

# **TEXAS CONSTABLE'S GUIDE TO CIVIL PROCESS**

## **6<sup>TH</sup> EDITION (2010)**

Published by the

**TEXAS JUSTICE COURT TRAINING CENTER**

Affiliated with Texas State University | San Marcos  
701 Brazos Street, Suite 710  
Austin, TX 78701

An educational endeavor of the  
Justices of the Peace & Constable Association of Texas, Inc.

This publication is funded by a grant from the Texas Court of Criminal Appeals.

## **The Texas Justice Court Training Center**

Previous Editions 1990, 1992, 1996, 2004, 2008

### **THE TEXAS CONSTABLE'S GUIDE TO CIVIL PROCESS IS DISTRIBUTED TO ALL ELECTED TEXAS CONSTABLES.**

Revised by the Constable Education Committee.

### **The staff of the Texas Justice Court Training Center, who provided legal review, technical support and production of this publication:**

Roger Rountree – Executive Director  
Heather Hidalgo – Civil Process Program Administrator  
Patricia F. Broline – Senior Program Attorney  
Angie Varela – Associate Director

This publication is written by constables for constables. It is intended to provide constables with current and accurate information for successful performance of the constables' many duties and responsibilities. The information in this book, however, may not be sufficient in dealing with a particular area of inquiry. Therefore, additional assistance may be necessary. Additional assistance is available from your elected constable or the Texas Justice Court Training Center.

© Copyright 2010. All rights reserved.

No part of this work may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or by an information storage or retrieval system without prior written permission of the Texas Justice Court Training Center unless copying is expressly permitted by federal copyright law. Address inquiries to: Permissions, Texas Justice Court Training Center, 701 Brazos Street, Suite 710, Austin, Texas, TX 78701.

## TABLE OF CONTENTS

<b>I. GENERAL DUTIES .....</b>	<b>1</b>
<b>§ 1.01 OFFICE OF CONSTABLE.....</b>	<b>1</b>
§ 1.01.01 Creation of the Office.....	1
§ 1.01.02 Qualifications for Office.....	2
§ 1.01.03 Initial Training and Education for Constables .....	3
<b>§ 1.02 FEE OFFICERS .....</b>	<b>4</b>
<b>§ 1.03 BAILIFF .....</b>	<b>5</b>
§ 1.03.01 Duties .....	5
§ 1.03.02 Summoning Jurors—Drawing Names for Jury Lists .....	6
§ 1.03.03 Use of Jury Lists .....	6
§ 1.03.04 Summons for Jury Service on Election Day.....	7
§ 1.03.05 Summons Procedure for Jury Service by Sheriff or Constable.....	7
<b>§1.04 SUMMONING JURORS FOR JUSTICE COURT—</b>	
<b>Counties of 2.8 Million Population .....</b>	<b>7</b>
§1.04.01 Summoning perspective Jurors Directly to Justice Court.....	8
§1.04.02 If Jury is Incomplete.....	8
<b>§1.05 CONSTABLES AS PEACE OFFICERS.....</b>	<b>8</b>
§1.05.01 Peace Officer Duties and Powers.....	8
§1.05.01.01 Firearms Proficiency .....	9
§1.05.02 Eligibility For Legislative Leave.....	10
§1.05.03 Payment for Appearance of Peace Officers Employed by County in Court or Administrative Proceedings .....	10
§1.05.04 Complaint Against Law Enforcement.....	11
§1.05.05 Termination Report Filed by Employing Agency .....	12
§1.05.06 Terminated Officer's Right to Copy of Report .....	12
§1.05.07 Suspension of Officer's License.....	14
<b>§1.06 POTENTIAL GROUNDS OF LIABILITY FOR CONSTABLES .....</b>	<b>15</b>
§1.06.01 Section 1983, Civil Rights Act of 1871 .....	15
§1.06.02 Tort Claims .....	18
§1.06.03 Civil Rights Violations by Elected Officials .....	18
§1.06.04 Contributions to Elected Officials Cannot be Accepted in a Courthouse .....	19
<b>§1.07 UNLAWFUL EMPLOYMENT PRACTICES.....</b>	<b>19</b>
<b>§1.08 OTHER STATUTORY LIABILITIES AND PENALTIES .....</b>	<b>20</b>
§1.08.01 Civil Process.....	20

§1.08.02 Execution of Writs.....	21
<b>§1.09 REMOVAL FROM OFFICE .....</b>	<b>21</b>
§1.09.01 Immediate Removal from Office .....	23
<b>§1.10 POTENTIAL LIABILITY OF COUNTY, WHISTLEBLOWER ACT .....</b>	<b>23</b>
<b>FORM 1</b> Oath of Office .....	25
<b>FORM 2</b> Official Statement (retained by Official) .....	26
<b>II. CITATION .....</b>	<b>27</b>
<b>§2.01 CITATION .....</b>	<b>27</b>
§2.01.01 Definition and Issuance .....	27
§2.01.02 Requisites of a Citation .....	27
<b>§2.02 SERVICE .....</b>	<b>29</b>
§2.02.01 When Service may be Made.....	29
§2.02.02 Who may Serve .....	29
<b>§2.03 METHODS OF SERVICE .....</b>	<b>30</b>
§2.03.01 Personal Service.....	30
§2.03.02 Service of Citation by Mail .....	31
§2.03.03 Service of Citation by Substituted Service .....	31
§2.03.04 Service of Citation on a Business .....	32
§2.03.05 Service of Citation by Publication .....	36
§2.03.06 Service on Military Reservations.....	38
§2.03.07 Service on Financial Institutions .....	38
<b>§2.04 RETURN OF SERVICE .....</b>	<b>38</b>
§2.04.01 Requisites of Return on Personal Service .....	38
§2.04.02 Return of Service by Mail.....	39
§2.04.03 Return of Service by Substituted Service .....	39
§2.04.04 Return of Service by Publication.....	40
§2.04.05 Return of Service on Unexecuted Citations .....	40
<b>FORM 3</b> Return of Service of Citation—In Person, by Mail, or Substituted Service.....	40
<b>III. NOTICES .....</b>	<b>43</b>
<b>§3.01 NOTICE TO SHOW CAUSE.....</b>	<b>43</b>
§3.01.01 Definition and Issuance .....	43
§3.01.02 Requisites of Show Cause Orders.....	43
§3.01.03 Who May Serve Show Cause Orders .....	44
§3.01.04 Service of Show Cause Orders.....	44
§3.01.05 Return of Service for Show Cause Orders.....	45
<b>§3.02 PRECEPTS.....</b>	<b>45</b>

§3.02.01 Definition.....	45
§3.02.02 Requisites of Precept.....	45
§3.02.03 Service.....	45
§3.02.04 Return.....	46
<b>§3.03 POSTING.....</b>	<b>46</b>
§3.03.01 Definition and Issuance .....	46
§3.03.02 Requisites of Posting .....	46
§3.03.03 Service of Citation by Posting.....	47
§3.03.04 Posting of Sale of Real Property.....	47
§3.03.05 Posting Sale of Personal Property under Execution .....	47
§3.03.06 Posting of Citation in <i>Ad Valorem</i> Tax Suits .....	47
§3.03.07 Return of Posting .....	47
<b>FORM 4</b> Return of Service by Posting .....	49
<b>FORM 5</b> Return of Service of Precept .....	50
<b>FORM 6</b> Return of Service On Notice to Show Cause – Personal Service.....	51
<b>IV. SUBPOENAS.....</b>	<b>52</b>
<b>§4.01 CIVIL SUBPOENAS .....</b>	<b>52</b>
§4.01.01 Definition and Issuance .....	52
§4.01.02 Requisites for Civil Subpoena.....	52
§4.01.03 Witness Fee-Civil Subpoena .....	53
§4.01.04 Service of Civil Subpoena.....	53
§4.01.05 Return – Civil Subpoena.....	54
<b>§4.02 CRIMINAL SUBPOENAS.....</b>	<b>54</b>
§4.02.01 Definition and Issuance .....	54
§4.02.02 Who May Serve – Criminal Subpoena.....	55
§4.02.03 Service – Criminal Subpoena .....	55
§4.02.04 Return – Criminal Subpoena .....	55
<b>§4.03 JUVENILE SUMMONS.....</b>	<b>56</b>
§4.03.01 Definition and Issuance .....	56
§4.03.02 Who May Serve – Juvenile Summons .....	56
§4.03.03 Service – Juvenile Summons.....	56
§4.03.04 Return – Juvenile Summons.....	56
<b>§4.04 ADMINISTRATIVE SUBPOENAS.....</b>	<b>57</b>
<b>FORM 7</b> Return on Civil Subpoenas.....	58
<b>FORM 8</b> Memorandum of Acceptance.....	59
<b>V. INJUNCTIONS .....</b>	<b>60</b>

<b>§5.01 INJUNCTIONS</b> .....	<b>60</b>
§5.01.01 Definition and Issuance .....	60
<b>§5.02—TEMPORARY INJUNCTION</b> .....	<b>60</b>
§5.02.01 Definition and Issuance .....	60
§5.02.02 Requisites of a Preliminary or Temporary Injunction .....	62
§5.02.03 Service.....	63
§5.02.04 Return .....	63
§5.02.05 Liability.....	63
<b>§5.03—MANDAMUS</b> .....	<b>64</b>
§5.03.01 Definition and Issuance .....	64
§5.03.02 Requisites of Writ of Mandamus .....	65
§5.03.03 Service.....	69
§5.03.04 Return.....	70
<b>FORM 9</b> Return of Preliminary or Temporary Injunction .....	<b>71</b>
<b>VI. WRITS – PRE-JUDGMENT FOR PROPERTY</b> .....	<b>72</b>
<b>§6.01—WRIT OF ATTACHMENT</b> .....	<b>72</b>
§6.01.01 Definition and Issuance .....	72
§6.01.02 Plaintiff's Attachment Bond .....	73
§6.01.03 Requisite of a Writ of Attachment .....	74
§6.01.04 Service.....	75
§6.01.05 Defendant's Rights – Writ of Attachment .....	75
§6.01.06 Levy .....	75
§6.01.07 Replevy.....	76
§6.01.08 Return.....	76
§6.01.09 Officer's Liability.....	76
<b>§6.02—WRIT OF SEQUESTRATION</b> .....	<b>77</b>
§6.02.01 Definition and Issuance .....	77
§6.02.02 Requisites of a Writ of Sequestration.....	77
§6.02.03 Service.....	78
§6.02.04 Levy and Replevy .....	79
§6.02.05 Defendant's Rights .....	79
§6.02.06 Plaintiff's Rights .....	80
§6.02.07 Return.....	80
§6.02.08 Liability.....	81
<b>§6.03—TRIAL OF RIGHT OF PROPERTY</b> .....	<b>81</b>
§6.03.01 Definition and Issuance .....	81
§6.03.02 Requisites of a Trial of Right of Property .....	83

