inc., MERS, or a similar derivation of the name is the current mortgagee or record, nominee for the lender, or the beneficiary of the recorded security instrument, state:)* "[The name or derivation of the name used in the security instrument for Mortgage Electronic Registration Systems, Inc., or MERS] ("MERS") is the mortgagee of record of Debtor's security instrument filed in the official real property records of [*name of Texas county*]. MERS is a book entry system referred to in Section 51.0001(1), Property Code.

2. RESPONDENT:

NO PERSONAL LIABILITY IS SOUGHT IN THIS PROCEEDING AGAINST ANY RESPONDENT.

(Note: in Paragraph 2 complete each subpart and make a separate sub-paragraph for each person named as a respondent)

(2-a) [*State name of each person liable for the loan agreement debt sought to be foreclosed*] ("Debtor") is the person liable for payment of the debt evidenced by the transferred tax lien or property tax loan agreement that encumbers the property sought to be foreclosed and may be served at [*state last known address of each Debtor*].

(2-b) [*State name of each mortgagor of the security instrument sought to be foreclosed*] ("Mortgagor") is a grantor of the security instrument that encumbers the property sought to be foreclosed and may be served at [*state Mortgagor's last known address*]. Applicant is not seeking to collect a debt against a mortgagor who is not liable for the loan agreement debt.

(2-c) [*State name of the holder of any recorded preexisting first lien on the property as defined in Rule 735.3(g)*] ("First Lien Holder") is the current holder of a recorded preexisting first lien encumbering the property that was filed in the real property records before the transferred tax lien sought to be foreclosed. The First Lien Holder may be served at [*state address and method of service as provided in Rule 736.7*].

(2-d) (*Note: if Debtor, Mortgagor, or First Lien Holder is deceased, state as appropriate*) [*name of surviving spouse*] is the surviving spouse and [*state name of each heir and describe status, i.e., heir, distribute, or personal*

representative] of [*state name of each deceased Debtor or Mortgagor*] ("Decedent") who was the [*state whether* Debtor, Mortgagor, *or both* Debtor and Mortgagor] of the loan agreement encumbering the property sought to be foreclosed and may be served at [*state last known address of the surviving spouse and each heir, distribute, or personal representative, as applicable*]. Applicant is not seeking to collect a debt against a surviving spouse or heir who is not liable for the loan agreement debt.

3. PROPERTY: The real property, fixtures, and improvements sought to be foreclosed are commonly known as [*state property address of the encumbered property*] ("Property") and the legal description of the Property is: [*state legal description*].

4. STATUTORY ALLEGATIONS: [*State name of each property owner or owner of the property liable for the property tax loan agreement*] and [*state name of the transferee or property tax lender*] entered into a contract that is secured by a transferred tax lien or property tax loan agreement that encumbers the Property in accordance with Sections 32.06 and 32.065, Tax Code. As required to be alleged in this application by Section 32.06(c-1), Tax Code:

("A") "the lien is an ad valorem tax lien instead of a lien created under Article XVI, Section 50, Texas Constitution";

("B") "the applicant does not seek a court order required by Article XVI, Section 50, Texas Constitution";

("C") "the Transferee has provided notice to cure default, notice of intent to accelerate, and notice of acceleration of the maturity of the debt to the property owner and each holder of a recorded first lien on the property in the manner required by Section 51.002, Property Code"; and

("D") "the Transferee has confirmed that the property owner has not requested a deferral of taxes authorized by Section 33.06, Tax Code."

5. DEFAULT: According to Mortgage Servicer's records for Debtor's loan agreement account that are kept in the regular course of business, as of [*state a specific date – the date must be no more than 30 days before the date the affiant executes the Rule 736.2(c) declaration attached to the application*], Debtor breached Debtor's obligations under the terms and conditions of the loan agreement as described in the affidavit or declaration attached to this application and made a part of this application by reference for all purposes. Prior to filing this application, a notice or demand to cure the default, a notice of intent to accelerate, a notice of acceleration of the maturity of the debt, and any other notice required by law as of the date of the acceleration was sent to each Debtor obligated for the transferred tax lien or property loan and First Lien Holder, as provided in Section 32.06(c-1)(C), Tax Code, and Section 51.002, Property Code. *(Note: Choose (5-a) or (5-b) as appropriate)*

(5-a) (*Note: if the default is a monetary default, state:)* "Under the terms of Debtor's loan agreement note and security instrument as of [*date stated in 5 above*], Debtor has not cured the default and at least [*state number of payments in arrears*] scheduled loan payments are in arrears. The amount necessary to cure Debtor's default, which includes principal, interest, escrow for taxes and insurance, if any, and all other fees and expenses

payable by Debtor under the terms of the loan agreement note and security instrument is at least [*state reinstatement amount in U.S. dollars*] as of [*date stated in 5 above*]. The amount necessary to pay off Debtor' loan agreement is at least [*state payoff amount in U.S. dollars*] as of [*date stated in 5 above*]. All funds paid by Debtor to Mortgage Servicer have been credited to Debtor's loan agreement account, to include any funds held in a suspense account. As of the filing date of this application, Debtor has not cured the default.

(5-b) (*Note: if the default is a non-monetary default, state:)* "Debtor has breached Debtor's obligations under the terms of Debtor's loan agreement note and security instrument because [*state with specificity the reason for the non-monetary default*]. To cure the default, Debtor must [*state the acts or omissions necessary to cure the default*]. As of the filing date of this application, Debtor has not cured the default.

6. EXHIBITS: The originals or true and correct copies of the original documents related to Debtor's loan agreement are attached to this application and made a part of this application by reference for all purposes. The documents attached and marked as exhibits in the order listed below are:

(6-a) note and evidence of transfer, if any – Exhibit 6-a;

(6-b) the recorded security instrument and current assignment of the security instrument, if any, filed in the real property records with the county clerk's indexing information clearly legible – Exhibit 6-b;

(6-c) the notice or demand to cure the default, notice of intent to accelerate, and notice of acceleration of the maturity of the debt, whether combined or in separate notices, which were sent to Debtor and each First Lien Holder, as provided in Section 32.06(c-1)(C), Tax Code, and Chapter 51, Property Code, and the loan agreement – Exhibit 6-c;

(6-d) proof of mailing by certified mail of all notices described in (6-c); *(Note: a copy of an electronic image obtained from the U.S. Postal Service's official website, a copy of a return receipt or "green card", or a declaration under penalty of perjury by Mortgage Servicer or its attorney that correlates to a particular 6-c notice sent by certified mail shall be proof of mailing unless a respondent files a specific denial)* – Exhibit 6-d;

(6-e) a statement made under penalty of perjury by an officer or employee of the current mortgage servicer servicing the Debtor's loan agreement account as provided in Rule 736.2(c), which must be sworn before a notary or made under penalty of perjury – Exhibit 6-e;

(6-f) in accordance with the Servicemember's Civil Relief Act, 50 U.S.C. App. § 521, a statement made under penalty of perjury that each Respondent who is a natural person is not in military service *(Note: a copy of an electronic image obtained from the official SCRA website of the U.S. Department of Defense Manpower Data Center, at www.dmdc.osd.mil/scra/ or the successor website, or a declaration from the mortgage servicer currently servicing the debtor's account describing the respondent's military service status shall be accepted as true unless a respondent files a specific denial)* – Exhibit 6-f;

(6-g) a statement addressed to the clerk of the court providing: (a) the name and last known address and response date for each Respondent to be served under this rule, and (b) the property address – Exhibit 6-g;

(6-h) all transferred tax lien documents required to be recorded in the real property records under Section 32.06(d), Tax Code, – Exhibit 6-h; and

(6-i) all other notices, declarations, documents, or other instruments of any kind or form required by law and proof of mailing or delivery in any manner required by law up to and including acceleration as a condition precedent for conducting a non-judicial foreclosure against the Property – Exhibit 6-i.

7. OFFSETS AND CREDITS: According to Mortgage Servicer's records, each Debtor received the use or benefit of the funds advanced under the terms of the loan agreement and all lawful offsets, payments, and credits, including amounts held in suspense, if any, have been applied to Debtor's account as of [*date stated in 5 above*].

8. RELIEF REQUESTED: Because Debtor breached Debtor's loan agreement obligations, Applicant is seeking a court order so that it may proceed with a non-judicial *in rem* foreclosure of the lien encumbering the Property in accordance with Chapter 51, Property Code, and the loan agreement.

[*Signature Block for Applicant in accordance with Rule 57*]

(c) Declaration Form for Rule 736.2(a) and (b) Applications.

(*Note: choose one*: [NOTARIZED AFFIDAVIT *or* DECLARATION MADE UNDER PENALTY OF PERJURY]) IN SUPPORT OF AN APPLICATION FILED BY [*NAME OF APPLICANT*] RELATED TO THE PROPERTY COMMONLY KNOWN AS [*PROPERTY ADDRESS OF PROPERTY SOUGHT TO BE FORECLOSED*].

(*Choose one: state)* [Before me, the undersigned authority, personally appeared (*name of affiant*) who being by me duly sworn, deposed that the following statements are true and correct *or* Under penalty of perjury, I (*name of affiant*) swear that the following statements are true and correct]:

"My name is [*state name of affiant*] "Affiant." I am over eighteen years of age, of sound mind, capable of making this affidavit, and I am personally acquainted with the facts stated herein as to the status and circumstance of [*state name of each debtor*] ("Debtor's") loan agreement account that is being serviced by [*state name of mortgage servicer – see Rule 735.3(l)*] ("Mortgage Servicer"). I am [*state (officer) or (employee)*] of [*state name of Affiant's employer*], whose address is [*state street address, city, state, and zip code*], and my job function is [*state Affiant's title and job function*].

All the facts stated in this declaration are true and correct, were formed after a personal review of the business and public records related to the servicing of Debtor's loan agreement account or by an inquiry of a person under my supervision who personally reviewed the business records of Debtor's loan agreement account, and based on my: (a) knowledge of the customary mortgage servicing records and processes which are under my custody and control as to Debtor's account; (b) knowledge that all the records related to Debtor's account were made and prepared in the ordinary course of business of originating and servicing Debtor's account and that the persons or employees who maintained such accounts and records did so for the business purpose

of maintaining a complete and accurate record of matters related to the servicing Debtor's loan agreement and account; and (c) familiarity with the manner and processes in which Mortgage Servicer compiles and maintains the records and files related to Debtor's account, whether in paper or electronic form.

I adopt by reference the application, records, and declaration attached to the application on the date stated.

The documents attached to the application or my application were made and kept in the regular course of business for originating and servicing Debtor's loan agreement account; the documents were made at or near the date and time reflected in the documents; and the information contained in Debtor's servicing account file was recorded by a person with knowledge of the transmitted information. According to the mortgage servicing records of Debtor's account, the documents attached to the application are the originals or true and correct copies of the originals.

The business records of [*state name of Mortgage Servicer*] indicate that all the foreclosure related notices attached to the application were properly addressed to each addressee and timely delivered into the custody and control of the U.S. Postal Service.

According to mortgage servicing records of Debtor's account, [*state name of each Debtor*] is the maker of the note or the current obligor of the note evidenced by the loan agreement that encumbers the property sought to be foreclosed. Debtor has had the use and benefit of all funds advanced under the terms of the loan agreement by the original lender to Debtor and Debtor has not indicated that Debtor is not liable for the loan agreement debt. The property securing Debtor's loan agreement is commonly known as [*property address*] and is more specifically described as: [*legal description*].

According to a review of Mortgage Servicer's records relating to Debtor's account that was made on [*state date which must be no more than 30 days before Affiant executes this declaration and should be the same as the date contained in the application*], the number of Debtor's loan payments which were in arrears were [*state number*]. As of [*date – typically a date 30 days in the future of the date the application is prepared*] the amount necessary to cure Debtor's default is [*state reinstatement amount in U.S. dollars*], and the payoff amount is [*state amount in U.S. dollars*] according to Mortgage Servicer's records. All lawful offsets, payments, and credits to include funds held in suspense, if any, have been applied in the calculation of what Debtor owes under the terms and conditions of the loan agreement.

It is the customary business practice of Mortgage Servicer to terminate a foreclosure proceeding if Debtor's account is brought current at any time before the property encumbered by Debtor's loan agreement is auctioned at a foreclosure sale.