§6.03.03 Service.....	83
§6.03.04 Return.....	84
<b>FORM 8</b> Return of Service of Writ of Attachment – Personal Property.....	85
<b>FORM 10</b> Return of Service of Writ of Attachment – Perishable Property.....	87
<b>FORM 11</b> Return of Service of Writ of Attachment – Real Property.....	89
<b>FORM 12</b> Return of Service on Writ of Sequestration – Personal Property.....	91
<b>FORM 13</b> Return of Service of Writ of Sequestration – Perishable Property.....	93
<b>VII. WRITS – POST – JUDGMENT FOR PROPERTY.....</b>	<b>95</b>
<b>§7.01—WRIT OF CERTIORARI.....</b>	<b>95</b>
§7.01.01 Definition and Issuance.....	95
§7.01.02 Requisites for a Writ of Certiorari.....	95
§7.01.03 Service.....	96
§7.01.04 Return.....	96
<b>§7.02—WRIT OF EXECUTION.....</b>	<b>97</b>
§7.02.01 Definition and Issuance.....	97
§7.02.02 Requisites of Writ of Execution.....	101
§7.02.03 Interest.....	101
§7.02.04 Prejudgment Interest.....	102
§7.02.05 Post-Judgment Interest.....	102
§7.02.06 Execution on Particular Types of Property.....	102
§7.02.07 Exempt Property.....	103
§7.02.08 Real Property.....	103
§7.02.09 Personal Property.....	103
§7.02.10 Service.....	106
§7.02.11 Levy – Writ of Execution.....	106
§7.02.12 Levy on Particular Types of Property.....	107
§7.02.13 Levy on Property Conveyed to a Third Party.....	108
§7.02.14 Sale – Real Property.....	109
§7.02.15 Notice of Sale.....	109
§7.02.16 Sale of Personal Property.....	111
§7.02.17 Return.....	111
§7.02.18 Defendant's Rights.....	112
§7.02.19 Responsibilities.....	113
§7.02.20 Liability.....	114
<b>§7.03—WRIT OF GARNISHMENT.....</b>	<b>116</b>
§7.03.01 Definition and Issuance.....	116
§7.03.02 Requisites of a Writ of Garnishment.....	118
§7.03.03 Service.....	118

§7.03.04 Defendant's Rights .....	119
§7.03.05 Garnishee's Rights .....	119
§7.03.06 Return.....	120
§7.03.07 Officer's Liability.....	121
<b>§7.04—ORDER OF SALE.....</b>	<b>121</b>
§7.04.01 Definition and Issuance .....	121
§7.04.02 Requisites of an Order of Sale.....	122
§7.04.03 Service.....	122
§7.04.04 Return.....	123
§7.04.05 Additional Rules.....	124
<b>§7.05—WRIT OF POSSESSION.....</b>	<b>124</b>
§7.05.01 Definition and Issuance .....	124
§7.05.02 Requisites .....	125
§7.05.03 Service.....	125
§7.05.04 Return.....	125
§7.05.05 Defendant's Rights .....	126
<b>§7.06—WRIT OF SCIRE FACIAS.....</b>	<b>126</b>
§7.06.01 Definition and issuance.....	126
§7.06.02 Requisites of a Writ of <i>Scire Facias</i> .....	127
§7.06.03 Service.....	128
§7.06.04 Return.....	128
<b>§7.07—TURNOVER ORDER .....</b>	<b>129</b>
§7.07.01 Definition and Issuance .....	129
§7.07.02 Requisites of a Turnover Order.....	130
§7.07.03 Service.....	131
§7.07.04 Return.....	131
§7.07.05 Defendant's Rights .....	132
<b>FORM 14</b> Officer's Return—Execution .....	133
<b>FORM 15</b> Officer's Return—Execution and Order of Sale .....	135
<b>FORM 16</b> Constable's Bill of Sale—Sale Property.....	137
<b>FORM 17</b> Officer's Return—Order of Sale.....	139
<b>FORM 18</b> Officer's Return—Garnishment .....	141
<b>FORM 19</b> Officer's Return—Possession (not eviction) .....	142
<b>FORM 20</b> Officers Return— <i>Scire Facias</i> .....	143
<b>FORM 21</b> Officer's Return—Turnover Order .....	144
<b>VIII. WRITS FOR PERSONS.....</b>	<b>145</b>
<b>§8.01—WRIT OF ATTACHMENT .....</b>	<b>145</b>



§8.01.01 Definition and Issuance .....	145
§8.01.02 Emergency Order Authorizing Possession of a Child .....	145
§8.01.03 Attachment of Garnishee .....	146
§8.01.04 Attachment For Disobeying Injunction .....	147
§8.01.05 Requisites of an Attachment.....	148
§8.01.06 Service.....	149
§8.01.07 Service of Writ for Juvenile Hearing.....	149
§8.01.08 Return.....	149
§8.01.09 Officer's Liability.....	150
<b>§8.02—HABEAS CORPUS.....</b>	<b>150</b>
§8.02.01 Definition and Issuance .....	150
§8.02.02 Requisites of <i>Habeas Corpus</i> .....	151
§8.02.03 Service.....	152
§8.02.04 Return.....	153
§8.02.05 Liability .....	154
<b>§8.03—COMMITMENTS .....</b>	<b>154</b>
§8.03.01 Definition and Issuance .....	154
<b>§8.04—CAPIAS.....</b>	<b>154</b>
§8.04.01 Definition and Issuance .....	154
§8.04.02 Requisites of a <i>Capias</i> .....	156
§8.04.03 Service.....	156
§8.04.04 Return.....	158
<b>FORM 22</b> Return of Service of Writ of Attachment of Persons .....	159
<b>FORM 23</b> Subpoena for Out of County Witness in Criminal Case .....	160
<b>FORM 24</b> Return of <i>Habeas Corpus</i> .....	161
<b>FORM 25</b> Return of Service on <i>Capias</i> .....	162
<b>IX. EVICTIONS .....</b>	<b>163</b>
<b>§9.01—EVICTIONS .....</b>	<b>163</b>
§9.01.01 Definition and Issuance .....	163
§9.01.02 Requisites of Citation In an Eviction .....	164
§9.01.03 Requisites of Citation in an Immediate Possession Eviction.....	166
§9.01.04 Service.....	166
§9.01.05 Alternate Service Application.....	167
§9.01.06 Alternate Service .....	168
§9.01.07 Return.....	168
<b>§9.02—WRIT OF POSSESSION.....</b>	<b>169</b>
§9.02.01 Definition and Issuance .....	169

§9.02.02 Requisites of Writ of Possession .....	169
§9.02.03 Service.....	171
§9.02.04 Return.....	171
<b>§9.03—WRIT OF REENTRY .....</b>	<b>172</b>
§9.03.01 Definition and Issuance .....	172
§9.03.02 Requisites of Writ of Reentry .....	172
§9.03.03 Service.....	172
§9.03.04 Return.....	173
<b>§9.04—DISTRESS WARRANT .....</b>	<b>173</b>
§9.04.01 Definition and Issuance .....	173
§9.04.02 Requisites of a Distress Warrant .....	174
§9.04.03 Service.....	175
§9.04.04 Return.....	175
<b>§9.05—RESIDENTIAL TENANT'S RIGHT OF RESTORATION AFTER UNLAWFUL UTILITY DISCONNECTION .....</b>	<b>176</b>
9.05.01 Definition and Issuance.....	176
9.05.02 Service .....	177
<b>FORM 26</b> Officer's Request for Authorization of Alternate Service– Eviction .....	179
<b>FORM 27A</b> Officer's Return – Writ of Possession .....	181
<b>FORM 27B</b> Storage Notice to Tenant – Writ of Possession .....	182
<b>FORM 28</b> Officer's Return - Writ of Reentry .....	184
<b>X. FAMILY LAW .....</b>	<b>185</b>
<b>§10.01—FAMILY LAW.....</b>	<b>185</b>
§10.01.01 Protective Orders and Magistrate's Order for Emergency Protection .....	185
§10.01.02 Definition and Issuance – Magistrate's Order .....	185
§10.01.03 Requisites of a Magistrate's Order.....	186
§10.01.04 Service of a Magistrate's Order .....	187
<b>§10.02—TEMPORARY <i>EX PARTE</i> PROTECTIVE ORDERS .....</b>	<b>188</b>
§10.02.01 Definition and Issuance .....	188
§10.02.02 Requisites of A Temporary <i>Ex Parte</i> Order .....	189
§10.02.03 Service of Notice of Application for a Temporary <i>Ex Parte</i> Protective Order.....	189
§10.02.04 Return of Service for Temporary <i>Ex Parte</i> Protective Order.....	190
<b>§10.03—FAMILY CODE, CHAPTER 85, FINAL PROTECTIVE ORDER .....</b>	<b>191</b>
§10.03.01 Definition and Issuance .....	191
§10.03.02 Requisites for Final Protective Order .....	191
§10.03.03.01 Requisites of a Protective Order (Applicable to Person Who .....	

Committed Family Violence) .....	192
§10.03.04 Service of a Final Protective Order .....	193
§10.03.05 Service and Return of Service for Final Protective Order Served Like Injunction .....	196
<b>FORM 29</b> Return of Service on Notice of Protective Order.....	198
<b>XI. MENTAL HEALTH</b> .....	<b>199</b>
<b>§11.01—MENTAL HEALTH OFFICER</b> .....	<b>199</b>
§11.01.01 Definition and Issuance .....	199
<b>§11.02—APPREHENSION WITH A WARRANT</b> .....	<b>199</b>
§11.02.01 Definition and Issuance .....	199
§11.02.02 Requisites of Mental Health Warrant .....	200
§11.02.03 Service.....	200
§11.02.04 Return.....	201
<b>§11.03—APPREHENSION WITHOUT A WARRANT</b> .....	<b>202</b>
§11.03.01 Definition.....	202
§11.03.02 Requisites of Application .....	203
<b>§11.04—NON COMPOS MENTIS</b> .....	<b>204</b>
§11.04.01 Definition.....	204
§11.04.02 Requisites of Notice .....	204
§11.04.03 Service.....	205
§11.04.04 Return.....	205
§11.04.05 Liability.....	206
<b>XII. TAX SEIZURES AND SUITS</b> .....	<b>207</b>
<b>§12.01—TAX WARRANT</b> .....	<b>207</b>
§12.01.01 Definition and Issuance .....	207
§12.01.02 Requisites of a Tax Warrant .....	208
§12.01.03 Service.....	209
§12.01.04 Bond for Payment of Taxes .....	209
§12.01.05 Notice of Tax Sale .....	209
§12.01.06 Sale of Seized Personal Property and Distribution of Proceeds (County of 3M Population) .....	210
§12.01.07 Seizure of Real Property and Notice of Sale .....	211
§12.01.08 Return.....	212
<b>§12.02—TAX CITATION</b> .....	<b>213</b>
§12.02.01 Definition and Issuance .....	213
§12.02.02 Requisites of a Tax Citation.....	213
§12.02.03 Alternative Notice of Tax Foreclosure on Certain Parcels of Real	

Property .....	215
§12.02.04 Alternative Notice of Foreclosure for Parcels in Certain Municipalities .....	219
§12.02.05 Service of Citation in Tax Suits .....	220
§12.02.06 Personal Service of Citation.....	221
§12.02.07 Service by Publication or Posting In Tax Suits.....	221
§12.02.08 Substituted Service of Citation on Nonresident .....	222
§12.02.09 General Provisions .....	223
§12.02.10 Return- Personal Service .....	224
§12.02.11 Return-Service by Mail .....	225
§12.02.12 Return-Substituted Service .....	225
§12.02.13 Return-Service by Publication.....	225
§12.02.14 Return-Unexecuted Citations.....	225
<b>§12.03—POST-SALE PROCEEDINGS .....</b>	<b>227</b>
§12.03.01 Distribution of Excess Proceeds After Expedited Foreclosure .....	227
<b>FORM 30 Officer's Return – Tax Warrant.....</b>	<b>229</b>
<b>FORM 31 Officer's Return - Tax Citation .....</b>	<b>231</b>
<b>Sheriffs' &amp; Constables' 2010 Fees .....</b>	<b>233</b>
<b>APPENDIX 1 .....</b>	<b>234</b>
<b>COUNTY FEES AND FUNDS OF CONSTABLE .....</b>	<b>234</b>
<b>A. Service Fees Generally .....</b>	<b>234</b>
<b>B. Protective Orders Service Fees .....</b>	<b>235</b>
<b>C. Child Support Enforcement Fees.....</b>	<b>235</b>
<b>D. Delinquent Tax Suits Fees.....</b>	<b>235</b>
<b>E. Postage for Service by Mail.....</b>	<b>235</b>
<b>F. Rules of Civil Procedure .....</b>	<b>236</b>
<b>G. Deposit of Funds and Required Reports.....</b>	<b>236</b>
<b>H. Law Enforcement Officers Standards and Education Account.....</b>	<b>237</b>
<b>APPENDIX 2 .....</b>	<b>240</b>
<b>CIVIL FEES AND COURT COSTS – JUSTICE COURT .....</b>	<b>240</b>
<b>A. COURT FEES FOR SERVICES RENDERED BEFORE JUDGMENT.....</b>	<b>241</b>
1. and 2. Basic Lawsuit Filing Fees – Civil and Small Claims and Inmate Litigation .....	241
3. Sheriff & Constable Service Fees – Civil Cases .....	242
4. Fee for Writ of Reentry .....	243

<b>B. "FEES FOR SERVICES OF PEACE OFFICERS"</b> .....	<b>243</b>
1. Notice to Appear/Arrest without Warrant .....	244
2. Executing Warrant Capias, or <i>Capias Pro Fine</i> .....	244
3. Summons .....	245
4. Other Writs .....	245
5. Taking/Approving Bond .....	245
6. Commitment or Release .....	245
7. Summoning Jury .....	245
8. Attending Prisoner .....	245
9. Mileage and Expenses .....	245
10. Conveying Attached Witness .....	246
11. Examining Trials .....	246
<b>Appendix 3</b> .....	<b>247</b>
<b>GLOSSARY</b>	
<b>FORMS</b>	
<b>I. General Duties</b>	
<b>FORM 1</b> Oath of Office .....	25
<b>FORM 2</b> Official Statement (retained by Official) .....	26
<b>II. Citations</b>	
<b>FORM 3</b> Return of Service of Citation—In Person, by Mail, or Substituted Service .....	42
<b>III. Notices</b>	
<b>FORM 4</b> Return of Service by Posting .....	49
<b>FORM 5</b> Return of Service of Precept .....	50
<b>FORM 6</b> Return of Service On Notice to Show Cause – Personal Service .....	51
<b>IV. Subpoenas</b>	
<b>FORM 7</b> Return on Civil Subpoenas .....	58
<b>FORM 8</b> Memorandum of Acceptance .....	59
<b>V. Injunctions</b>	
<b>FORM 9</b> Return of Preliminary or Temporary Injunction .....	71
<b>VI. Writs- Pre-Judgment For Property</b>	
<b>FORM 10</b> Return of Service of Writ of Attachment – Personal Property .....	85
<b>FORM 11</b> Return of Service of Writ of Attachment – Perishable Property .....	87
<b>FORM 12</b> Return of Service of Writ of Attachment – Real Property .....	89
<b>FORM 13</b> Return of Service on Writ of Sequestration – Personal Property .....	91
<b>FORM 14</b> Return of Service of Writ of Sequestration – Perishable Property .....	93

**VII. Writs- Post- Judgment For Property**

<b>FORM 14</b> Officer's Return—Execution .....	133
<b>FORM 15</b> Officer's Return—Execution and Order of Sale .....	135
<b>FORM 16</b> Constable's Bill of Sale—Sale Property .....	137
<b>FORM 17</b> Officer's Return—Order of Sale .....	139
<b>FORM 18</b> Officer's Return—Garnishment .....	141
<b>FORM 19</b> Officer's Return—Possession (not eviction) .....	142
<b>FORM 20</b> Officers Return— <i>Scire Facias</i> .....	143
<b>FORM 21</b> Officer's Return—Turnover Order .....	144

**VIII. Writs for Persons**

<b>FORM 22</b> Return of Service of Writ of Attachment of Persons .....	159
<b>FORM 23</b> Subpoena for Out of County Witness in Criminal Case .....	160
<b>FORM 24</b> Return of <i>Habeas Corpus</i> .....	161
<b>FORM 25</b> Return of Service on <i>Capias</i> .....	162

**IX. Evictions**

<b>FORM 26</b> Officer's Request for Authorization of Alternate Service Eviction .....	179
<b>FORM 27A</b> Officer's Return – Writ of Possession .....	181
<b>FORM 27B</b> Storage Notice to Tenant – Writ of Possession .....	182
<b>FORM 28</b> Officer's Return - Writ of Reentry .....	184

**X. Family Law**

<b>FORM 29</b> Return of Service on Notice of Protective Order .....	198
--	-----

**XI. Mental Health**

None

**XII. Tax Law**

<b>FORM 30</b> Officer's Return – Tax Warrant.....	229
<b>FORM 31</b> Officer's Return – Tax Citation .....	231

## I. GENERAL DUTIES

### **§1.01 OFFICE OF CONSTABLE**

#### **§1.01.01 Creation of the Office**

Article V, § 18 of the Texas Constitution provides for the election of constables. Constables serve for a term of four years. The constitutional provision states the requirements for establishing the appropriate number of precincts in each county from which constables are elected. It also controls the effect of boundary changes on constable precincts and the term of office to be served after such changes have taken place.

From the constitutional base establishing the office of a constable, we turn to examination of the statutory authority that defines the duties and powers of a constable. The Local Government Code defines the general powers and duties of constable as follows:

1. A constable shall execute and return as provided by law each process, warrant, and precept that is directed to the constable and is delivered by a lawful officer.
2. A constable may execute any civil or criminal process throughout the county in which the constable's precinct is located and in other locations as provided by the Code of Criminal Procedure or by any other law.
3. A constable expressly authorized by statute to perform an act or service, including the service of civil or criminal process, citation, notice, warrant, subpoena, or writ, may perform the act of service anywhere in the county in which the constable's precinct is located.
4. Regardless of the Texas Rules of Civil Procedure, all civil process may be served by a constable in the constable's county or in a county contiguous to the constable's county, except that a constable who is a party to or interested in the outcome of a suit may not serve any process related to the suit.
5. The constable shall attend each justice court held in the precinct. [§ 86.021, V.A.L.G.C.]

If a constable encounters resistance the constable may summon any resident of the county who is convenient to assist in the execution of lawful process or arrest of an offender. [§ 86.022, V.A.L.G.C.]

The Local Government Code also sets forth strict guidelines for executing and maintaining a constable's surety bond or executing a new bond. [§ 86.002, V.A.L.G.C.] Appointment of deputy constables and reserve deputy constables operate under the general authority of county commissioners but are directly supervised by the constable in the precinct in which they serve [§§ 86.011-.012, V.A.L.G.C.]