According to the servicing records of [*state name of the person servicing Debtor's account*], [*state name of the owner, noteholder, or investor of Debtor's account*] is the [*state "Owner" or "Noteholder" or "Investor"*] of Debtor's loan agreement [*state name of Owner, Noteholder, or Investor of Debtor's account*] and is the person: (a) for whose benefit Mortgage Servicer of Debtor's account remits the principal and interest received from Debtor; and (b) who suffers the risk of loss if Debtor defaults. (*Note: if applicable, state:)* [*state name of Mortgage Servicer*] is the duly authorized agent for loan service administration for [*name of Owner, Noteholder, or Investor*] and has been retained to administer all loan servicing activities related to Debtor's loan agreement to include foreclosure in accordance with Section 51.0025, Property Code.

(If Debtor's loan agreement is a transferred tax lien or property tax loan, state) Debtor's loan agreement is a transferred tax lien or property tax loan and [*state name and current address of transferee*] is the current transferee of Debtor's loan agreement. All conditions precedent

required by Sections 32.06 and 32.065 of the Tax Code for initiating a foreclosure under Texas Rule of Civil Procedure 735 or 736 have been timely accomplished.

On the date I signed this declaration, the default status of Debtor's account had not been cured and all the information contained in the application and my declaration was true and correct as of the stated date.

Dated this ____ day of _____, _____.

[*Signature of Affiant*]
[*Printed name of Affiant and Title*]
[*Address of Affiant*]

(*CHOOSE ONE OF THE VERIFICATON OPTIONS BELOW*)

"I, [*state name of Affiant*] am the [*state title or job responsibility of Affiant*] am an [*state* (officer) *or* (employee)] of [*state name and address of Mortgage Servicer servicing Debtor's loan agreement*] and declare under penalty of perjury that I have read the application and all attached exhibits to which my declaration is to be affixed and the statements and averments made in the application and exhibits and my declaration are true and correct as of the date stated.

_____
[*Signature of Affiant*]

OR

STATE OF [*state*]
COUNTY OF [*county*]

Before me, on this day personally appeared [*state name of Affiant*] an [*state* (officer) *or* (employee)] of [*state name and address of the Mortgage Servicer servicing Debtor's loan agreement*] (*choose one, state* [known to me *or* proved to me on the oath of (*name of witness*) *or* proved to me through (*description of identity card or other document*)]) to be the person whose name is subscribed to the foregoing instrument and being sworn by me acknowledged to me that s/he read the application and all attached exhibits to which his or her declaration is affixed and the statements and averments made in the application and exhibits are true and correct as of the date stated.

Sworn to and subscribed on this [*day*] day of [*month*], [*year*].
[SEAL]

_____
[*Title of notary or officer*]
My commission expires: [*date*]

736.3 Duties of Applicant with Regard to Service

(a) Upon filing the application, the applicant shall provide the clerk of the court, for each citation required under this rule:

(1) sufficient copies of the application, declaration, and exhibits for attachment to each citation, unless the filing was made electronically and the clerk directs that copies are not required;

(2) a statement containing:

(a) the name and last known address for each person to be served with citation; and

(b) the property address of the property sought to be foreclosed.

(3) unless the clerk instructs otherwise, a self addressed postage prepaid envelope or wrapper for the return of all citations served by the clerk.

(b) The party requesting a citation shall be responsible for obtaining service of each citation with a copy of the application, declaration, and all attached exhibits attached.

(c) At the time of filing of an application, the applicant shall pay all filing fees, all citation preparation and service of citation fees due the clerk, and all other service of process fees due that may be due at the time of filing, as well as all other authorized costs and expenses of court, all of which shall be taxed as costs of court.

736.4 Citation

(a) A condition precedent for filing an application with the clerk of the court is the payment of all fees and costs due for filing the application, preparation of citation, and service of citation in accordance with Rule 736.5, and collection of fees required for service under Rules 736.6, 736.7, and 736.8, if applicable. Upon request, the clerk of the court shall issue:

(1) one citation for each debtor and each mortgagor at their last known address;

(2) two citations for the property by addressing the citations to "RESIDENT OF [*property address*]" at the property address;

(3) if a person who would otherwise be a respondent is deceased, as applicable:

(i) one citation for the personal representative of the decedent's estate; or

(ii) if no personal representative has been qualified,

a. one citation for the surviving spouse at the surviving spouse's last known address and one citation for each heir at the heir's last known address, or

b. if the name or last known address of the surviving spouse or an heir is unknown, one citation addressed to "surviving spouse of [*name of decedent*]" at the property address and one citation addressed to "heirs of [*name of decedent*]" at the property address; and

(4) for a Rule 736.2(b) property tax loan application:

(i) the citations described in (a)(1)-(3),

(ii) one citation for each property owner or owner of the property, and

(iii) one citation for any holder of a recorded preexisting first lien on the property.

(b) The cost for preparing and issuing each citation shall be in accordance with Section 51.317, Government Code, shall be paid to the clerk of the court at the time the application is accepted for filing, and shall be taxed as cost of court.

(c) The response date contained in a citation to be served by the clerk of the court on a person named as a debtor, mortgagor, property owner or owner of the property, surviving spouse, heir, or personal representative shall be the first Monday – unless the Monday is a federal or state holiday and then the next day – after the

expiration of 38 days of service of the citation by the clerk of the court made in accordance with Rule 736.5(c).

(d) The response date contained in a citation served on the holder of a recorded preexisting first lien encumbering the property shall be the Monday next following the expiration of 20 days after the date service is made under Rule 736.7.

(e) For a citation addressed to and served on the resident of the property, as provided in Rule 736.6, no return date is applicable.

(f) The clerk of the court shall attach to each citation a copy of the application, declaration, and exhibits.

(g) The clerk shall include the assigned cause or case number, court, court number, and date of filing on each application served with a citation.

(h) The clerk of the court shall prepare and have delivered other citations as directed by the requesting party.

736.5 Service of Citation by Court Clerk by First Class Mail

(a) The clerk of the court shall serve a citation by first class mail on each person named in Rule 736.4(a), as applicable.

(b) Service is complete when a citation and application, including the declaration and exhibits, are deposited into the custody and control of the U.S. Postal Service in a properly addressed, postage prepaid wrapper or envelope.

(c) The return date of a citation served by the clerk of the court is calculated from the date the citation and application were placed in the custody and control of the U.S. Postal Service in accordance with the clerk of the court's standard mailing procedures and Rule 736.4(c).

(d) Under this rule, a return of service that is regular on its face is prima facie evidence of proper service by the clerk.

(e) The clerk of the court may collect a reasonable fee not to exceed $10.00 for each citation served by the clerk of the court to compensate for the costs of handling and mailing in accordance with Chapter 118.137(C) and (D), Government Code, as may be amended.

(f) The clerk of the court shall provide the applicant with a return of service for each citation served under this subdivision.

(g) The cost of service of citation by the clerk of the court shall be paid by the applicant at the time of filing the application and shall be taxed as a cost of court.

736.6 Service of Citation on the Property by Delivery to the Property Address

(a) In addition to service of citation by the clerk of the court under Rule 736.5, the applicant shall deliver a citation addressed to "RESIDENT of [*property address*]" to any sheriff, constable, or other person authorized by Rule 103 to serve citations.

(b) The citation and application, including the declaration and all exhibits, shall be placed in a plain wrapper or envelope without any other markings except the following conspicuous notation:

TO THE RESIDENTS OF [*PROPERTY ADDRESS*]
IMPORTANT LEGAL DOCUMENT INSIDE

(c) The citation shall be personally served by the sheriff, constable, or other person authorized by Rule 103 by delivering the citation to any person over the age of sixteen (16) years residing at the property.

(1) If service on a person at the property address is unsuccessful, the citation shall be served by securely affixing the envelope or wrapper to the front door or main entry of the property.

(2) If the property cannot be accessed or is located in a gated community, within 24 hours of the attempted delivery of citation on the property, the authorized process server shall deposit the citation in a prepaid wrapper or envelope addressed to "RESIDENT at [*state property address*]" with the notation "DO NOT RETURN TO SENDER" into the custody and control of the U.S. Postal Service's express mail service or a commercial delivery service.

(d) The authorized process server shall state on the return of citation his or her name, and the date, time, and ultimate method of the service of citation under (c). If service is by prepaid express mail or commercial delivery service, the authorized process server shall attach the document tracking number and original receipt of payment of the delivery charge from the U.S. Postal Service or commercial delivery service.

(e) The recipient of a citation addressed to the resident at the property address is not required to file a response unless the recipient is otherwise named as a respondent in the application and a response is due from such person as provided in this rule.

(f) The return of service on the property address must be on file with the clerk of the court at least 20 days before a judge may sign a default order.

(g) The cost for service of a citation to the property at the property address shall be paid by the applicant and shall be taxed as a cost of court.

736.7 Service of Transferred or Property Tax Lien Application on the Holder of a Recorded Preexisting First Lien on the Property

(a) For a transferred tax lien or property tax loan application, the applicant shall obtain personal service on any person who is the current holder of a recorded preexisting first lien on the property by delivery of citation to any sheriff, constable, or other person authorized by Rule 103 to serve process.

(b) Service of citation on the current holder of a recorded preexisting first lien shall be by delivery of the citation to:

(1) the person, if a natural person;

(2) the person's current Texas registered agent;

(3) the person's president, vice president, or general counsel at the person's principal place of business;

(4) if the person is a non-resident, the Texas Secretary of State with a statement containing the name and address of the non-resident person's residence or home office in accordance with Section 17.045, Civil Practices and Remedies Code;

(5) the office manager or the person in charge who is over 21 years of age at the person's current principal place of business address, if the person is an unincorporated business association;

(6) the current mortgage servicer of the recorded preexisting first lien; or

(7) in the event that service cannot be effected under (1)-(6):

(i) the address of the holder of the recorded preexisting first lien on the property as listed in the document evidencing the lien recorded in the real property records; or

(ii) the person or persons otherwise entitled to service of a petition in the manner set forth in Rule 106(b).

(c) The cost for service of a citation on any person who is the current holder of a recorded preexisting lien on the property shall be paid by the applicant and shall be taxed as a cost of court.

736.8 Application and Service on Heirs of Decedent

(a) If a debtor, mortgagor, property owner or owner of the property, or holder of a recorded preexisting first lien on the property as defined in Rule 735.3 is deceased, the promulgated forms contained in Rules 736.2 and 736.17 must be modified to include the following:

(1) The deceased person shall be identified by name and last known address and thereafter identified as "Decedent" in the application, declaration, and order.

(2) If a probate proceeding has been opened for the decedent's estate, provide:

(i) the type of probate proceeding opened for the decedent's estate;

(ii) if the probate proceeding requires the appointment of a personal representative, the name, address, and date the person qualified as the personal representative of the decedent's estate;

(iii) the caption of the proceeding to include name of the decedent, case or cause number, court, county, state, and date of filing of the probate proceeding; and

(iv) a statement that [*name of personal representative*] is the qualified personal representative of the decedent's estate.

(3) If a probate proceeding has been opened for the decedent's estate requiring the appointment of a personal representative, but an order appointing a personal representative has not been entered or a personal representative has not been qualified, provide:

(i) the caption of the proceeding to include the name of decedent, case or cause number, court, county, state, and filing date of the probate proceeding;

(ii) the name and address of the person opening the probate proceeding and the person's attorney of record, if any; and

(iii) a statement that no person has qualified as the personal representative of the decedent's estate.

(4) A statement specifying whether the surviving spouse acquires all right title and interest of the decedent's interest in the property in accordance with Section 45, Probate Code, as it may be amended, and if so, the name and current address of the surviving spouse.

(5) If the surviving spouse does not acquire the decedent's interest in the property or the decedent's spouse predeceased the decedent and no personal representative for the decedent's estate has qualified, provide:

(i) the name and last known address of the surviving spouse and the name and last known address of each heir who has an interest in the property sought to be foreclosed under the statutes of descent

and distribution to the second degree of consanguinity as provided in Section 573.024, Government Code;

(ii) if the name, last known address, or whereabouts of the surviving spouse or an heir is unknown, describe the due diligence exercised to find or locate the whereabouts of the spouse or heir; and

(iii) if an heir is a minor child or *non compos mentis* person, state the name and last known address of such person and identify by name and last known address the parent, natural guardian, next friend, or person with a power of attorney for the person or if a guardianship has been opened for the person the name and last known address of the guardian of the person's estate.

(6) State the estimated "as is" appraised or fair market value of the property sought to be foreclosed, supported by documentation from two sources which may be a current appraisal, broker's price opinion (BPO), valuation from an official taxing authority, or automated valuation model appraisal (AVM) that is less than six months old.

(7) If the decedent's will has been probated in the county where the property is located, identify by name and last known address of all the distributees of the property under the decedent's will.