The commissioners court of a county may declare the office of constable in a precinct dormant if at least seven consecutive years have passed since the end of the term of the person who was last elected or appointed to the office and during that period of the time no person was elected to fill that office, or during that period a person was elected to that office, but the person failed to meet the qualifications of that office or failed to assume the duties of that office. If an office of constable is declared dormant, the office may not be filled by election or appointment and the previous officeholder does not continue to hold the office under Art. V, § 18(a) or Article XVI, § 17, Texas Constitution. The records of an office of constable declared dormant are transferred to the county clerk of the county. The commissioners court may reinstate an office of constable declared dormant by vote of the commissioners court or by calling an election in the precinct to reinstate the office. The commissioners court shall call an election to reinstate the office if the commissioners court receives a petition signed by at least 10 percent of the qualified voters of the precinct. If an election is called under this subsection of the Constitution, the commissioners court shall order the ballot for the election to be printed to permit voting for or against the proposition: "reinstating the office of Constable of Precinct No. \_\_\_\_\_ that was previously declared dormant." The office of constable is reinstated if a majority of the voters of the precinct voting on the question at the election approved the reinstatement. [Art. V, §18(h), Tex. Const.]

### **§1.01.02 Qualifications for Office**

A person is not eligible to serve as constable unless the person:

1. Is eligible to be licensed under Sections 1701.309 and 1701.312, Occupations Code, and:
  - A. Has at least an associate's degree conferred by an institution of higher education accredited by an accrediting organization recognized by the Texas Higher Education Coordinating Board;



- B. Is a special investigator under Article 2.122(a), Code of Criminal Procedure; or
  - C. Is an honorably retired peace officer or honorably retired federal criminal investigator who holds a certificate of proficiency issued under Section 1701.357, Occupations Code; or
2. The person is an active or inactive licensed peace officer under Chapter 1701, Occupations Code.

On or before the 270<sup>th</sup> day after the date a constable takes office, the constable shall provide to the commissioners court of the county in which the constable serves evidence that the constable has been issued a permanent peace officer license under Chapter 1701, Occupations Code. This requirement supersedes the license requirement of Section 1701.302, Occupations Code. [§ 86.0021(a), V.A.L.G.C.]. A constable who fails to provide evidence of licensure or who fails to maintain a permanent license while serving in office forfeits the office. A constable who forfeits the office is subject to removal in a *quo warranto* proceeding under Chapter 66, Civil Practice and Remedies Code. [*Id.* At (b).]

### **§1.01.03 Initial Training and Education for Constables**

A public institution of higher education selected by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) shall establish and offer a program of initial training and a program of continuing education for constables. The curriculum for each program must relate to law enforcement management and civil process issues. The institution selected under this subsection shall develop the curriculum for the programs. The curriculum must be approved by TCLEOSE. [§ 1701.3545(a), V.A.Occ.C.] Not later than January 1, 2006, the public institution of higher education selected by the TCLEOSE, shall establish the required initial training and education programs.

1. Each constable must complete at least 40 hours of continuing education provided by the selected institution each 48-month period. The Commission by rule shall establish a uniform 48-month continuing education training period. An individual who is subject to the continuing education requirements of this Subsection is exempt from other continuing education requirements under Subchapter H, Chapter 1701, Occupations Code. [*Id.* At (b) and (f).]

**§1.02 FEE OFFICERS**

The Texas Constitution sets forth compensation guidelines for district, county, and precinct officers. All county officers in counties having a population of 20,000 or more shall be paid on a salary basis, including all constables and deputy constables. [Art. XVI, § 61, Tex. Const.] Chapter 154 of the Local Government Code contains the corresponding statutes for the constitutional authorization controlling payment of county officers on a salary basis and defining precinct officer to mean a justice of the peace or a constable. [§154.001, V.A.L.G.C.]

Salaried precinct officers receive their salary in lieu of all fees, commissions, and other compensation the officer would otherwise be authorized to keep. [§154.002, V.A.L.G.C.] However, certain fees may be retained by salaried officer, including:

1. Any reward for the apprehension of a criminal fugitive from justice or for the recovery of stolen property; and [§154.005(c), V.A.L.G.C.]
2. All fees, commissions, or payments for delivering notices to vacate required by Section 24.005, Property Code, relating to eviction actions. Those notices may be delivered only when not in conflict with the official duties and responsibilities of the constable. A constable delivering a notice to vacate must not be wearing upon the constable's person a uniform or any insignia which would usually be associated with the position of constable nor may the constable use a county vehicle or county equipment while delivering the notice. For the purposes of collecting fees or serving these notices a constable is considered a private process server. [*Id.* at (d).]

Other prohibitions exist as to the payment of fees by the state and counties to salaried officers that do not affect the constable. [§154.004, V.A.L.G.C.] In addition, salaried officers are subject to a setoff against their pay if a commissioner's court finds that the officer has, through neglect, failed to collect a fee or commission that the officer is required by law to collect. [§154.009(a), V.A.L.G.C.]

In a county of less than 20,000 population, the commissioners court shall enter an order setting out whether county officers are to be compensated by fee or

salary. This does not apply to a county surveyor, registrar of vital statistics, or notary public, or to a county officer required to be compensated on a salary basis. Before the expiration of the first month of each fiscal year, the county clerk shall deliver a copy of the order to the State Comptroller. [§154.022(b), V.A.L.G.C.]

An elected county or precinct officer who is aggrieved by the setting of the officer's salary or personal expenses may request a hearing before the salary grievance committee before the approval of the county's annual budget. [§152.016(a), V.A.L.G.C.] The request must be in writing, delivered to the committee chair within five days after the date the officer receives notice of the salary or personnel expenses, and state the desired change in salary or personal expenses. [*Id.*]

### **§1.03 BAILIFF**

#### **§1.03.01 Duties**

A bailiff is a court officer or attendant who has charge of a court session by keeping order, custody of the jury, and custody of the prisoners while in court. [Art. III, U.S. Const. and Art. 1, § 15, Tex. Const.] The Government Code contains detailed provisions relating to the mandatory appointment of bailiffs in some district courts in certain counties, and to the permissive appointment of bailiffs in certain other district courts or in other counties. [§§ 53.001-002, 53.031, and 53.052, V.A.G.C.] Generally, bailiffs take an oath of office before assuming their duties and perform duties required by the judge of the court including serving process, subpoenas, warrants, and writs. {§§ 53.001-.008, V.A.G.C.]

A district attorney and the court may appoint grand jury bailiffs to attend upon the grand jury. [Art. 19.36, V.A.C.C.P.] Grand jury bailiffs are to obey the instructions of the foreperson, summon all witness, and generally perform all duties as the foreperson may require. [Art. 19.37 V.A.C.C.P.] In addition, the grand jury bailiff may be responsible for execution of process. If the grand jury is in session, the bailiff or other officer who receives process shall execute the process promptly and return it to the foreman. If the grand jury is not in session, the process shall be returned to the district clerk. Process that is returned unexecuted should state the reason it was not served. [Art. 20.13, V.A.C.C.P.]

Any person serving as a grand jury bailiff should be aware that the bailiff “. . . shall [not] take part in the discussions or deliberations of the grand jury nor be present when they are discussing or voting upon a question.” Violation of this

prohibition may subject the offending bailiff to punishment for contempt of court. [Art. 19.38, V.A.C.C.P.]

### **§1.03.02      Summoning Jurors – Drawing Names for Jury Lists**

The county clerk and the sheriff of the county shall draw the names of the prospective jurors for a county court from the jury wheel in the presence and under the direction of the county judge. The district clerk and the sheriff or any constable of the county shall draw the names of the prospective jurors for a justice or a district court from the jury wheel in the presence and under the direction of the district judge. [§62.004(a), V.A.G.C.]

The county or district clerk and the sheriff or constable shall draw the names of prospective jurors from the jury wheel after the wheel has been turned to thoroughly mix the jury wheel cards and shall draw the names one by one if so directed by the judge in whose presence the names are drawn. The names of prospective jurors shall be drawn at least 10 days before the first day of the term of court. The county or district clerk and the sheriff or constable shall draw as many jury lists as are required for the term of the court. They shall record the names that are drawn on as many lists as the judge in whose presence the names are drawn considers necessary to ensure an adequate number of jurors for the term. [*Id.* at (b)-(c).]

A deputy may represent the county or district clerk or the sheriff or constable at the drawing. Other persons may be present only as provided by the Government Code. An official attending the drawing may not divulge to anyone the name of a person that is drawn as a prospective juror. The names of additional prospective jurors may be draw as needed in the manner provided by law if it appears at any time during the term of court that the jury lists already drawn will be exhausted before the term expires. [*Id.* at (d)-(f), V.A.G.C.]

### **§1.03.03      Use of Jury Lists**

When a justice of the peace or a county or district judge requires a jury for a particular week, the judge, within a reasonable time before the prospective jurors are summoned, shall notify the county clerk, for a county court jury, or the district clerk, for a justice or district jury, to open the next consecutively-numbered envelope containing a jury list that is in the clerk's possession and has not been opened. The judge shall also notify the clerk of the date that the prospective jurors are to be summoned to appear for jury service. [§62.012(a), V.A.G.C.]

On receiving the notice from the judge, the clerk shall immediately write on the jury list the date that the prospective jurors are to be summoned to appear and shall deliver the jury list to:

1. The sheriff, for a county or district court jury; or
2. The sheriff or constable, for a justice court jury. [*Id.* at (b).]

**§1.03.04 No Summons for Jury Service on General Election Day**

Prospective jurors may not be summoned to appear for jury service on the date of the general election for state and county officers. [§62.0125, V.A.G.C.]

**§1.03.05 Summons Procedure for Jury Service by Sheriff or Constable**

Except as provided by Section 62.014, Government Code, the sheriff or constable, on receipt of a jury list from a county or district clerk, shall immediately notify the persons whose names are on the list to appear for jury service on the date designated by the judge. The sheriff or constable shall notify each prospective juror to appear for jury service:

1. By an oral summons; or
2. If the judge ordering the summons so directs, by a written summons sent by registered mail or certified mail, return receipt requested, or by first class mail to the address on the jury wheel card or the address on the current voter registration list of the county.
3. Delivery of a written summons is sufficient if the mail containing the summons is received by a person authorized by the United States Postal Service to receive it. The content of an oral or written summons to appear for jury service is sufficient if it includes the time and place for the appearance of the prospective juror for jury service, the purpose for which he is to appear, and the penalty for his failure to appear as required. [§62.013(a) – (d), V.A.G.C.]