(8) State whether there is any equity in the property after deducting the payoff of the lien sough to be foreclosed, any known inferior liens, and the amount of any governmental liens to include ad valorem liens encumbering the property as of a date that must be within 60 days of the date of filing the application, and provide a schedule showing how the equity calculation was made.

(b) The applicant is responsible for obtaining personal service on:

(1) the personal representative of decedent's estate if a personal representative has qualified;

(2) if a personal representative has not qualified:

(i) the surviving spouse who acquires all of the decedent's right, title, and interest in the property under Section 45, Probate Code, as amended;

(ii) if the surviving spouse does not acquire the decedent's interest in the property under Section 45, Probate Code, as amended, the heirs of the decedent in the order of taking to the second degree of consanguinity under Section 573.024, Government Code, with service of citation for each heir who is a minor child or a *non compos menits* person on the person's legal guardian and if no legal guardian has been appointed, the person's natural guardian, next friend, or person with a power of attorney for the person's estate; and

(iii) the distributees under the decedent's will if it is probated in the county where the property is located.

(c) If a surviving spouse or an heir must be served and the name or whereabouts of the surviving spouse or heir is unknown, citation by publication is required under Rule 109 or 109a.

(d) Notwithstanding other provisions of this rule, if a dependent or creditor's probate administration is pending for a decedent's estate and a personal representative has

qualified for letters of administration, an application under Rule 735 or 736 must be filed in the probate court where the administration is pending.

736.9 Citation Form

A citation under this rule shall be sufficient if, when completed, the citation is regular on its face and is substantially the same or similar to the promulgated citation form contained in this rule.

THE STATE OF TEXAS
CITATION FOR A TEX. R. CIV. PROC. 736 ORDER

[NOTE: The clerk of the court may use the clerk's customary caption for a citation, but at a minimum, the caption must contain the name and location of the court, cause or suit number on the docket, the date the application was filed, the names of the parties, the property address or the name and address of the person to be served, and the date the citation was prepared.]

YOU HAVE BEEN SUED

You should carefully read and understand the allegations contained in the application, declaration, and exhibits attached to this citation because it may affect your rights in the described property. You may employ an attorney.

RESPONSE DATE

The response date marked below is the date you or your attorney should file a response with the clerk of the court.

□ (a) As a debtor, mortgagor, property owner, spouse, heir, or personal representative, you or your attorney must file a written response to the allegations contained in the application with the clerk of the court at the clerk's address listed below on [*the specific date certain the clerk of the court puts in this blank that is calculated in accordance with Rules 736.4(c) and 736.5(c)]*.

□ (b) As the holder of a current recorded preexisting first lien on the property, you or your attorney must file a response with the clerk of the court on or before 10:00 AM on the first Monday after the expiration of 20 days from the date the citation was served on you in accordance with Texas Rule of Civil Procedure 736.7.

□ (c) For a citation addressed to "RESIDENT at the Property Address", no response is required from you, unless you have been served with citation as a debtor, mortgagor, property owner or owner of the property, spouse, heir, or personal representative.

IF YOU OR YOUR ATTORNEY DOES NOT FILE A TIMELY WRITTEN RESPONSE WITH THE CLERK OF THE COURT, YOUR FAILURE TO RESPOND WILL BE DEEMED YOUR CONSENT FOR AN ENTRY OF A DEFAULT ORDER BY THE COURT WITHOUT A HEARING. AN ORDER WILL ALLOW THE APPLICANT OR ITS SUCCESSOR TO PROCEED WITH FORECLOSURE OF A LIEN ENCUMBERING THE PROPERTY.

If you file a written response, it must contain at a minimum the following information: (a) your name and the current mailing address for you or your attorney [so that a notice of the date, time,

and place of a hearing in this matter may be sent]; (b) the cause or case number and the name, county, and number of the court, which may be obtained from the application that was attached to the citation served on you; and (c) your response or defense to the allegations contained in the application.

[NOTE: The clerk of the court may use the clerk's customary form of citation verification. But at a minimum, the verification must include the date of issuance of the citation, signature block and seal of the court, and the name and address of person signing the citation on behalf of the clerk.]

-- - -- - -- - -- - -- - -- - -- - -- - -- - -- - **RETURN** -- - -- - -- - -- - -- - -- - ---- - --

Came to hand on the _____ day of [*month*], [*year*] at _____ o'clock ____M., and executed on the _____ day of [*month*], [*year*] at _____ o'clock __ M. by delivery of an original or a duplicate original citation to the person or property named in the citation, with a true and correct copy of the application, declaration, and all exhibits attached, by:

(MARK ONE)

- □ Service was made in accordance with Texas Rule of Civil Procedure 736.5.
- □ Service was made on the property at the property address in accordance with Texas Rule of Civil Procedure 736.6(c).
- □ Service was made on the property in accordance with Texas Rule of Civil Procedure 736.6(c)(1).
- □ Service was made on the property in accordance with Texas Rule of Civil Procedure 736.6(c)(2).
- □ Service was made on the property in accordance with Texas Rule of Civil Procedure 736.6(d). Attached is the original payment receipt with tracking number as required by Texas Rule of Civil Procedure 736.6(d).
- □ Service on the current holder of the current recorded preexisting first lien against the property was made in accordance with Texas Rule of Civil Procedure 736.7, by delivering a citation to [*state name of person representing the holder of the current recorded preexisting first lien on the property in accordance with Rule 736.7(b)*] at [*state location where citation was personally served*] by [*state means or method of service in accordance with Rule736.7(b)(1)-(6)*] on [*state date*]. If the person served was the mortgage servicer of the current recorded preexisting first lien against the property state [*name of mortgage servicer*] is the mortgagor servicer for [*name of the current holder of the recorded preexisting first lien against the property*].
- □ Service on a spouse, heir, or personal representative was made by delivery of a citation to [*state name of person*] at [*state location where citation was personally served*] in accordance with Texas Rule of Civil Procedure 736.8.

[*Signature of Process Server*]_____
[*Printed Name of Process Server*]_____
[*Address of Process Server*]_____
[*State authority of Process Server, i.e. Sheriff, Constable, Rule 103*]

STATE OF TEXAS
COUNTY OF [_____]

This instrument was acknowledged before me on [*date*] by [*name of officer or authorized person under Rule 103*], [*title or authority of person servicing citation*] acting in his/her official or authorized capacity.

_____ [SEAL]
Notary Public in and for the
State of [_____]
Notary Name: [*Printed*]
My commission expires: [*Date*]

736.10 Amended Application

If the servicing or ownership rights of a debtor's loan agreement are transferred or assigned to another person before an order is signed under this rule:

(a) the application must be amended to reflect the name, address, and status of the person's successor or assignee;

(b) the amended application must be served in accordance with Rule 21a on each person who filed a response with the clerk of the court; and

(c) if the mortgage servicer of the debtor's loan agreement is transferred or assigned before the response due date stated in a citation served on the respondent expires, and the respondent received notice of the change of servicing in accordance with 12 U.S.C. 2605 more than 30 days before an application was filed under this rule, an amended application must be re-served in accordance with Rules 736.4 through 736.8 on all respondents whose response due date has not expired.

736.11 Response

(a) A response shall be filed with the clerk of the court and a copy of the response with any affidavits, declarations, documents, or other attachments shall be served on the applicant or the applicant's attorney in accordance with Rule 21a.

(b) A response may be in the form of a general denial under Rule 92 except that a respondent must affirmatively plead:

(1) a person named as a debtor or mortgagor in the application did not sign or assume the loan agreement documents or instruments evidencing the debt;

(2) the dollar amounts claimed as due or in arrears as of the date specified in the application are materially incorrect;

(3) the default under the loan agreement was cured as of the date the response was filed;

(4) any document attached to the application is not a true and correct copy of the original; or

(5) proof of a payment in accordance with Rule 95.

(c) Each response filed by a natural person *pro se* shall contain the person's U.S. Postal Service mailing address, property address, phone number, and facsimile or email address, if the person desires to be contacted by facsimile or email. An attorney filing a response shall sign the response in accordance with Rule 57.

(d) No counterclaim, cross claim, third party claim, intervention, or other cause of action or claim may be filed or considered by the court in a Rule 736 proceeding. Such claims or causes of action must be brought in a separate and independent original proceeding filed in a court of competent jurisdiction. If a counterclaim,

cross claim, third party claim, or intervention is filed in a Rule 736 proceeding, the court shall strike such claims in the original Rule 736 proceeding.

736.12 Hearing When Response Filed

(a) If a response is filed before a default order is signed, applicant shall obtain a hearing date, time, and place from the clerk of the court. The hearing shall be held not earlier than 10 days and not less than 30 days after a request for a hearing is made. The applicant or applicant's counsel shall send notice of the date, time, and place of the hearing in accordance with Rule 21a to each person who files a response. A duplicate copy of the notice of hearing sent to each person filing a response shall be mailed or delivered to the clerk of the court. Proof of mailing or delivery of the notice of hearing to each respondent filing a response shall be retained by applicant or applicant's attorney.

(b) The only issue to be determined at a Rule 736 hearing is whether the applicant is entitled to proceed with foreclosure under Chapter 51, Property Code, the debtor's loan agreement, and, if the debtor's loan agreement is a property tax loan or transferred tax lien loan agreement, Sections 32.06 and 32.065, Tax Code.

736.13 Default

If a respondent fails to file a response prescribed by Rule 736.4, all matters alleged in the application and declaration shall be accepted as prima facie evidence of the truth of the matters alleged. Within 10 days after the due date for the respondent's response, the court shall sign a default order, without hearing, provided:

(a) the record shows the application and declaration conform to Rule 736.2;

(b) the record shows proper service on all respondents and that the return of service of citation has been on file with the clerk of the court for at least 10 days exclusive of the date of filing except the return of service on the property which shall be on file for 20 days exclusive of the date of filing; and

(c) a proposed default order conforming to Rule 736.15 was previously filed with the clerk of the court.

736.14 Discovery

No discovery of any kind shall be permitted in a Rule 736 proceeding.

736.15 Order

(a) An order granting or denying an application under Rule 736 is final and is not subject to a motion for rehearing, new trial, bill of review, or appeal.

(b) The presiding judge must provide the attorney for the applicant or respondent, if any, the reason an application, response, or order was denied and record the reason for such denial on the court's docket sheet.

(c) Any challenge to an order signed under this rule must be filed in the form of a new suit filed in a separate and independent original proceeding in a court of competent jurisdiction.

(d) An order under this rule shall expire 180 days after the date the order is signed.

(e) The form of a Rule 736 order shall be sufficient if it is substantially the same or similar to the following promulgated form.

CAPTION OF THE APPLICATION CURRENTLY
ON FILE WITH THE CLERK OF THE COURT

DEFAULT ORDER

1. On the _____ day of _____, the court considered the application filed in this cause by [*name of applicant and applicant's street address, city, state, and zip code*]. The court has determined that it has jurisdiction over the subject matter and the parties in this proceeding. Though properly served with the citation and the application, declaration, and exhibits, [*name or each party who failed to file a timely response – the court may conspicuously cross out the name of any person against whom the default order does not apply*], (hereinafter "Respondent") failed to file a response within the time required by law and wholly made default. The court deems a Respondent's failure to file a response as the Respondent's consent for the court to enter a default order. The citation and proof of service have been on file with the court in the time provided by Rule 736.13(b).
2. The property made the subject of the application is commonly known as [*property address*] and the legal description of the property is: [*legal description*].
3. Based on the declaration of the applicant or applicant's representative, any Respondent who is a natural person and who is subject to this default order is not a member of the United States military.
4. Therefore, the court GRANTS an order allowing the applicant to proceed with foreclosure under Chapter 51, Property Code, the loan agreement, and, if applicable, Sections 32.06 and 32.065, Tax Code.
5. This order is final and not subject to a motion for rehearing, new trial, or appeal. Any challenge of this order must in the form of a new suit filed in a separate and independent original proceeding in a court of competent jurisdiction at least 24 hours before the property described herein is auctioned at a foreclosure sale.
6. The clerk of the court is directed to hand deliver or mail by first class mail a conformed copy of this order to applicant or applicant's counsel and to each Respondent.
7. The applicant or its agents or attorneys may communicate with any party or other person as reasonably necessary to effectuate a foreclosure sale.
8. This order shall expire 180 days after the date this order is signed.

SIGNED this ____ day of _____, 20__.