**§1.04 SUMMONING JURORS FOR JUSTICE COURT**

In addition to other methods of jury selection provided by the Government Code set out above, a justice of the peace may issue a writ commanding the sheriff or constable to immediately summon a venire from which six qualified persons may be selected for jury service if:

1. A jury case is pending for trial at a term of justice court; or
2. The court does not have a sufficient number of prospective jurors present whose names are on the jury list and who are not excused from jury service.
3. Jurors who are impaneled shall remain in attendance in the court and, until discharged by the court, may serve as jurors in any case before the court. [§62.411, V.A.G.C.]

#### **§1.04.01 Summoning Prospective Jurors Directly to Justice Court**

A county that uses interchangeable juries under Section 62.016, Government Code, may summon a prospective juror to report directly to a justice court in the precinct in which that person resides. The justice of the peace of the justice court to which prospective jurors are summoned for jury service in this manner shall hear the excuses of the prospective jurors and swear them in for jury service. A justice of the peace may command the sheriff or constable to immediately summon additional persons for jury service in the justice court if the number of qualified jurors, including persons summoned under Section 62.016, is less than the number necessary for the justice court to conduct its proceedings. [§62.412(a) – (c), V.A.G.C.]

#### **§1.04.02 If Jury Is Incomplete**

If the jury is left incomplete after the parties make peremptory challenges, the justice shall direct the sheriff or constable to summon others to complete the jury; and the same proceedings shall be had in selecting and impaneling such jurors as are had in the first instance. [Rule 552, T.R.C.P.]

### **§1.05 CONSTABLES AS PEACE OFFICERS**

The Texas Code of Criminal Procedure classifies constables and deputy constables as peace officers. [Art. 2.12(2), V.A.C.C.P.] Law enforcement officers are licensed by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE). [§1701.302, V.A.O.C.]

#### **§1.05.01 Peace Officer Duties and Powers**

Peace officers' duties primarily affect the public, that is, the prevention of crime and arrest of offenders. By command of statute, it is the duty of every peace officer to:

1. Preserve the peace within the officer's jurisdiction by all lawful means;

2. Interfere without warrant to prevent or suppress crime where authorized by the Code of Criminal Procedure;
3. Execute all lawful criminal process issued to the officer by any magistrate or court;
4. Give notice to some magistrate of all offenses committed within the officer's jurisdiction, where the officer has good reason to believe there has been a violation of the penal law; and
5. Arrest offenders without warrant in every case, where the officer is authorized by law, in order that they may be taken before the proper magistrate or court and be tried. [Art. 2.13, V.A.C.C.P.]

Other statutory powers provide that:

**§1.05.01.01 Firearms Proficiency**

An agency that employs one or more peace officers shall designate a firearms proficiency officer and require each peace officer the agency employs to demonstrate weapons proficiency to the firearms proficiency officer at least annually. The agency shall maintain records of the weapons proficiency of the agency's peace officers. [V.A.Occ.C. § 1701.355.]

1. Whenever a peace officer meets with resistance in discharging any duty imposed under law, the officer shall summon sufficient citizens to overcome the resistance. [Art. 2.14, V.A.C.C.P.]
2. The peace officer who has summoned any person to assist the officer in performing the officer's lawful duty shall report such person if that person refuses to obey. [Art. 2.15, V.A.C.C.P.]
3. When requested, the peace officer will inform the victim of a crime about certain procedures in criminal investigations. [Art. 56.02, V.A.C.C.P.]
4. An officer who comes into custody of allegedly stolen property, with the exception of property governed by the "Texas Pawnshop Act," Chapter 371, Texas Finance Code, shall hold the property subject to order of the proper court only if the ownership of the property is contested or disputed. [Art. 47.01, V.A.C.C.P.]

5. A person making an arrest or having custody of a person who is arrested shall without unnecessary delay, but not later than 48 hours after the person is arrested, take the person or have the person taken before some magistrate of the county where the person was arrested. [Art. 15.17, V.A.C.C.P.]

#### **§1.05.02 Eligibility For Legislative Leave**

A peace officer employed by:

1. The State;
2. A municipality with a population of 50,000 or more;
3. A county with a population of 190,00 or more, is entitled to legislative leave to serve in, appear before, or petition a governmental body during a regular or special session of the body. [V.A.G.C. § 614.002.]

To be eligible for legislative leave, a peace officer must submit a written application to the individual's employer on or before the 30th day before the date the individual intends to begin the legislative leave. The application must state the length of the requested leave and that the peace officer or fire fighter is willing to reimburse the employer for any wages, pension, or other costs the employer will incur as a result of the leave. The length of requested leave may not exceed the length of the session. [V.A.G.C. § 614.004.]

An employer may require reimbursement of all costs associated with legislative leave. Within 30 days after the date an employer receives an application, the employer shall notify the peace officer in writing of the actual amount of money required to offset the costs the employer will incur. An employer may require a peace officer to post the money before granting the leave. A peace officer shall give to the employer a sworn statement identifying the source of the money posted. [V.A.G.C. § 614.005.]

#### **§1.05.03 Payment for Appearances of Peace Officers Employed by County in Court or Administrative Proceedings.**

A county shall pay a peace officer employed by the county for an appearance as a witness in a criminal suit, a civil suit, or an administrative proceeding in which the county or other political subdivision or government agency is a party in interest if the appearance:



1. Is required;
2. Is made on time off; and
3. Is made by the peace officer in the capacity of a peace officer.  
[V.A.L.G.C. §157.906(a).]

Payment is at the peace officer's regular rate of pay. Payment under this section may be taxed as court costs in civil suits. This section does not reduce or prohibit compensation paid in excess of the regular rate of pay. [V.A.L.G.C. §157.906(b)-(d), V.A.L.G.C.]

#### **§1.05.04 Complaint Against Law Enforcement**

Subchapter B, Chapter 614, Texas Government Code, contains the procedure for filing a complaint against a law enforcement officer who is, among others, a peace officer under Article 2.12, Code of Criminal Procedure, or other law and appointed or employed by a political subdivision of this state. [§612.021(a), V.A.G.C.] This does not apply to a peace officer appointed or employed by a political subdivision that is covered by a meet and confer or collective bargaining agreement under Chapter 143 or 174, Local Government Code, if that agreement includes provisions relating to the investigation of, and disciplinary action resulting from, a complaint against a peace officer, as applicable. [*Id.* at (b).] To be considered by the head of a state agency or by the head of a fire department or local law enforcement agency, the complaint must be:

1. In writing; and
2. Signed by the person making the complaint. [§ 614.022, V.A.G.C.]

A copy of a signed complaint against a law enforcement officer of this state, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state shall be given to the officer or employee within a reasonable time after the complaint is filled. Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee. In addition to this requirement, the officer or employee may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless:

1. The complaint is investigated; and

2. There is evidence to prove the allegation of misconduct. § 614.023, V.A.G.C.]

#### **§1.05.05 Termination Report Filed by Employing Agency**

Before a law enforcement agency may hire a person licensed under Chapter 1701, Occupations Code, the agency head or the agency head's designee must:

1. Make a written request to the Commission for any employment termination report regarding the person that is maintained by the Commissioner under Subchapter J, Chapter 1701; and
2. Submit to the Commission on the form prescribed by the Commission confirmation that the agency:
  - A. Conducted criminal background check regarding that person;
  - B. Obtained the person's written consent for the agency to view the person's employment records;
  - C. Obtained from the Commission any service or education records regarding the person maintained by the Commission; and
  - D. Contacted each of the person's previous law enforcement employers.  
[§ 1701.451 (a), V.A.Occ.C.]

A law enforcement agency that obtains a consent form described by Subsection (2)(B) above shall make the person's employment records available to a hiring law enforcement agency on request. § 1701.451(a-1), V.A.Occ.C.] The written request required by Subsection (1) must be on the agency's letterhead and be signed by the agency head or the agency head's designee. [*Id.* at (b).] If the Commission receives from a law enforcement agency a written request that complies with Subsections (1) and (2) above, the Commission employee having the responsibility to maintain any employment termination report regarding the person who is the subject of the request shall release the report to the agency. [*Id.* at (b) and (c).]

#### **§1.05.06 Terminated Officer's Right to Copy of Report**

If a person is terminated or resigns from employment with a law enforcement agency, the head of the agency shall file a report with the Commission on a form prescribed by the commission regarding a person licensed under Chapter 1701,

Occupations Code, who resigns or retire from employment with the law enforcement agency, whose appointment with the law enforcement agency is terminated, or who separates from the law enforcement agency for any other reason. The report must be submitted by the head or the designee no later than the seven business day after the date the license holder:

1. Resigns, retires, or separated from the agency; or
2. Exhausts all administrative appeals available to the license holder if the license was terminated based on allegation of misconduct.

The head of a law enforcement agency or the head's designee shall include in the required report a statement on whether the license holder was honorably discharged generally discharged or dishonestly discharged and, as required by the commission, an explanation of the circumstances under which the person resigned, retired or was terminated. For purposes of this subsection:

1. "Honorably discharged" means a license holder who, while in good standing and not because of pending or final disciplinary actions or a documented performance problem, retired, resigned, or separated from employment with or died while employed by a law enforcement agency.
2. "Generally discharged" means a license holder who:
  - A. Was terminated by, retired or resigned from, or died while in the employ of a law enforcement agency and the separation was related to disciplinary investigation of conduct that is not included in the definition of dishonorably discharged; or
  - B. Was terminated by or retired or resigned from a law enforcement agency and the separation was for a documented performance problem and was not because of reduction in workforce or an at-will employment decision.
3. "Dishonorably discharged" means a license holder who:
  - A. Was terminated by a law enforcement agency or retired or resigned in lieu of termination by the agency in relation to allegations of criminal misconduct; or

- B. Was terminated by a law enforcement agency or retired or resigned in lieu of termination by the agency for insubordination or untruthfulness. §1701.452 (b), V.A.Occ.C.]

The head of the law enforcement agency from which a person resigns or is terminated for reasons other than death shall provide to the person a copy of the report. If the person who is the subject of the employment termination is deceased, the head of the law enforcement agency on request shall provide a copy of the report to the person's next of kin. The head of a law enforcement agency must submit a report each time a person licensed under Chapter 1701, Occupation Code, resigns or is terminated from the agency. The report is an official government document. [*Id.* at (d) and (e).]

#### **§1.05.07 Suspension of Officer's License**

The commission shall suspend the license of an officer licensed under this chapter on notification that the officer has been dishonorably discharged if the officer has previously been dishonorably discharged from another law enforcement agency § 1701.4521, V.A.Occ.C.] An officer whose license is suspended under Section 1701.4521 may appeal the suspension in writing to the commission not later than the 30<sup>th</sup> day after the date the officer is suspended. [*Id.* at (b).] After a commission determination, the commission may revoke or reinstate the officer's license in accordance with rules or procedures adopted by the commission under this chapter related to revocation or reinstatement of a license. The commission shall revoke the officer's license if the officer does not appeal the suspension before the 30<sup>th</sup> day after the date the officer is suspended. The commission's decision does not affect:

1. The employment relationship between an officer licensed under this chapter and a law enforcement agency; or
2. Any disciplinary action taken against an officer licensed under this chapter by a law enforcement agency. [*Id.* at (c).]

A person who is the subject of an employment termination report maintained by the commission under Subchapter J, Chapter 1701, may contest information contained in the report by submitting to the law enforcement agency and to the commission a written request for a correction of the report and any evidence contesting the information contained in the report not later than the 30<sup>th</sup> day the date the person receives a copy of the report. The commission shall allow the head of the law enforcement agency to submit to the commission any evidence

rebutting the evidence submitted by the person who is the subject of the report .[§1701.4525(a), V.A.Occ.C.] The commission may order the head of a law enforcement agency to correct a person's report in a timely manner based on information submitted to the law enforcement agency and to the commission by the person filing the contest. An agency head ordered to correct a person's report shall correct the person's report or request a hearing conducted by the State Office of Administrative Hearings. The commission may assess an administrative penalty against an agency head who fails to make a correction or request a hearing under this subsection in a timely manner. [*Id.* at (b).] If the commission refuses to order the head of a law enforcement agency to correct the person's report, the person is entitled to a hearing conducted by the State Office of Administrative Hearings. [*Id.* at (c).]

The Commission may order the head of a law enforcement agency to correct a person's report in a timely manner based on information submitted to the law enforcement agency and to the Commission by the person as set out above. An agency head ordered to correct a person's report shall correct the person's report or request a hearing conducted by the State Office of Administrative Hearings. The Commission may assess an administrative penalty against an agency head who fails to make a correction or request a hearing under this subsection in a timely manner. [*Id.* at (b).]

If the Commission refuses to order the head of a law enforcement agency to correct the person's report, the person is entitled to a hearing conducted by the State Office of Administrative Hearings. A proceeding to contest the Commission's order or to correct an employment termination report is a contested case under Chapter 201, Government Code. [*Id.* at (c) and (d).]

## **§1.06 POTENTIAL GROUNDS OF LIABILITY FOR CONSTABLES**

### **§1.06.01 Section 1983, Civil Rights Act of 1871**

Constables are subject to liability for civil rights violations under federal and state law. The most typical federal suit is one that is filed as a § 1983 suit. [42 U.S.C. § 1983, 28 U.S.C. § 1343(3).] This is a reference to § 1983 of the post-Civil War Rights Act of 1871. It says:

"Sec. 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

Although § 1983 was rarely used before 1960, there is a large body of case law interpreting private civil rights actions filed under § 1983. Rather than attempt to present a complete explanation of the complexities of § 1983, what follows is a very brief, general explanation of how the statute works and its application to a constable serving process or executing a writ.

A § 1983 action may be filed in state or federal court. The statute does not create any new rights; rather, the plaintiff alleges that the defendant, acting under color of state law, violated one or more of the plaintiff's constitutional rights. These suits are viewed as tort actions arising out of interference with the rights of citizenship and § 1983 applies to the actions of state officers acting beyond their lawful authority. [*Monroe v. Pape*, 365 U.S. 167, 180 (1961).] A plaintiff can sue a constable in the constable's official and personal capacities. Official-capacity suits seek to impose liability upon the governmental entity, the official represents, and any judgment in such a suit is collectible only against the governmental entity, not against the official's personal assets. An award of damages against an official in his personal capacity can be executed only against the official's personal assets. [*Harris County v. Walsweer*, 930 S.W. 2d 659, 665 (Tex. App. – Houston [1<sup>st</sup> Dist.]1996)] Note: a constable named in a personal capacity suit will be paying damages personally if found to have violated § 1983.

A county may be held liable for violation of § 1983 if the constitutional tort was caused through “a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.” [*City of S. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L.Ed. 2d 107 (1988).] Moreover, a county can be held liable for constitutional deprivations resulting from governmental custom even if the custom has not received formal approval by the appropriate decision-making body. [*Id.* at 121.]

A constable making independent policies, that is, not following county policies, may stand alone when defending such acts. Plaintiffs may name the county, in addition to the constable, in an effort to prove the offending constable was following an established county policy. The constable who acts alone, however, will probably never be able to count on any admission by the county that “wild card” acts were either

1. A policy of the county;

2. Known about by the county; or,
3. That the constable had authority to set policy that led to the illegal act.

**Example of § 1983 Action in Court**

*Merritt v. Harris County*, 775 S.W. 2d 17 (Tex. App. –Houston [14<sup>th</sup> Dist.]1989, writ denied) provides a case in which a county and its employees were sued on the basis of § 1983. In this case, the trial court found that private warehousemen who had picked up and sold the plaintiff's household belongings violated the plaintiffs' constitutional rights. The trial court did not, however, hold Harris County, or the defendant constable and deputy constable liable for any constitutional violation. The appeal was brought to determine whether Harris County and its constables, acting with a private storage company, could lawfully remove a tenant's belongings from a landlord's premises pursuant to a writ of restitution.

The appeals court found that, in compliance with the statute, tenants were given notice of the writ of restitution by posting a form on the door of the dwelling prior to the execution of the writ of restitution. Because the tenant did not comply with the notice, a private moving company packed and removed the belongings of the tenants; the constables did not participate in the resulting sale of plaintiffs' property by the warehousemen. The court found no causal connection between the constables' acts in executing the writs of restitution and the subsequent deprivation of constitutional rights caused by the private warehousemen. The constables were charged with the duty of executing process as officers of the court, thereby they were protected by judicial immunity so long as they were acting in good faith and diligently. The acts of the warehousemen did not constitute state action because they were not closely linked to the execution of the writs.

The court held that Harris County was not liable for the acts of the warehousemen because constables executing writs of restitution are not considered to be policy-making officials. Although constables are elected officials they hold a limited amount of discretion in executing writs as directed by a court.

**NOTE:** Even if the constables had deprived the plaintiffs of certain rights the county was "off the hook" because constables were not accorded policy-making

status. Counties will generally not be held liable for the acts of their employees unless the employee is in the position of setting policy for the county or the county is unaware of the illegal practice that is taking place. [*Pickrel v. City of Springfield*, 45 F. 3<sup>rd</sup> 1115 (7<sup>th</sup> Cir. 1995)]

Constables are accorded a degree of immunity by statute. An officer is not liable for damages resulting from the execution of a writ issued by a Texas court if the officer:

1. Executes the writ in good faith as provided by the law and the Texas Rules of Civil Procedure; and
2. Uses reasonable diligence in performing his or her other official duties.

Notwithstanding the above, an officer must keep securely all personal property levied on and for which no delivery bond is given. Otherwise, if a loss to an interested party results from negligence, the officer is liable for damages. [ §§ 7.003 and 34.061, V.A.C.P.R.C.]

#### **§1.06.02 Tort Claims**

A constable or deputy constable may be sued under the Texas Tort Claims Act (the "Act"). [ §§ 101.001-.109, V.A.C.P.R.C.] The Act covers any property damage, personal injury, and death proximately caused by wrongful acts, omissions, or negligence of an employee acting within the scope of the person's employment. [ § 101.021, V.A.C.P.R.C.] It is a comprehensive statute that defines which employees and governmental units are subject to suit and gives permission to sue within the limits of the act. [*Id.*] Generally, the Act does not apply to the act or omission of an employee in the good faith execution of a lawful order of any court. [ § 101.053, V.A.C.P.R.C.]

#### **§1.06.03 Civil Rights Violations by Elected Officials**

Texas law has significant implications for elected officials, including constables and their employees. [ §§ 21.001-.306, V.A.L.C.] All individuals elected to public office in this state or a political subdivision of this state are deemed to be employers for the purpose of compliance with: (1) Title VII of the Civil Rights Act of 1964 ("CRA") [42 U.S.C. § 2000 (e).]; (2) certain portions of the Age Discrimination in Employment Act of 1967 ("ADEA") [29 U.S.C. § 623.]; and (3) Title I of the Americans with Disabilities Act of 1990 ("ADA") [42 USC § 623.] These acts prohibit discrimination in employment on the basis of: race, color, religion, gender, national origin, age, and disability. Therefore, a



constable/employer (or the agent of a constable, for example, chief deputy, clerk, or anyone having supervisory responsibilities) can be subjected to an employment discrimination complaint for either unlawful employment practices (those having a disparate impact) or unlawful intentional discrimination (those involving disparate treatment). [*Tex. Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed. 2d 207 (1981).] If an agent is found to have engaged in illegal discrimination, liability will attach to the constable as well, and possibly to the county.

#### **§1.06.04 Contributions to Elected Officials Cannot be Accepted in a Courthouse**

A person may knowingly make or authorize a political contribution while in the Capitol or courthouse to:

1. A candidate or office holder
2. A political committee; or
3. A person acting on behalf of a candidate, officeholder, or political committee. [§253.039(a), V.A.E.I.C.]

A candidate, officeholder, or political committee or a person acting on behalf of a candidate, officeholder, or political committee may not knowingly accept a political contribution, and shall refuse a political contribution that is received, in a Capitol or a courthouse. [§253.039(b), V.A.E.I.C.]