_____
JUDGE PRESIDING

736.16 Effect of the Order

An order and any determination of law or fact made under this rule is without prejudice and has no res judicata, collateral estoppel, or estoppel by judgment effect in any other proceeding or suit. The failure of a respondent to dispute the validity of the debt under this section may not be construed by any court as an admission of liability by the respondent.

736.17 Bankruptcy

(a) If a respondent files bankruptcy after an application is filed and a true and correct file stamped copy of the first page of the bankruptcy petition is filed with the

clerk of the court, the Rule 736 proceeding shall be dismissed unless, within 90 days after the respondent was served with citation under this rule, the automatic stay under the United States Bankruptcy Code, 11 U.S.C. § 362, is lifted or the bankruptcy case is closed, dismissed, or respondent is discharged.

(b) If a Rule 736 order has been signed and a respondent files bankruptcy, the Rule 736 order is void 180 days after the date the Rule 736 order was signed.

736.18 Abatement, Dismissal, Annulment of a Rule 736 Proceeding or Order

(a) A pending Rule 736 proceeding is automatically abated and dismissed if the respondent:

(1) files a separate original civil suit in a court of competent jurisdiction that puts in issue any matter arising under or related to the loan agreement, the property, or the foreclosure process;

(2) files with the clerk of the court in which the Rule 736 application is pending a notice of the suit with a copy of the original petition or complaint attached; and

(3) delivers a copy of the original petition or complaint to the applicant or applicant's attorney in accordance with Rule 21a or by email or other electronic delivery.

(b) A signed Rule 736 order is void and automatically annulled and vacated if, no later than 5:00 p.m. the Monday prior to the posted foreclosure sale date, the respondent:

(1) files a separate original civil suit in a court of competent jurisdiction that puts in issue any matter arising under or related to the loan agreement, the property, or the foreclosure; and

(2) delivers a copy of the original petition to the trustee, substitute trustee, or applicant's attorney by hand delivery, courier, facsimile, email, or other electronic delivery.

(c) The respondent shall be liable for all claims of any kind made against the applicant, owner, noteholder, investor, mortgage servicer, trustee, or substitute trustee or their attorneys, to include attorneys fees and court costs, by a purchaser of a foreclosure property at a void sale under (a) or (b), if the respondent in bad faith fails to timely deliver a notice of the filing of an original civil suit that would have reasonably prevented the property from being sold at the foreclosure sale.

736.19 Attachment of Order to Trustee's Foreclosure Deed

After foreclosure of the property described in a Rule 736 order, a conformed copy of the court's Rule 736 order shall be attached to the trustee or substitute trustee's deed.

736.20 Supplementation of Citations and References

In accordance with Rules 818 and 819, wherever this section refers to any practice or procedure in any law, statute, or regulation, or to a title, chapter, section, or article of any law or statute, or contains any reference of any such nature, and the matter referred to has been supplanted in whole or in part by these rules, every such reference shall be deemed to be to the pertinent part of these rules.

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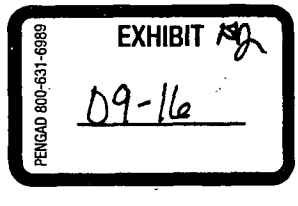
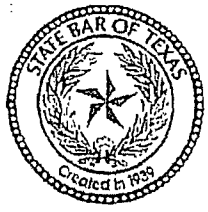




APPROVED BY THE STATE BAR BOARD OF DIRECTORS
APRIL 17, 2009

RESOLUTION OF THE STATE BAR OF TEXAS
LEGAL SERVICES TO THE POOR IN CIVIL MATTERS STANDING COMMITTEE

WHEREAS, the Legal Services to the Poor in Civil Matters Standing Committee's purpose is to concern itself with the delivery of legal services to persons who are unable to afford counsel to represent themselves in civil matters; and

WHEREAS, declining interest rates have drastically depleted revenue from interest on lawyers' trust accounts (IOLTA), which is a major source of funding for civil legal services in Texas, and that loss has created a funding crisis for civil legal services to the poor, and

WHEREAS, the courts currently have broad authority under the Texas Rules of Civil Procedure and the Texas Civil Practice & Remedies Code to impose monetary sanctions related to discovery abuse and frivolous pleadings, and

WHEREAS, Rules 13, 191.3, and 215 of the Texas Rules of Civil Procedure collectively address both discovery sanctions and frivolous-pleading sanctions, with Rule 13 incorporating Rule 215 sanctions, and

WHEREAS, Rules 191.3 and 215 may be amended to specifically mention a monetary sanctions option permitting an award to be paid into "the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent," and

WHEREAS, such amendment could produce significant awards in some cases that would benefit the provision of legal services to the poor, and

WHEREAS, the above-quoted language already appears in the Texas Government Code's pro hac vice fee provision, Section 82.0361,

THEREFORE BE IT RESOLVED that the Legal Services to the Poor in Civil Matters Standing Committee respectfully requests that the Supreme Court of Texas and the Court's Advisory Committee consider amending Rules 191.3 and 215 of the Texas Rules of Civil Procedure to specify a new option for monetary sanctions permitting an award to be paid into "the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent" or some similar option that would benefit the provision of civil legal services for the poor in Texas.

Rule 191.3(e): "*Sanctions.* If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code, or impose a monetary sanction to be paid into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent."

Rule 215.2(b)(2): ". . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sanction into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent . . . ."[1]

[1] Note that arguably Rule 215.2(b) already permits such a monetary award directed to legal services. In the instances specified in that introductory paragraph, that provision broadly authorizes "such orders in regard to the failure as are just, and among others the following . . . ." We have suggested adding the proposed language to Rule 215.2(b)(2) for two reasons: (1) to make clear and explicit the legal-services sanctions option; and (2) to permit that option under Rule 215.3, which addresses discovery abuse sanctions in broader terms and which cross-references several of the sanctions options under the subdivisions of Rule 215.2(b) but does not refer to that introductory paragraph of Rule 215.2(b).

Rule 191.3(e): "*Sanctions.* If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code, or a sanction to pay a monetary sum to a nonprofit provider of legal services to the poor in civil matters."

Rule 191.3(e): "*Sanctions.* If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code, or a sanction to pay a monetary sum to a nonprofit entity selected by the trial court from a list compiled by the State Bar of Texas of providers of legal services to the poor in civil matters."

Rule 191.3(e): "*Sanctions.* If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code, or a sanction to pay a monetary sum to the State Bar of Texas for use in providing legal services to the poor in civil matters."

Rule 215.2(b)(2): ". . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sum to a nonprofit provider of legal services to the poor in civil matters."

Rule 215.2(b)(2): ". . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sum to a nonprofit entity selected by the trial court from a list compiled by the State Bar of Texas of providers of legal services to the poor in civil matters."

Rule 215.2(b)(2): ". . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sum to the State Bar of Texas for use in providing legal services to the poor in civil matters."

TEX. R. CIV. P. 13. EFFECT OF SIGNING PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule.

Rule 191.3. Signing of Disclosures, Discovery Requests, Notices, Responses, and Objections.

(a) *Signature Required.* Every disclosure, discovery request, notice, response, and objection must be signed:

(1) by an attorney, if the party is represented by an attorney, and must show the attorney's State Bar of Texas identification number, address, telephone number, and fax number, if any; or

(2) by the party, if the party is not represented by an attorney, and must show the party's address, telephone number, and fax number, if any.

(b) *Effect of Signature on Disclosure.* The signature of an attorney or party on a disclosure constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(c) *Effect of Signature on Discovery Request, Notice, Response, or Objection.* The signature of an attorney or party on a discovery request, notice, response, or objection constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, notice, response, or objection:

(1) is consistent with the rules of civil procedure and these discovery rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) has a good faith factual basis;

(3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(4) is not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(d) *Effect of Failure to Sign.* If a request, notice, response, or objection is not signed, it must be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, notice, response, or objection. A party is not required to take any action with respect to a request or notice that is not signed.

(e) *Sanctions.* If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose on the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code.

CREDIT(S)

Added Aug. 5, 1998, and amended Nov. 9, 1998, eff. Jan. 1, 1999.

Rule 215.2. Failure to Comply with Order or with Discovery Request

(a) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to appear or to be sworn or to answer a question after being directed to do so by a district court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 [FN1] or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following:

(1) an order disallowing any further discovery of any kind or of a particular kind by the disobedient party;

(2) an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him;

(3) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(4) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(5) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;

(6) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(7) when a party has failed to comply with an order under Rule 204 requiring him to appear or produce another for examination, such orders as are listed in paragraphs (1), (2), (3), (4) or (5) of this subdivision, unless the person failing to comply shows that he is unable to appear or to produce such person for examination.

(8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal from the final judgment.

(c) *Sanction Against Nonparty For Violation of Rules 196.7 or 205.3.* If a nonparty fails to comply with an order under Rules 196.7 or 205.3, the court which made the order may treat the failure to obey as contempt of court.

CREDIT(S)

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of Aug. 5, 1998, and Nov. 9, 1998, eff. Jan. 1, 1999.

Rule 215.3. Abuse of Discovery Process in Seeking, Making, or Resisting Discovery

If the court finds a party is abusing the discovery process in seeking, making or resisting discovery or if the court finds that any interrogatory or request for inspection or production is unreasonably frivolous, oppressive, or harassing, or that a response or answer is unreasonably frivolous or made for purposes of delay, then the court in which the action is pending may, after notice and hearing, impose any appropriate sanction authorized by paragraphs (1), (2), (3), (4), (5), and (8) of Rule **215.2**(b). Such order of sanction shall be subject to review on appeal from the final judgment.

CREDIT(S)

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of Aug. 5, 1998, and Nov. 9, 1998, eff. Jan. 1, 1999.

CIVIL PRACTICE AND REMEDIES CODE CHAPTER 10. SANCTIONS FOR FRIVOLOUS PLEADINGS AND MOTIONS

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 10. SANCTIONS FOR FRIVOLOUS PLEADINGS AND MOTIONS

Sec. 10.001. SIGNING OF PLEADINGS AND MOTIONS. The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry:

(1) the pleading or motion is not being presented for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.002. MOTION FOR SANCTIONS. (a) A party may make a motion for sanctions, describing the specific conduct violating Section 10.001.

(b) The court on its own initiative may enter an order describing the specific conduct that appears to violate Section 10.001 and direct the alleged violator to show cause why the conduct has not violated that section.

(c) The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion, and if no due diligence is shown the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.003. NOTICE AND OPPORTUNITY TO RESPOND. The court shall provide a party who is the subject of a motion for sanctions under Section 10.002 notice of the allegations and a reasonable opportunity to respond to the allegations.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.004. VIOLATION; SANCTION. (a) A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a party represented by the person, or both.

(b) The sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated.

(c) A sanction may include any of the following:

(1) a directive to the violator to perform, or refrain from performing, an act;

(2) an order to pay a penalty into court; and

(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees.

(d) The court may not award monetary sanctions against a represented party for a violation of Section 10.001(2).

(e) The court may not award monetary sanctions on its own initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party or the party's attorney who is to be sanctioned.

(f) The filing of a general denial under Rule 92, Texas Rules of Civil Procedure, shall not be deemed a violation of this

chapter.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.005. ORDER. A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

Sec. 10.006. CONFLICT. Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.

Added by Acts 1995, 74th Leg., ch. 137, Sec. 1, eff. Sept. 1, 1995.

GREGORY JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE §3(B), at 1-16, 1-60, 1-61 (4th ed. 2008)("Many sanctions awards [are] in excess of $1 million.")

Low v. Henry, 221 S.W.3d 609 (Tex. 2007) (reversing and remanding $50,000 in penalty sanctions awarded under §10.004(c)(2)).

Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123 (1991) (affirming an inherent-power sanctions award of almost $1 million).

Cass v. Stephens, 156 S.W.3d 38 (Tex.App.—El Paso 2004, pet. denied) (affirming a $978,492 sanctions award).

Kugle v. DaimlerChrysler Corp., 88 S.W.3d 355 (Tex.App.—San Antonio 2002, pet. denied) (affirming a sanction of more than $865,000).

FDIC v. Hurwitz, 384 F.Supp.2d 1039 (S.D. Tex. 2005) (imposing sanctions of $72,255,147.51), *rev'd in part and remanded, FDIC v. MAXXAM, Inc.*, 523 F.3d 566 (5th Cir. 2008).

Compaq Computer Corp. V. Ergonome Inc., 387 F.3d 403 (5th Cir. 2004) (sanctions of $2,765,026.90).

Crowe v. Smith, 151 F.3d 217 (5th Cir. 1998) (reversing $5.075 million in sanctions).