#### **§1.07 UNLAWFUL EMPLOYMENT PRACTICES**

It shall be an unlawful employment practice for an employer to use an employment practice that causes a disparate impact on an individual on the basis of race, color, religion, sex, national origin, or disability, if the employer:

1. Fails or refuses to hire or discharges any individual or otherwise discriminates with respect to the individual's compensation, terms and conditions or privileges or employment;
2. Limits, segregates, or classifies employees in any way that would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the individual's status as an employee. [§21.051, V.A.La.C.]

To defeat a complaint of unlawful employment practice, a constable/employer must be able to show, among other things, that a challenged practice is not

designed to get around the prohibition on discrimination and is justified by business necessity. [§21.051, V.A.La.C.] The Labor Code contains a list of exceptions to the categories of unlawful business practices with explanations for those exceptions. [§§ 21.101-129, V.A.La.C.] The subject area of employment law is complex and any questions or concerns should be discussed with the county attorney or county personnel office.

Except as otherwise provided by law, an unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was one motivating factor for an employment practice, unless race, color, sex, national origin, religion, age, or disability is combined with objective job-related factors to attain diversity in the employer's work force. The relief to which an individual may be entitled in state court includes declaratory relief, injunctive relief with certain limits, and payment of court costs and attorney's fees. A state court may not award damages or issue an order requiring an admission, reinstatement for the employee, hiring, promotion, or back pay. [§21.125, V.A.La.C.] Suits in federal court can result in any of the remedies not available in state court.

## **§1.08 OTHER STATUTORY LIABILITIES AND PENALTIES**

The preceding sections dealt with penalties and liabilities generally applicable to all public officials. This section will discuss potential liabilities of constables and deputy constables in their dual roles as officers of the court and peace officers.

### **§1.08.01 Civil Process**

A person injured by the failure or refusal of a constable to execute and return, according to the law, any process, warrant, or precept lawfully directed and delivered to the constable may file a motion for contempt with the court that issued the process. [§86.024 V.A.L.G.C., §7.001, V.A.C.P.R.C.] The constable charged in such a motion for contempt must be given ten days' notice of hearing. The constable shall be fined not less than ten (\$10.00) or more than one hundred (\$100) dollars, and costs. [§86.024(b), V.A.L.G.C.]

If a constable receives a bond, bill, note, or account for collection, from any person, and the constable gives a receipt for same in an official capacity, the constable and the constable's sureties are liable under the constable's bond. The extent of liability is determined by the amount the constable is responsible to deliver to the person for whom collection was made. [§86.023, V.A.L.G.C.]

**§1.08.02 Execution of Writs**

See §§ 7.02.10, 7.02.11, and 7.02.20 herein.

The governing body of a county or other political subdivision is required to insure each law enforcement officer appointed or employed by the political subdivision against liability to third persons arising out of an officer's operation of a motor vehicle owned, leased, or otherwise controlled by the political subdivision at any time that the officer is authorized to operate the vehicle. This coverage includes times that the officer is authorized to operate the vehicle while off duty. The coverage must be in amounts not less than those required by Subchapter D, Chapter 601, Transportation Code, to establish financial responsibility. [§612.005(b) and (c), V.A.G.C.]

If any sheriff or other officer shall willfully refuse or fail from neglect to execute any summons, subpoena, or attachment for a witness, or any other legal process which it is made the officer's duty by law to execute, the officer shall be liable to a fine for contempt not less than ten (\$10.00) dollars nor more than two hundred (\$200.00) dollars, at the discretion of the court. The payment of the fine shall be enforced in the same manner as fines for contempt in civil cases. [Art. 2.16, V.A.C.C.P.].

A peace officer is prohibited from intentionally engaging in any kind of sexual activity with persons in custody. Any such activity is a violation of the civil rights of the person in custody and is a state jail felony. [§39.04, V.A.P.C.]

**§1.09 REMOVAL FROM OFFICE**

Various county officers, including constables, are subject to removal from office by a district judge on statutory grounds. [§87.012(15), V.A.L.G.C.] A county officer may be removed for:

1. Incompetency;
2. Official misconduct;
3. Intoxication on or off duty caused by drinking an alcoholic beverage;
4. Failure to execute bond within the time prescribed by law; or
5. Failure to give new or additional bond security when required to do so by law. [§§ 87.013 - .014, V.A.L.G.C.]

A constable may be removed from office if the constable fails to meet the requirements listed above, including failing to receive and/or maintain a peace officer license under Chapter 1701, Occupations Code. [§86.0021, V.A.L.G.C.] (*See Qualifications for Office.*) A constable is also subject to removal for failure or refusal to give bond at the designated time and for failing to give new bond when required. [§86.003(b), V.A.L.G.C.]

The procedure to remove a constable or any other county officer begins when any resident of Texas who has lived in the county for at least six months files a sworn petition for removal and an application for an order for citation in a district court of the county where the officer resides. The petition must set forth the grounds alleged for removal and the specific times and places of the occurrence of each alleged act. [§87.015, V.A.L.G.C.] This is the exclusive procedure for removal of elected county officials [*State ex rel Downs v. Harney*, 164 S.W. 2d 55, 59 (Tex. Civ. App. 1942, writ ref'd w.o.m.)] and, although the procedure is deemed to be of a quasi-criminal type, it is governed by the Rules of Civil Procedure. [*State ex rel Dishman v. Gary*, 359 S.W. 2d 456, 458 (Tex. 1962); *State ex rel Edwards v. Red Reyna*, 333 S.W. 2d 831, 836 (Tex. 1960).] An officer who is the subject of a petition for removal is entitled to be served with citation and a certified copy of the petition after the district judge issues an order for citation. [§87.016, V.A.L.G.C.]

If the judge refuses to order citation issued, the petition will be dismissed, and this decision is not appealable or subject to writ of error. If the judge grants an order for citation, the clerk shall issue citation with a certified copy of the petition, and the judge shall require the person filing the petition to post security for costs. [§87.016(c), V.A.L.G.C.] After the issuance of the citation, the judge may also temporarily suspend the officer and appoint someone, who shall be required to execute a bond with sufficient sureties, to perform the duties of the suspended officer. The bond shall be used to pay damages and costs to the suspended officer if the alleged grounds for removal are found at trial to be insufficient or untrue. [§87.017, V.A.L.G.C.]

An officer may be removed only following a trial by jury. Either party to removal action may appeal the final judgment to the court of appeals as in other civil cases. Such an appeal takes precedence over other cases before the court of appeals and shall be decided promptly. [§87.018-.019, V.A.L.G.C.]

**§1.09.01 IMMEDIATE REMOVAL FROM OFFICE**

Conviction of a constable by a jury for any felony or for a misdemeanor involving official misconduct operates as an immediate removal of that officer. The judge rendering judgment shall include an order for the officer's removal in the judgment. [§87.031, V.A.L.G.C.] This removal is "automatic" and is effective if, in lieu of a guilty verdict by a jury, the officer pleads guilty. [*Sullivan v. State*, 572 S.W. 2d 778]. An appeal supersedes the order of removal unless the trial court finds that it is in the public interest to suspend the officer. [§87.032, V.A.L.G.C.]

**§1.10 POTENTIAL LIABILITY OF COUNTY, WHISTLEBLOWER ACT**

The State passed the "Whistleblower Act" (the "Act") in 1993 based, in part, on similar federal law. It is intended to protect a government employee who reports certain wrongdoing to law enforcement, and to encourage the reporting by public employees of crimes or questionable activities in government agencies.

Under the Act, a state or local government entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who "in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." A report is made to an appropriate law enforcement authority if the authority is a part of a state or local government entity or of the federal government that the employee in good faith believes is authorized to:

1. Regulate under or enforce the law alleged to be violated in the report; or
2. Investigate or prosecute a violation of criminal law [§554.002, V.A.G.C.]

If a public employee's employment is suspended or terminated or the employee is subjected to an adverse personnel action, the person is entitled to sue for:

1. Injunctive relief;
2. Actual damages;
3. Court costs; and
4. Reasonable attorney fees. [§554.003(a), V.A.G.C.]

In addition, a public employee whose employment is suspended or terminated is entitled to:

1. Reinstatement to the employee's former position or an equivalent position;
2. Compensation for wages lost during the period of suspension or termination; and
3. Reinstatement of fringe benefits and seniority rights lost because of the suspension or termination [*Id.* at (b).] There are certain limits on other types of recovery based on the number of employees of the employing entity [*Id.* (c).]

A public employee who alleges a violation of the Act may sue the employing state or local governmental entity; sovereign immunity is waived and abolished to the extent of liability for the relief allowed. [§554.0035, V.A.G.C.; *Tarrant Co. v. Bivins*, 936 SW 2d 419 (Tex. App.-Fort Worth, 1996).] A public employee of a state governmental entity may sue in a district court of the county in which the cause of action arises or in a district court of Travis County. [§554.007, V.A.G.C.]

A public employee who sues under the Act has the burden of proof. However, if the suspension, termination, or adverse personnel action occurs not later than the 90<sup>th</sup> day after the date on which the employee reports a violation of the law, the suspension, termination, or adverse personnel action is presumed, subject to rebuttal, to be because the employee made the report. It is an affirmative defense that the employing state or local government entity would have taken the action against the employee that forms that basis of the suit based solely on information, observation, or evidence that is not related to the employee's report of a violation of law protected by the Act. [§554.004, V.A.G.C.]

A public employee must initiate action under the grievance or appeal procedures of the employing state or local government entity relating to suspension or termination of employment or adverse personnel action before suing under the Act. The employee must invoke the applicable grievance or appeal procedure not later than the 90<sup>th</sup> day after the date on which the alleged violation of the Act:

1. Occurred; or
2. Was discovered by the employee through reasonable diligence. [§554.006, V.A.G.C.]

**FORM 1 Oath of Office**  
[Tex. Const. Art. XVI, § 1(a)]

In the name and by the authority of  
The State of Texas

**OATH OF OFFICE**

I, \_\_\_\_\_, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of \_\_\_\_\_ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.