Lubrizol Corp. v. Exxon Corp., 957 F.2d 1302 (5th Cir. 1992) ($2,424,462 in inherent-power sanctions).

American Cash Card Corp. v. AT&T Corp., 184 F.R.D. 521 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 354 (2d Cir. 2000) ($108 million sanctions default judgment).

DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc., 534 F.Supp.2d 224 (D. Mass. 2008) ($10 million inherent-power sanction).

Bush Ranch, Inc. v. E.I. duPont de Nemours & Co., 918 F.Supp. 1524, 1557-1558 (M.D. Ga. 1995), *rev'd*, 99 F.3d 363 (11th Cir. 1996) ($114,687,675.06 in attorneys' fees and fines imposed for discovery abuse pursuant to the court's inherent power, Fed. R. Civ. P. 11, 26, 33, 34, and 37, 28 U.S.C. §1651 and 18 U.S.C. §401 (contempt)).

Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912 (3d Cir. 1992) ($73 million default judgment for discovery abuse and failure to appear at trial entered pursuant to Fed. R. Civ. P. 37 and 55).

Wanderer v. Johnston, 910 F.2d 652 (9th Cir. 1990) ($25 million default judgment for discovery abuse entered pursuant to Fed. R. Civ. P. 37).

Philips Med. Sys. Int'l, B.V. v. Bruetman, 982 F.2d 211 (7th Cir. 1992) and 8 F.3d 600 (7th Cir. 1993) ($19 million default judgment for discovery abuse and other contumacious behavior entered pursuant to Fed. R. Civ. P. 37).

Baker v. General Motors Corp., 159 F.R.D. 519 (W.D. Mo. 1994) ($11.3 million default judgment for discovery abuse entered pursuant to Fed. R. Civ. P. 37), *rev'd*, 86 F.3d 811 (8th Cir. 1996).

Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990) ($8.3 million default judgment for the defendant on a counterclaim entered pursuant to Fed. R. Civ. P. 37).

Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 41 (4th Cir 1995) (reversing $6 million default judgment).

Bonilla v. Volvo Car Corp., 150 F.3d 88 (1st Cir. 1998) (reversing $3,518,844.41 in attorneys' fees and costs).

United States v. Philip Morris USA, Inc., 327 F.Supp.2d 21, 26 (D.D.C. 2004) ($2,750,000 ordered to be paid into court for deletion of email in violation of court order and corporate policy).

Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc., 2002 U.S. Dist. LEXIS 13706, at *45 (S.D.N.Y. July 25, 2002) ($2,578,159 in expert witness fees awarded pursuant to inherent power of the court).

Tex. Gov't Code §22.004

§ 22.004. RULES OF CIVIL PROCEDURE. (a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. The secretary of state shall report the rules or amendments to rules to the next regular session of the legislature by mailing a copy of the rules or amendments to rules to each elected member of the legislature on or before December 1 immediately preceding the session.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws, Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

Tex. Const. Art. V, §31

Sec. 31. COURT ADMINISTRATION; RULE-MAKING AUTHORITY; ACTION ON MOTION FOR REHEARING. (a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.
(b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.
(c) The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.
(d) Notwithstanding Section 1, Article II, of this constitution and any other provision of this constitution, if the supreme court does not act on a motion for rehearing before the 180th day after the date on which the motion is filed, the motion is denied.

Added Nov. 5, 1985; Subsec. (d) added Nov. 4, 1997.)

Tex. Loc. Gov't Code provisions

Section 113.02: ". . . (a) The fees, commissions, funds, and other money belonging to a county shall be deposited with the county treasurer by the officer who collects the money. . . . (b) The county treasurer shall deposit the money in the county depository in a special fund to the credit of the officer who collected the money. If the money is fees, commissions, or other compensation collected by an officer who is paid on a salary basis, the appropriate special fund is the applicable salary fund created under Chapter 154."

Section 154.023(a): "A salary fund shall be created in the county to be known as the 'officers' salary fund of _____ County, Texas."

Section 154.042(a): "A salary fund shall be created in the county for each district, county, and precinct office to be known as the '(officer's title) salary fund of (name of county) County, Texas.' The purpose of the fund is to pay: (1) the salary of the officer; (2) the salaries of the officer's deputies, assistants, clerks, stenographers, and investigators; and (3) authorized and approved expenses of the office of the officer."

Section 154.007(a): "At its first regular meeting in the first month of each fiscal year, the commissioners court may direct, by order entered in its minutes, that all money that otherwise would be deposited in a salary fund created under this chapter shall be deposited in the general fund of the county. (b) In a county in which the order is adopted, a reference in this chapter to a salary fund means the general fund."

Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure §L(2), 120 F.R.D. 101, 124 (1988).

124.2 Types of Sanctions. Among the types of sanction that the court, in its discretion, may choose to impose are:

a. a reprimand of the offender;
b. mandatory continuing legal education;
c. a fine;
d. an award of reasonable expenses, including reasonable attorneys' fees, incurred as a result of the misconduct;
e. reference of the matter to the appropriate attorney disciplinary or grievance authority
f. an order precluding the introduction of certain evidence;
g. an order precluding the litigation of certain issues;
h. an order precluding the litigation of certain claims or defenses;
i. dismissal of the action;
j. entry of a default judgment;
k. injunctive relief limiting a party's future access to the courts; and
l. censure, suspension or disbarment from practicing before the forum court, subject to applicable rules or statutes.

Initial SCAC Subcommittee Report on Problems and Proposals of Poverty Law Section and Charles ("Chuck") Herring

Problems 1-3, 6: The reported problems are that indigent litigants are charged by some clerks' offices for fees arising after the filing fee, there is no provision for exemption from e-filing fees, and some courts require affidavits of indigence to include unnecessary and sensitive information.

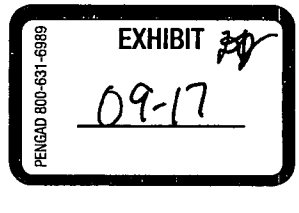
Current Texas Rule of Civil Procedure 145 may be interpreted, and is interpreted by some but not all clerk's offices, to exempt an indigent from any clerk's fees. If this is the intent, or it is determined that it should be the intent, the following redraft makes it clear. (Conforming changes may be made to JP and appellate rules, although the former is also governed by a statutory provision.)

E-filing fees are charged by state and private entities. To the extent local court rules require e-filing but have an exception for *pro se* litigants, *many* litigants who would qualify as indigent can avoid the fees by filing paper pleadings. However, indigents represented by legal aid lawyers or other lawyers cannot avoid, or their lawyers cannot avoid, these charges. Indigent *pro se* litigants who have access to the internet may also wish to use e-filing in lieu of hand-delivery or mail. The subcommittee is doubtful that fees imposed by private entities, pursuant to contract with the state, can be waived by a rule change. The subcommittee proposes a rule change that would require the clerk's office to advise Texas Online and the private Electronic Filing Service Providers (EFSPs) of affidavits of indigence, and orders overruling them, to enable these entities to waive the fees, if they are required by other law to do so or if they voluntarily wish to do so.

The sensitive information that the Poverty Law Section states has been required by some courts is not information required by any statute or rule. Addressing the concern would require language prohibiting the inclusion of this information. Even if the rule were to provide a form affidavit, unless it prohibits this information, it would not be clear to courts that they could not modify the form to require the sensitive information.

Proposed Redraft of Rule 145 (a) and (b). Affidavit on Indigency

(a) *Affidavit.* In lieu of paying or giving security for costs ~~of an orginal action~~ a party who is unable to afford costs must file an affidavit as herein described. A "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs.



Upon the filing of the affidavit, the clerk must docket the action, issue citation and, throughout the pendency of the suit unless and until any contest to the affidavit is sustained by written order, provide ~~such other~~ all customary services ~~as are provided any party~~ without charge. The clerk must also immediately notify Texas Online and all certified Electronic Filing Service Providers of the filing of the affidavit and of the filing of any order sustaining a contest to the affidavit.

(b) *Contents of Affidavit.* The affidavit must contain complete information as to the party's identity, nature and amount of governmental entitlement income, nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to the party, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses. The affidavit must not contain a social security number, a checking account number, or a place of birth. The affidavit shall contain the following statements: "I am unable to pay the court costs. I verify that the statements made in this affidavit are true and correct." The affidavit shall be sworn before a notary public or other officer authorized to administer oaths. If the party is represented by an attorney on a contingent fee basis, due to the party's indigency, the attorney may file a statement to that effect to assist the court in understanding the financial condition of the party.

Problem 4: In eviction cases, Rule 749a of the Texas Rules of Civil Procedure allows a tenant to appeal a justice court decision by filing a pauper's affidavit. However, there is no provision in the eviction rules similar to Rule 145 to prohibit contests to the affidavit when an IOLTA Certificate is filed.

Rule 749a cannot be read alone as the legislature has addressed pauper's appeals on eviction cases also. Section 24.0052 of the Texas Property Code specifies the information a defendant must provide to the justice court when filing a pauper's affidavit to appeal an eviction, and this section does not mention the IOLTA Certificate. A rule change alone, therefore, may not be appropriate or effective. To amend the rule, the subcommittee proposes adding the IOLTA Certificate language, paragraph (c) of Rule 145, verbatim, to Rule 749a in the third paragraph.

Proposed redraft of Rule 749a paragraph 3:

A pauper's affidavit will be considered approved upon one of the following occurrences: the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; ~~or~~ (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit, or (4) if the party is represented by an attorney who is providing free legal services, without contingency, because of the party's indigency and the attorney is providing services either directly or by referral from a program funded by the Interest on Lawyers Trust Accounts (IOLTA) program, the attorney may file an IOLTA certificate confirming that the IOLTA-funded program screened the party for income eligibility under the IOLTA income guidelines. A party's affidavit of inability accompanied by an attorney's IOLTA certificate may not be contested.

Problem 5: Whenever a landlord's petition includes an allegation of nonpayment of rent, the rules require a tenant wishing to appeal to county court to pay one month's rent into the court registry within five days of filing the affidavit on indigence. When the tenant has already paid rent for the month in which he or she appeals, the rule nonetheless requires him or her to pay, into the registry, another month's rent. The corresponding Property Code provision, section 24.0053 requires only that rent be paid "as it becomes due." The Property Code also addresses the situation in which the government pays a portion of a tenant's rent, but the rule has no corresponding provision.

The problem and the inconsistencies can be resolved by amending Rule 749b as follows.

Proposed Redraft of Rule 749b Pauper's Affidavit in Nonpayment of Rent Appeals

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure;

~~(1) Within five days of the date that the tenant/appellant files his paupers's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.~~

(1) ~~(2)~~During the appeal process as rent becomes due under the rental agreement, the tenant/appellant shall pay rent ~~within five days of the due date under the terms of the rental agreement~~ into the county court registry.

(2) If a government agency is responsible for all or a portion of the rent under an agreement with the landlord, the tenant shall pay only that portion of the rent for which the tenant is responsible, as determined by the justice court.

(3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file

a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall immediately issue a writ of possession.

(4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.

(5) All hearings and motions under this rule shall be entitled to precedence in the county court.

The solution also requires a minor addition to Rule 748, to provide that the justice court will determine the rent and its due date. Although it is unnecessary to redraft 748 further, or to redraft 749a and 749c, the subcommittee proposes that they be redrafted to conform to the Property Code as follows.

Rule 748. Judgment and Writ

If the judgment or verdict is in the plaintiff's favor, the court must award the plaintiff possession of the premises and costs. The court may also award the plaintiff attorney's fees, if sought and established by proof, back rent, and post judgment interest, provided that such claims are within the court's jurisdiction. If the judgment or verdict is in the defendant's favor, the court must award the defendant possession of the premises and costs. The court may also award a defendant who prevails on the issue of possession a judgment for attorney's fees, if sought and established by proof, provided that such claim is within the court's jurisdiction. If the judgment is for the plaintiff for possession, the court must issue a writ of possession except that no writ of possession shall issue until the expiration of five days from the day the judgment is signed.

(a) An eviction judgment must be in writing in a separate document and contain the full names of the parties, as stated in the pleadings, and state for and against whom the judgment is rendered. The judgment shall recite who is awarded:

(1) possession of the premises:

(2) back rent, if any, and in what amount;

(3) attorney's fees, if any, and in what amount;

(4) court costs; and

(5) post judgment interest and at what rate.

(b) An eviction judgment must contain findings that must include the following:

(1) whether there is an obligation to pay rent on the part of the defendant;

(2) a determination of the rent paying period;

(3) a determination of the day the rent is due;

(4) a determination of the amount of rent due each rent paying period, and if the rental agreement provides that all or part of the tenant's rental obligation is subsidized by the government then a determination as to how much rent is to be paid by the tenant and how much rent is to be paid by the government;

(5) a determination of the date through which the judgment for back rent is calculated; and

(6) a determination of what rate of post judgment interest will apply.

(c) If the judgment of the justice court is not appealed then it remains in force and the prevailing party may enforce the party's rights under the judgment in the justice court. If the appeal from the justice court is perfected in accordance with Rule 749b and the county court's jurisdiction is invoked, then the justice court may not enforce the judgment.

(d) The county court may rely on the justice court's judgment in determining when and in what amount rent is due to be paid by the appellant into the registry of the county court during the pendency of the appeal. The county court may also rely on the justice court's judgment in determining whether or not to issue a writ of possession in the event rents are not timely paid into the registry of the county court. Nothing in this rule prohibits the county court

from making an independent determination, either on its own initiative or on sworn motion of either party, as to the amounts and due dates of rents to be paid into the registry of the county court during the pendency of the appeal.

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. Any dismissal or default set aside under this rule must be tried within seven days from the date the prior judgment was set aside.

(b) A party may appeal from a final judgment in an eviction case to the county court of the county in which the judgment is signed.

(c) A defendant may appeal by filing with the justice, not more than five days after the judgment is signed, an appeal bond, deposit, or security to be approved by said justice in an amount equal to the court costs incurred in justice court.

(d) If an appeal bond is posted it must be:

(1) in an amount required by this rule;

(2) made payable to the county clerk of the county in which the case was heard;

(3) signed by the judgment debtor or the debtor's authorized agent; and

(4) signed by a sufficient surety or sureties as approved by the court. If an appeal bond is signed by a surety or sureties, then the justice court may, in its discretion, require evidence of the sufficiency of the surety or sureties prior to approving the appeal bond.

(e) *Deposit in Lieu of Appeal Bond.* Instead of filing a surety appeal bond, a party may deposit with the justice court:

(1) cash;
(2) a cashier's check payable to the county clerk of the county where the case was heard, drawn on any federally insured and federally or state chartered bank or savings and loan association; or
(3) with leave of court, a negotiable obligation of the federal government or of any federally insured and federally or state chartered bank or savings and loan association.

(f) Any motions challenging the sufficiency of the appeal bond or deposit in lieu of appeal bond must be filed with the county court.

(g) Within five days following the filing of an appeal bond by a defendant, or the filing of a notice of appeal by a plaintiff, the party appealing must give notice in accordance with Rule 21a of the filing of an appeal bond or the filing of a notice of appeal to the adverse party. No judgment shall be taken by default against the adverse party in the county court to which the cause has been appealed without first showing substantial compliance with this subsection.

Rule 749a Affidavit on Indigence

(a) *Establishing Indigence.* A party who cannot pay the costs to appeal to the county court may proceed without advance payment of costs if:
(1) the party files an affidavit on indigence in compliance with this rule within five days after the justice court judgment is signed; and
(2) the claim of indigence is not contested or, if contested, the contest is not sustained by a timely written order.

(b) *Contents of Affidavit.* The affidavit on indigence must identify the party filing the affidavit and must state what amount of costs, if any, the party can pay. The affidavit must also contain complete information about:
(1) the tenant's identity;

(2) the nature and amount of the tenant's employment income;

(3) the income of the tenant's spouse, if applicable and available to the tenant;

(4) the nature and amount of any governmental entitlement income of the tenant;

(5) all other income of the tenant;

(6) the amount of available cash and funds available in savings or checking accounts of the tenant;

(7) real and personal property owned by the tenant, other than household furnishings, clothes, tools of a trade, or personal effects;

(8) the tenant's debts and monthly expenses; and

(9) the number and age of the tenant's dependants and where those dependants reside.

(c) *When and Where Affidavit Filed.* An appellant must file the affidavit on indigence in the justice court within five days after the justice court judgment is signed

(d) *Duty of Justice of the Peace.* Upon the filing of an affidavit on indigence the justice of the peace shall notice the opposing party, and the county clerk of that county, of the filing of the affidavit on indigence within one working day of its filing by written notification accomplished by first class mail.

(e) *No Contest Filed.* Unless a contest is timely filed, no hearing will be conducted, the affidavit's allegations will be deemed true, and the party will be allowed to proceed without advance payment of costs.

(f) *Contest to Affidavit.* The appellee or county clerk, may contest the claim of indigence by filing a contest to the affidavit. The contest must be filed in the justice court within five days after the date when the notice of the filing of the affidavit was mailed by the justice of the peace to the opposing party. The contest need not be sworn.

(g) *Burden of Proof.* If a contest is filed, the party who filed the affidavit on indigence must prove the affidavit's allegations. If the indigent party is incarcerated at the time the hearing on a contest is

held, the affidavit must be considered as evidence and is sufficient to meet the indigent party's burden to present evidence without the indigent party's attending the hearing.

(h) *Hearing and Decision in Trial Court; Notice Required.* If the affidavit on indigence is filed in the justice court and a contest is filed, the justice court must set a hearing, notify the parties of the setting, and rule on the matter within five days.

(i) *Appeal From Justice Court Order Disapproving Affidavit on Indigence.*

(1) No writ of possession may issue pending the hearing by the county court of the appellant's right to appeal on an affidavit on indigence.

(2) If a justice of the peace disapproves the affidavit on indigence, appellant may, within five days thereafter, bring the matter before the county court for a final decision, and, on request, the justice shall certify to the county court appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county court shall hold a hearing de novo and rule on the matter. If the affidavit on indigence is approved by the county court, it shall direct the justice to transmit to the clerk of the county court, the transcript, records, and papers of the case. If the county court disapproves the affidavit on indigence, appellant may perfect an appeal by filing an appeal bond, deposit, or security with the justice court in the amount required by this rule within five days thereafter. If no appeal bond is filed within five days thereafter, the justice court may issue a writ of possession.

(j) *Costs Defined.* As used in this rule, costs means:

(1) a filing fee paid in justice court to initiate the eviction action:

(2) any other costs sustained in the justice court; and

(3) a filing fee paid to appeal the case to the county court.

Rule 749c Appeal Perfected

When the defendant timely files an appeal bond, deposit, or security in conformity with Rule 749, and the filing fee required for the appeal of cases to the county court is paid, or an affidavit on indigence approved in conformity with Rule 749a, the appeal by the defendant shall be perfected. When the plaintiff timely files a notice of appeal in conformity with Rule 749 and the filing fee required for the appeal of cases to county court is paid, or an affidavit on indigence is approved, the plaintiff's appeal is perfected. When an appeal is perfected, the justice court must make a transcript of all the entries made on its docket of the proceedings had in the case and immediately file the same, together with the original papers, any money in the court registry pertaining to that case, and the appeal bond, deposit, or security filed in conformity with Rule 749, or the approved affidavit on indigence with the county clerk of the county in which the case was heard. The county clerk must docket the case and the trial must be de novo.

No factual determination in an eviction action, including determination of the right to possession, will be given preclusive effect in other actions that may be brought between the parties.

Problem 7: Some justice courts occasionally close before 5:00 pm. Litigants who show up to file documents on such days may, as a result, miss a deadline.

The most obvious approach is to take, as a starting point, appellate Rule 4.1(b), which reads as follows:

4.1. Computing Time

(a) *In General.* The day of an act, event, or default after which a designated period begins to run is not included when computing a period prescribed or allowed by these rules, by court order, or by statute. The last day of the period is included, but if that day is a Saturday, Sunday, or legal holiday, the period extends to the end of the next day that is not a Saturday, Sunday, or legal holiday.

(b) *Clerk's Office Closed or Inaccessible.* If the act to be done is filing a document, and if the clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the clerk's office is open and accessible. The closing or inaccessibility of the clerk's office may be proved by a certificate of the clerk or counsel, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

Copying this to a new Justice Court Rule, and making appropriate changes, yields this:

> **Proposed Redraft of Rule 523a. Court or Clerk's Office Closed or Inaccessible.**
>
> If the court or the clerk's office where a document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the court or clerk's office is open and accessible. The closing or inaccessibility of the court clerk's office may be proved by a certificate of the clerk or justice, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

A more ambitious approach is to amend Rule 4, Tex.R.Civ.P., to read as follows:

Proposed Redraft of Rule 4. Computation of Time

(a) In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

(b) Saturdays, Sundays and legal holidays shall not be counted for any purpose in any time period of five days or less in these rules, except that Saturdays, Sundays and legal holidays shall be counted for purpose of the three-day periods in Rules 21 and 21a, extending other periods by three days when service is made by registered or certified mail or by telephonic document transfer, and for purposes of the five-day periods provided for under Rules 748, 749, 749a, 749b, and 749c.

(c) If the court or the clerk's office where a document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the court or clerk's office is open and accessible. The closing or inaccessibility of the court clerk's office may be proved by a certificate of the clerk or judge, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner.

Problem – Dwindling IOLTA funds for poverty law programs. The Poverty Law Section and Chuck Herring have proposed amending the rules so that a court may order penalty sanctions to be paid to the Legal Services Account of Judicial Fund.

Trial courts have authority to order sanctions under statute (e.g., Tex. Civ. Prac. & Rem. Code chs. 9 and 10), rule (e.g., Rules 13, 191.3, 215.2), and inherent powers. Chuck Herring asks the Court to consider amending Rules 191.3(e) and 215.2(b)(2) as follows:

> Rule 191.3(e): "*Sanctions*. If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil practice and Remedies Code, or impose a monetary sanction to be paid into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent."
>
> Rule 215.2(b)(2): authorizing ". . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sanction into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent. . . "

This wording comes from Tex. Govt Code § 82.0361, regarding pro hac vice fees:

> The comptroller shall deposit the fees received under this section to the credit of the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent."

The concept raises three issues: (1) statutory authority, (2) standards for separating penalty sanctions from sanctions to compensate a party, and (3) policy.

I. Statutory Authority

Does the proposal require statutory authority?

If so, to what extent does the necessary statutory authority already exist?

Tex. Const. art 8, sec. 6 provides:

"No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; ... ."

"The appropriation of state money is a legislative function," the Texas Supreme Court has held, quoting art. 8 sec. 6. *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972). Noting that the Election Code did not expressly authorize the Secretary of State to spend public funds for the purpose, the Court refused to mandamus the Comptroller to pay warrants issued by the Secretary of State as chief elections officer to pay for primary elections.

Tex. Civ. Prac. & Rem. Code §10.004(c)(2) is a statute authorizing penalty sanctions. A court that orders sanctions for violation of §10.001's provisions concerning what the signing of a pleading or motion signifies may include in the sanction:

> "an order to pay a penalty into court."

Chuck Herring advises that there is a statute providing that "court" means "county treasury." He expects that David Escamilla will provide the citation.

Rule 191.3(e) provides that if a signed certification required in any disclosure, discovery request, notice, response, or objection" is "false without substantial justification, the court may ... impose ... an appropriate sanction as for a frivolous pleading under Chapter 10 of the Civil Practice and Remedies Code."

II. Standards for Penalty Sanctions

Should the Court provide standards for trial courts to use in deciding the amount of penalty sanctions and/or how to divide the minimum total sanctions needed to achieve the goals of sanctions between compensation to the party and penalty paid to the basic legal services fund?

If so, what standards?

Tex. Civ. Prac. & Rem. Code § 10.004(b) provides that

"the sanction must be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated."

More generally, any sanction must "be no more severe than necessary to satisfy its legitimate purposes." *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 917 (Tex. 1991).

The Texas Supreme Court held that penalty sanctions were within the trial court's discretion under Tex. Civ. Prac. & Rem. Code §10.004(c)(2), but remanded because "we cannot determine the basis" of the specific amount ordered by the trial court ($25,000 for each of two doctors sued without reasonable inquiry and evidentiary support). *Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007).

The Court stated that a trial court "should consider relevant factors in assessing the amount of the sanction." *Id.* It called an ABA 1988 report listing 13 factors "helpful," but noted that list was "non-exclusive", and held "we do not require a trial court to address all of the factors listed in the report to explain the basis of a monetary sanction under Chapter 10 ... ." *Id.* at 620-21 and n.5.

Tex. Civ. Prac. & Rem. Code § 10.004(c), in addition to penalty paid into court, authorizes

"(3) an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees."

Rule 215.2(b) sets out a trial court's authority to order many different kinds of discovery abuse sanctions, including but not limited to eight listed ones. The eighth is payment of "the reasonable expenses, including attorney fees, cause by the failure."

Low v. Henry does not address how a trial court divides the minimum legitimate sanction amount between a penalty sanction and a compensatory sanction.

Neither do the multiple opinions in *Unifund CCR Partners v. Villa*, 273 S.W.3d 385 (Tex. App. – San Antonio 2008) (en banc) (upholding as not excessive $18,685 in ch. 10 sanctions for inconvenience and harassment).

Neither does *Sterling v. Alexander*, 99 S.W.3d 793 (Tex. App. – Houston [14th Dist.] 2003, pet. denied) (reversing $3,340 in sanctions to be paid into the registry of the court for the use and benefit of two minors).

III. Policy Issues

Would rules extending penalty sanctions and requiring payment to the basic legal services fund result in significant funds for basic legal services?

Would such rules risk significant abuses difficult to police under the appellate review abuse of discretion standard?

Are there any reported data on the frequency with which Tex. Civ. Prac. & Rem. Code § 10.004(c)(2) or Rule 191.3(e) penalty sanctions are ordered, or the dollars involved? There are very few appellate opinions on penalty sanctions.

Would adoption of a rule broadening the situations in which penalty sanctions could be ordered and making penalty sanctions payable to basic legal services instead of to county treasuries lead to significantly more and/or larger penalty sanctions?

Would adoption of such a rule significantly increase the risks of the kinds of abuses of sanctions power addressed in *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991)?

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

Chambers of
Justice Nathan L. Hecht

April 16, 2009

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Rules Advisory Committee
Jackson Walker L.L.P.
1401 McKinney, Suite 1900
Houston, TX 77010

Re: Referral of Rules Issues

Via e-mail

Dear Chip:

The Court requests the Advisory Committee's recommendations on several proposed changes to the Rules of Civil Procedure. These proposals are summarized in the attached correspondence from the Poverty Law Section of the State Bar of Texas, the Texas Access to Justice Commission, and Charles Herring, Jr. — a former member of the Advisory Committee.

The Court greatly appreciates the Advisory Committee's thoughtful consideration of these issues and its dedication to the rules process. Thank you for your continued leadership on the Advisory Committee. I look forward to seeing you tomorrow.

Sincerely,

Nathan L. Hecht
Justice

THE POVERTY LAW SECTION

OF THE STATE BAR OF TEXAS

www.povertylawsection.com

January 23, 2009

Supreme Court of Texas
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: Follow-up to December 10, 2008 Supreme Court Hearing on Legal Services to the Poor in Civil Matters

To the Honorable Justices of the Supreme Court of Texas:

The Poverty Law Section of the State Bar of Texas presented testimony to the Court at the December 10, 2008 hearing on the needs and accomplishments of state legal aid organizations providing civil law services for the poor. We offered our concerns about the current state of e-filing, pauper's affidavits, court access, and other matters that affect poor Texans. At that hearing, the Court requested that the Poverty Law Section supplement its testimony in more detail in letter format.

The Poverty Law Section is composed of diverse members of the bar who provide civil legal services to the thousands of indigent Texans who face domestic violence, wrongful eviction, predatory lending practices, and lack of access to public benefits. Our concerns and proposals for change, many of which were presented at the December 10 hearing, include the following:

1. **Problem**: **E-filing requires the payment of various fees per filing that can total more than $10 per document (fees are charged by the state, county, and service provider), and there is no exception for e-filing *in forma pauperis*.**

Because e-filing is quickly becoming a common method of filing court documents in Texas courts (and within the next five years may be the default method of filing), the lack of an exception to the filing fees is a real and growing concern. Some state courts, including those in Travis County, *require* e-filing in many cases (e.g., home equity loan foreclosures). Even when e-filing is a voluntary option, any access that e-filing provides to poor clients who live far away from their lawyers or in rural areas is offset by the financial obstacle of required fees.

HAND DELIVER

This Court has been a steadfast defender of the right of poor persons to access the courts *in forma pauperis*. *See, e.g., Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684 (Tex. 2008); *Allred v. Lowry*, 597 S.W.2d 353 (Tex. 1980); *Goffney v. Lowry*, 554 S.W.2d 157 (Tex. 1977). The Court's Judicial Committee on Information Technology and the Access to Justice Commission have both recommended e-filing waivers for litigants who qualify under Rule 145 of the Texas Rules of Civil Procedure. However, the entities involved in e-filing (the state, the courts, and private service providers) do not offer indigent litigants a fee waiver.

Proposed Solution: The Court should issue a miscellaneous order enabling free e-filing access for poor litigants. This will provide important court access to poor Texans and avoid inevitable open courts and due course of law challenges.

2. Problem: **While courts have allowed indigent clients to file new cases with pauper's affidavits and avoid the initial filing fees, some courts are not allowing final judgments or temporary orders to be entered until court fees are paid.**

To require an indigent client to pay additional fees is contrary to the intent of Rule 145 of the Texas Rules of Civil Procedure.

Proposed Solution: The Court could issue a comment or modification to Rule 145, such as "Costs addressed by this rule may not be imposed as a prerequisite to entry or rendition of a temporary or final order, or other activity in the case."

3. Problem: **Some court clerks are requiring clients who have filed an affidavit of indigency to pay court fees set out in Chapter 110 of the Texas Family Code, including for the issuance of withholding orders, suits or motions to modify the parent/child relationship, motions for enforcement, notice of application for judicial writ or withholding, motions to transfer, motions for contempt, and filing transferred cases.**

These are common and routine services provided by legal aid organizations, and such fees impede the delivery of legal services to indigent Texans. While we believe that Rule 145 applies, a comment or modification to the rule making it clear it applies would be helpful.

Proposed solution: The Court could amend Rule 145 (a) as follows: "In lieu of paying or giving security for costs of an original action or any other motion, petition, request for issuance or service of an order, a party who is unable to afford costs must file an affidavit as herein described." The Court could also add the following comment: "*The Rule is amended to clarify that it applies to court fees*

that apply to initiating and maintaining court proceedings, including but not limited to fees set forth in the Texas Family Code Chapter 110."

4. <u>Problem</u>: **In eviction cases, Rule 749a of the Texas Rules of Civil Procedure allows a tenant to appeal a justice court decision by filing a pauper's affidavit. However, there is no provision in the eviction rules similar to Rule 145 to prohibit contests to the affidavit when an IOLTA Certificate is filed.**

The lack of a rule in eviction cases similar to Rule 145 of the Texas Rules of Civil Procedure has resulted in needless challenges to pauper's affidavits in eviction cases where an IOLTA funded program is providing free legal services to the indigent Texan and the client is clearly poor. We believe Rule 145 applies by virtue of Rule 523, but a rule change could eliminate any uncertainty.

Proposed solution: The Court should issue a rule change or comment to Rule 749a that prohibits contests to the affidavit when an IOLTA Certificate is filed.

5. <u>Problem</u>: **In the appeal process in eviction cases, a conflict exists between Rule 749b of the Texas Rules of Civil Procedure and Section 24.0053 of the Texas Property Code resulting in indigent tenants being unfairly denied the ability to stay in possession of their homes pending appeal.**

In "nonpayment of rent" eviction cases, Rule 749b of the Texas Rules of Civil Procedure requires that an indigent tenant pay one month's rent into the court registry within five days of filing a pauper's affidavit in order to stay in possession pending appeal, and then pay rent as it becomes due. The payment of rent five days after the filing of the pauper's affidavit is problematic if the tenant has already paid the landlord rent for that month. This occurs when an eviction case includes allegations of nonpayment of rent, but actually involves other issues. For example, a tenant might dispute unfair late fees, parking fines, or a utility charge and fail to pay them; however, if the landlord applies rent received to these disputed charges first, the landlord will consider the tenant behind on rent. In another example, a subsidized housing landlord may have unfairly raised a tenant's income-based rent. Thus, while these evictions may be based on nonpayment in the pleadings, the tenant has actually paid the rent for the month the appeal was filed. The result in such cases is that the tenant is forced to pay rent twice for the same month in order to stay in possession pending appeal, and few indigent tenants possess the funds required by the rule.

Section 24.0053(b) of the Texas Property Code only requires rent payment as it comes due and does not require double payments. Despite the conflict in the rules, failure to pay rent timely in to the court registry can have dire ramifications: Rule

749b(3) requires a writ of restitution to be entered upon a showing of a default for failure to pay rent into the court registry.

Proposed solution: Rule 749b should be modified consistent with the Texas Property Code so that rent is only required to be paid as it comes due after the filing of the affidavit (to protect the landlord during the pendency of the appeal).

6. **Problem: Courts are requiring indigent litigants provide information in pauper's affidavits that is not only unnecessary, but intrusive.**

Even the Texas Justice Court Training Center suggests that justice courts require indigent Texans use pauper's affidavits that contain the name of the financial institution where the affiant has funds, and the account number, the date and place of birth, and other information that is unnecessary and problematic for a public filing. See the Center's recently adopted forms attached Exhibit A.

Proposed solution: The Court should modify Rule 145 and Rule 749a (and other rules allowing these affidavits) so that it is clear that an affidavit calling for information such as this should be avoided; or in the alternative, the Court should provide in the rules the actual form of the affidavit indigent Texans should use.

7. **Problem: The variable hours of operation of some justice courts raise serious issues of access to the courts.**

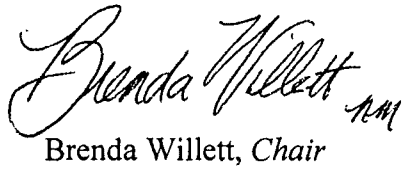
In some areas of Texas, justice of the peace courts have different hours of operation, thus limiting Texans from when they can file appeals. For example, each of the different justice of the peace precincts in Williamson County is open at different times during the week. Some of these Williamson County courts only accept civil filings until 3:30; others are open only half-days on various days of the week; and still others close one day a week. In San Patricio County, at least one justice court closes at noon on Fridays. In the Rio Grande Valley, justice courts have different hours and several close before 5:00 p.m. Because timely filing of appeals is jurisdictional, individuals can be deprived of their right to appeal if they attempt to file documents during normally accepted business hours.

Proposed solution: The rules should be amended to provide that the filing deadline for an appeal in justice court extends to the following day the court is open to accept filings when a court closes prior to 5:00 p.m. or is closed (other than weekends and legally recognized holidays).

The Poverty Law Section thanks the Court for its leadership on access to justice issues and the opportunity for additional comments. If you have any questions, or you would like any additional information or guidance on this or any other issues

concerning access to justice by indigent Texans, we are very happy to be of assistance. You can reach our Chair, Brenda Willett, by telephone at (936) 462-7000, and the contact information for each of our officers and council members can be found at our website at http://povertylawsection.com/Officers.html.

Respectfully submitted,



Brenda Willett, *Chair*
Tony Alvarado, *V. Chair*
Julie Balovich, *Secretary*
Nelson H. Mock, *Treasurer*

FORM 102 **AFFIDAVIT OF INABILITY TO PAY COSTS – EVICTION APPEAL BY TENANT**
V.A.Pr.C. s 24.0052; Rule 749a, T.R.C.P.

NO. _____

_____ (PLAINTIFF)	X	IN THE JUSTICE COURT
VS.	X	PCT. _____, PL. _____
_____ (DEFENDANT)	X	_____ COUNTY, TEXAS

AFFIDAVIT OF INABILITY TO PAY COSTS - EVICTION APPEAL

I, _____, Defendant in the above-styled and number cause, am unable to pay the court costs of appeal therein. I verify that the statements made in this affidavit are true and correct, and contain complete information as to the my identity, the nature and amount of governmental entitlement income, the nature and amount of employment income, other income, (interest, dividends, etc.), spouse's income if available to me, property owned (other than homestead), cash or checking account, dependents, debts, and monthly expenses.

Tenant's Identity

Full Name:	
Address: City, State, and Zip Code	
Home Telephone:	Cellular Phone:
Former Address:	
Date of Birth:	Place of Birth:
Employer:	
Employment Address:	
Work Telephone:	Job Title or Duties:
Supervisor's Name:	

Tenant's Income

Monthly earnings:	Amount:
Other income: Description:	Amount:

EXHIBIT
A

Spouse's Income and Identity

Spouse's monthly earnings:	
Other income: Description:	Amount:
Spouse's Name:	
Spouse's Address: City, State, and Zip Code	
Spouse's Home Telephone:	Spouse's Cellular Phone:
Spouse's Employer:	
Spouse's Employment Address:	
Spouse's Work Telephone:	Spouse's Supervisor's Name:

Government Entitlement Income

Unemployment Benefits:	Benefit Amount:
AFDC:	
Social Security:	
Disability:	
Veteran's Benefits:	
Child Support:	

Other -- Description:	Amount:

All Other Income of Tenant

Description:	Amount:

Accounts in Financial Institutions

Checking Accounts: Name of Financial Institution:	Account Number:	Current Balance:
Saving Accounts: Name of Financial Institution:	Account Number:	Current Balance:

Real Property Owned by Tenant

Description:	Address:	Value:

Personal Property Owned by Tenant ***(other than household furnishings, clothes, tools of a trade, or personal effects)***

Description:	Value:

Debts

Description:	Total Due:	Monthly Payment:

Monthly Expenses ***(for example, food, transportation, child care, health care, etc.)***

Description:	Amount:

Dependants of Tenant

Name:	Address:	Age:	Relationship:

Date Completed:_____

_____
Signature of Tenant

THE STATE OF TEXAS §

COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, who, upon oath stated that he/she is the Tenant making this Pauper's Affidavit and that the information provided is true and correct.

SWORN TO AND SUBSCRIBED before me on the _____ day of _____.

_____
Notary Public in and for
State of Texas

_____
_____
Notary's Name (printed):

My commission expires:_____
_____

FORM 22 **AFFIDAVIT OF INABILITY TO PAY COSTS**
Rule 145, T.R.C.P.

NO. _____

_____ (PLAINTIFF)	X	IN THE JUSTICE COURT
VS.	X	PCT._____, PL. _____
_____ (DEFENDANT)	X	_____ COUNTY, TEXAS

AFFIDAVIT OF INABILITY TO PAY COSTS

I, _____, am Plaintiff/Defendant in the above-styled and number cause, and I am unable to pay the court costs therein. I verify that the statements made in this affidavit are true and correct.

Tenant's Identity

Full Name:	
Address: City, State, and Zip Code	
Home Telephone:	Cellular Phone:
Former Address:	
Date of Birth:	Place of Birth:
Employer:	
Employment Address:	
Work Telephone:	Job Title or Duties:
Supervisor's Name:	

Tenant's Income

Monthly earnings:	Amount:
Other income: Description:	Amount:

Spouse's Income and Identity

Spouse's monthly earnings:	
Other income: Description:	Amount:
Spouse's Name:	
Spouse's Address: City, State, and Zip Code	
Spouse's Home Telephone:	Spouse's Cellular Phone:
Spouse's Employer:	
Spouse's Employment Address:	
Spouse's Work Telephone:	Spouse's Supervisor's Name:

Government Entitlement Income

Unemployment Benefits:	Benefit Amount:
AFDC:	
Social Security:	
Disability:	
Veteran's Benefits:	
Child Support:	
Other -- Description:	Amount:

All Other Income of Tenant

Description:	Amount:

Accounts in Financial Institutions

Checking Accounts: Name of Financial Institution:	Account Number:	Current Balance:

Saving Accounts: Name of Financial Institution:	Account Number:	Current Balance:

Real Property Owned by Tenant

Description:	Address:	Value:

Personal Property Owned by Tenant ***(other than household furnishings, clothes, tools of a trade, or personal effects)***

Description:	Value:

Debts

Description:	Total Due:	Monthly Payment:

Monthly Expenses ***(for example, food, transportation, child care, health care, etc.)***

Description:	Amount:

Dependants of Tenant

Name:	Address:	Age:	Relationship:

Date Completed:_____

_____
Signature of Tenant

THE STATE OF TEXAS §
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, who upon oath, stated that he/she is the Tenant making this Pauper's Affidavit and that the information provided is true and correct.

SWORN TO AND SUBSCRIBED before me on the _____ day of _____ 20____.

_____
Notary Public in and for
State of Texas
Notary's Name (printed):
My commission expires: _____

TEXAS
ACCESS TO JUSTICE COMMISSION

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TELEPHONE : (713) 651-5151
FACSIMILE: (713) 651-5246

February 26, 2009

The Supreme Court of Texas
Attention: Blake A. Hawthorne, Clerk of the Court
P.O. Box 12248
Austin, Texas 78711

Re: Proposed Rule Change – Texas Rules of Civil Procedure, Rule 749(a)

To the Honorable Justices of the Supreme Court of Texas:

The purpose of this letter is to file with and forward to the Supreme Court of Texas the recommendation of the Texas Access to Justice Commission ("the Commission") proposing an amendment to Rule 749(a) of the Texas Rules of Civil Procedure, which addresses the appeal of a justice court decision in eviction cases. Specifically, the Commission recommends that the rule be amended to eliminate the need for a hearing to determine indigence when a party represented by an attorney providing free legal services files an IOLTA certificate together with a pauper's affidavit.

At the recent Supreme Court Hearing on the Status of Civil Legal Services, the Court provided an opportunity for stakeholders to present testimony that directly addressed access to justice issues in Texas. Among those who testified, the Poverty Law Section presented testimony on a number of proposals necessary for the enhancement of access to justice in Texas. These proposals have been outlined in a separate letter by the Poverty Law Section in response to a request from the Court to provide the details of this proposal. The Commission wholeheartedly supports the Poverty Law Section efforts to increase access to civil legal services for poor and low-income individuals throughout Texas. In particular, the Commission respectfully urges the Court to consider the Section's proposed modification to Rule 749(a) of the Texas Rules of Civil Procedure.

Rule 749(a) of the Texas Rules of Civil Procedure authorizes a tenant to appeal a justice court's decision in an eviction case by filing a pauper's affidavit. Therefore, if appellant is unable to pay appeal costs, he or she is entitled to an appeal

by a showing of strict proof of inability to pay within five days after the judgment is signed. However, the rule also states:

> **It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold a hearing and rule on the matter within five days.**

Under current provisions, a hearing is held when the affidavit is contested, even in circumstances when the litigant is represented by an IOLTA-funded program. However, challenges to pauper's affidavits are unnecessary if an IOLTA-funded program is providing free legal services to the appellant. IOLTA-funded programs are legally obligated to carefully screen applicants pursuant to the strict income restrictions tied to the funding they receive. As the Court noted when it modified Rule 145 of the Texas Rules of Civil Procedure, the rule requirement of a formal hearing to determine a litigant's indigent status constitutes an unnecessary drain on judicial resources and, importantly, creates an unnecessary and serious barrier to a citizen's access to the courts.

The Commission strongly recommends and respectfully requests that the Court amend Texas Rule of Civil Procedure 749(a) in the same manner Texas Rule of Civil Procedure 145(c) was amended by the Court in 2005. The amendment to Texas Rule of Civil Procedure 749(a) will eliminate the need for a hearing when a party represented by an attorney providing free legal services files an IOLTA certificate together with a pauper's affidavit. Amending Rule 749(a) to prohibit contests when an IOLTA certificate is filed will make access to justice available to the poor and low income citizens of this state and, concomitantly, will preserve valuable judicial resources.

I am available at your convenience to discuss this issue further. You may also contact Elma Garcia at 512-427-1858 or egarcia@texasbar.com with any questions or further inquiries. The Commission appreciates the continued strong support of the Court in its efforts to ensure access to justice in Texas. Your consideration of this request is gratefully appreciated.

Sincerely,

James B. Sales, Chair
Texas Access to Justice Commission

JBS/ns

HERRING & IRWIN, L.L.P.
701 BRAZOS STREET, SUITE 650
AUSTIN, TEXAS 78701

TEL: 512-320-0665 **FAX: 512-320-0931**

March 16, 2009

Chief Justice Wallace B. Jefferson
Texas Supreme Court
Supreme Court Building
201 W. 14th Street, Room 104
Austin, Texas 78701

Dear Chief Justice Jefferson:

I want to thank you for your leadership and strong efforts to increase funding for legal services to the poor in this time of crisis. I have served on the State Bar Legal Services to the Poor in Civil Matters Committee for several years, and this year I again serve on the funding subcommittee. The near-term funding prospects are indeed bleak, and the legislative funding increase that you and others are seeking is critically important. If I or any of our other committee members can be of any assistance in your effort (e.g., letters, testimony, etc.), please let me know.

Also on the funding issue, I offer another proposal for your consideration: to amend Tex. R. Civ. P. 191.3 and 215 to specify a new option for monetary sanctions—essentially to permit an award to be paid to the legal services account of the judicial fund.

I served two terms on your court's Advisory Committee and chaired the court's Statewide Task Force on Sanctions (Justice Brister (then a district judge) also served on the task force). In those capacities, I spent a great deal of time working on sanctions issues.

As you know, Texas appellate courts have upheld some large monetary sanctions awards—as high as $1 million. Thus, if courts directed some of that money to legal services for the poor, the result could be significant. As you also know, the three principal sources of sanctions are:

1. Chapter 10 of the Civil Practice & Remedies Code (addressing frivolous pleadings/motions).

2. Texas Rules of Civil Procedure. Most significantly: Rule 13 (addressing groundless pleadings/motions, and permitting the sanctions authorized by Rule 215); Rule 191.3 (addressing discovery-certification violations, and authorizing sanctions under Chapter 10); and R 215 (addressing discovery sanctions).

3. Inherent power sanctions (an interstitial doctrine, applicable to misconduct that other specific rules do not reach).

Thus, amending Rules 191.3 and Rule 215 could address both discovery sanctions (which the rules address directly) and frivolous-pleading sanctions (because Rule 13 incorporates the Rule 215 sanctions).

Adding an explicit option to permit a monetary sanction to benefit legal services would not require any court to make such an award. It would simply highlight the option—which seems appropriate in this time of critical need. (Current options under Rule 215 are quite broad. Rule 215.2(b) permits sanctions "orders as are . . . just." Under that broad authorization, for example, courts have required CLE attendance, pro bono service, and even (my personal favorite) cleaning a cemetery.)

The following is possible language for such amendments, with the additions shown in underlining:

Rule 191.3(e): "*Sanctions.* If the certification is false without substantial justification, the court may, upon motion or its own initiative, impose upon the person who made the certification, or the party on whose behalf the request, notice, response, or objection was made, or both, an appropriate sanction as for a frivolous pleading or motion under Chapter 10 of the Civil Practice and Remedies Code, or impose a monetary sanction to be paid into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent."

Rule 215.2(b)(2): authorizing ". . . an order charging all or any portion of the expenses of discovery or taxable court costs or both against the disobedient party or the attorney advising him, or requiring such party or attorney to pay a monetary sanction into the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent. . . ."

I suggest that specific language because it already appears in Section 82.0361 of the Texas Government Code. Section 82.0361 is the *pro hac vice* fee provision, entitled "Nonresident Attorney Fee." My understanding is that your court approved that language in the *pro hac vice* context. Section 82.0361 provides:

> The comptroller shall deposit the fees received under this section to the credit of ***the basic civil legal services account of the judicial fund for use in programs approved by the supreme court that provide basic civil legal services to the indigent.***"

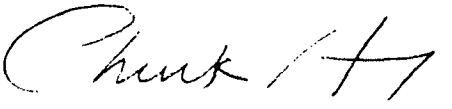
(Emphasis added.) I understand that the court has the Access to Justice Foundation administer that fund. Thus, the suggested rule amendment simply tracks the court approved, legislatively adopted precedent, which I would hope would make this approach non-controversial.

Most monetary sanctions are compensatory, reimbursing an injured party for fees and expenses. That will remain true even if the court adopts this amendment. This additional, explicit option would simply provide an alternative (and perhaps a specific reminder for trial judges) in those occasional instances in which courts choose to assess monetary sanctions as penalties, for punishment or deterrence. For example, Section 10.004(c)(2) of the Civil Practice & Remedies Code permits as a sanction "an order to pay a penalty into court." Currently such penalty funds are paid into the county's general fund and do not directly benefit the court system, much less legal services to the poor.

Having served on the Advisory Committee for several years, I recognize that rule changes can move at a glacial pace. However, given the current crisis, and given the court's strong leadership on this issue, I would hope that this change, or some similar change, could be adopted quickly. I spoke to Chip Babcock, your advisory committee chair, and Chip said that the committee is meeting in April and June. Chip also said that if the court chooses to move in this direction, he thought that the committee could act quickly. The spring-summer timing would seem ideal to me, so that we can see what action the Legislature takes in the interim.

I greatly appreciate your considering this suggestion. Please let me know if I can be of any assistance in this effort or in any other efforts to increase funding for legal services to the poor.

Sincerely,



Charles Herring, Jr.

c: Mr. Chip Babcock