\_\_\_\_\_ Affiant

SWORN TO and subscribed before me by affiant on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

(Seal)

\_\_\_\_\_  
Signature of Person Administering Oath

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

**FORM 2      Official Statement (retained by official)**

*Please type or print. Provide all information legibly.*

**STATEMENT OF ELECTED/APPOINTED OFFICER**

I, \_\_\_\_\_ do solemnly swear (or affirm) that I have not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or thing of value, or promised any public office or employment for the giving or withholding of a vote at the election at which I was elected or as a reward to secure my appointment or confirmation, whichever the case may be, so help me God.

---

Affiant's Signature

City and/or County

---

Position to Which Elected/Appointed

Date



## II. CITATION

### §2.01 CITATION

#### §2.01.01 Definition and Issuance

Due process of law in civil disputes requires that an individual is entitled to notice and hearing before being deprived of property right. [U.S. Const. amend XIV; Tex. Const. Art. I, §19.] This requirement is usually fulfilled by proper service of process. Service of process includes the delivery of a copy of the plaintiff's written petition along with the citation. The petition is the plaintiff's claim. [See Rule 47 T.R.C.P. (the rule district and county court; stating, in pertinent part, the "original petition...shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved."); *cf.* Rules 524 and 525, T.R.C.P. (The rules for institution of suit in the justice court.).]

The citation informs the defendant of the date and time to appear before the court to file and answer. [See, Rule 99 T.R.C.P. (governing issuance and form of citation in the district and county courts and generally providing **twenty days** to answer); *cf.* Rule 534 T.R.C.P. (governing issuance and form of citation in the justice court and generally providing **ten days** for the defendant's answer.).]

The Texas Rules of Civil Procedure (the "Rules") govern service of process. [See, Rule 2, T.R.C.P., stating, in pertinent part, "These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated".]

The purpose of the Rules is to obtain a just, fair, equitable, and impartial adjudication of the litigants' rights under established principles of substantive law. [Rule 1, T.R.C.P.; *Centennial Ins. Co. v. Commercial Union Ins. Co.*, 803 S.W. 2d 479, 482 (Tex. App. —Houston [14<sup>th</sup> Dist.] 1991, no writ).] The rules regarding service of process have always been strictly construed; failure to comply with them renders service void. [*Lawyers Civil Process, Inc. v. State ex rel. Vines*, 690 S.W. 2d 939, 942 (Tex. Civ. App. Dallas)]. The district, county, and justice courts are authorized to issue citations.

#### §2.01.02 Requisites of a Citation

When the petition is filed, the clerk, when requested, shall issue a citation and deliver it as directed. The party that requests a citation be issued is responsible for obtaining service of the citation and a copy of the petition. [Rule 99a, T.R.C.P.] The Civil Practice and Remedies Code also provides that: "(a) The

plaintiff or the plaintiff's attorney may prepare the appropriate citation for the defendant; (b) The citation must be in the form required by the Rules of Civil Procedure; and (c) The citation shall be served according to law and in compliance with the Rules of Civil Procedure." [§17.027, V.A.C.P.R.C.]

To be valid, a citation must:

1. Be styled "The State of Texas;'
2. Be signed by the clerk under seal\* of court;
3. Contain the name and location of the court;
4. Show date of filing of the petition;
5. Show date of issuance of citation;
6. Show file number;
7. Show names of parties;
8. Be directed to the defendant;
9. Show the name and address of attorney for plaintiff, otherwise the address of plaintiff;
10. Contain the time within which the Rules require the defendant to file a written answer with the clerk who issued citation;
11. \*Effective September 1, 2007, seal and signature authorized by electronic means. [§ 51.301, V.A.G.C.]
12. Contain address of the clerk; and
13. Notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. [Rule 99a., T.R.C.P.]

The citation shall include the following notice to the defendant: *"You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you."* [Rule 99c., T.R.C.P.]

Note that Rule 99c. governs the issuance and form of citation in the district and county courts. Citation in the justice court is governed by Rule 534(b), which commands that the notice will say, “*following the expiration of ten days after you were served this citation and petition... “instead of twenty days in citations from district and county courts. The date on which it is issued should appear on the face of the citation, but is frequently found on the back of the citation near the clerk’s signature. When the officer has a question regarding the validity of citation, the officer should consult the district attorney or county attorney or the issuing court regarding the proper action to take. Citations no longer expire other than ad valorem tax citation which must be served within 90 days after issuance. [ Rule 117a, T.R.C.P.]*

## **§2.02 SERVICE**

### **§2.02.01 When Service may be Made**

The rules specify that a citation may not be served on Sunday. [Rule 6, T.R.C.P. (providing, “No civil suit shall be commenced nor process issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings; provided that citation by publication published on Sunday shall be valid.”); *Nichols*, 857 S.W. 2d 657, 659 (Tex. App. –Houston [1<sup>st</sup> Dist.] 1993, no writ).] However, the listed types of writs may be served on Sunday. While it is true that service of a citation on Sunday gives the defendant notice of the suit, it is not valid service. In order for the civil lawsuit to proceed in a valid manner and not be subject to appeal on procedural grounds, the validity of service is essential and should not be taken lightly.

### **§2.02.02 Who may Serve**

Citation and other notices may be served by: (1) any sheriff or constable or other person authorized by law, or (2) by any person authorized by law or by written order of the court who is not less than 18 years of age; or (3) any person certified under order of the Supreme Court. [Rule 103, T.R.C.P. (the rule for district and county courts); Rule 536, T.R.C.P. (the rule for justice courts); *see, e.g., Mayfield v. Dean Witter Fin. Servs.*, 894 S.W. 2d 502, 505 (Tex. Appl. –Austin 1995, writ denied).] Notwithstanding the Texas Rules of Civil Procedure, all civil process may be served by a constable in the constable’s county or in a county contiguous to the constable’s county. No person who is a party to or interested in the outcome of a suit shall serve process. [§86.021(d), V.A.L.G.C.; Rules 103 and 536, T.R.C.P.]

The officer should check with the district or county attorney before serving any citation where a conflict of interest question exists. Examples of situations that the officer should avoid in order to prevent conflict of interest questions include:

1. If an officer is a party to the suit, the officer is disqualified from serving citation.
2. If an officer stands to receive monetary gain from the outcome of the suit, the officer is disqualified from serving citation.
3. If an officer's spouse is a party to the suit, the officer is disqualified from serving citation. [See, Rules 103, 536(a), T.R.C.P.]

### **§2.03 METHODS OF SERVICE**

Where statutes provide other methods of delivery, they overrule any conflict with the Rules of Civil Procedure, unless they state otherwise. Citation is issued when it is sent by authority of the court clerk's office to the person who is responsible for serving it. [*Aguilar v. Stone*, 901 S.W. 2d 955, 955 (Tex. Civ. App. –Houston [1<sup>st</sup> dist] 1995).] Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by the Texas Rules of Civil Procedure by the methods described below. [Rules 103, 106, 536, and 536a, T.R.C.P.]

#### **§2.03.01 Personal Service**

The Rules provide that a person may be served with citation “[b]y delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto.” [Rules 106(a)(1) and 536(b)(1), T.R.C.P.] The first duty of the officer or authorized person serving citation is to endorse on the citation the day and hour on which it was received. [Rules 16 and 105, T.R.C.P.] There is usually a place on the citation for making this notation. Care should be taken to record the correct day and hour; a stamped date and time are acceptable. The next requirement is that the process be executed and returned without delay. [*Id.* (stating, “[t]he officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.”).]

Actual service is made by following the commands of the citation. If the citation is to be delivered to the defendant personally, it must be given to the defendant and to no one else. Delivery is made when the individual is identified as the defendant, and the officer gives the copy of the citation and petition to the

person. If the person refuses the papers, it will usually be held that the service was accomplished when the papers are deposited in an appropriate place in the person's presence or near the person where the defendant is likely to find them, and if the person is also informed of the nature of the process and that service is being attempted. [*Dosamantes v. Dosamantes*, 500 S.W. 2d 233 (Tex. Civ. App. – Texarkana 1973).]

Personal delivery of citation or notice on a ward or an individual considered *non compos mentis* (meaning insane or incompetent) is required except when the person is under the age of 12. [§633, V.A. Prob. C.; 1074 *Black's Law Dictionary* (8<sup>th</sup> ed. 2004).]

### **§2.03.02 Service of Citation by Mail**

The officer or clerk of the court may serve a citation by mailing to the defendant, by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto. [Rules 103, 106, and 536, T.R.C.P.] Service of citation by mail has two essential components: (1) service that is performed correctly; and (2) service performed by a person permitted to perform it.

The language of the Rules of Civil Procedure is clear, stating “[u]nless the citation or an order of the court otherwise directs, the citation shall be served...by (1) delivery to the defendant in person...or (2) mailing to the defendant by registered or certified mail...” [Rules 106 and 536, T.R.C.P.] Equally unambiguous are the rules governing who is permitted to serve citation: “[c]itation...may be served anywhere by (1) any sheriff or constable or other person authorized by law or by written order of the court who is not less than eighteen years of age.” This Rule also authorizes service by mail”... by the clerk of the court in which the case is pending.” [Rules 106 and 536, T.R.C.P.; see Op. Tex. Att’y. Gen., NO. DM-250 (1993).]

### **§2.03.03 Service of Citation by Substituted Service**

If service by either of the foregoing methods of service has been unsuccessful, the court may allow the plaintiff to have service by substituted service. [See Rules 106, 536, and 742a, T.R.C.P.] The plaintiff may not use any form of substituted service without the court's permission. The court specifies the acceptable method for each case.

By filing a plaintiff's motion supported by affidavit (*sworn statement signed by the serving officer*) stating the defendant's usual place of business or usual place of

abode or to the place where the defendant can probably be found, and stating specifically the facts showing that service has been attempted (*due diligence*) but was unsuccessful by either personal service or mail, a party may request the court to authorize substituted service. Substituted service may be achieved by:

1. Leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in the affidavit, or
2. Any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit. [See Rules 106 and 536, T.R.C.P.]

The motion is prepared by the plaintiff or plaintiff's attorney and supported by affidavit (*sworn statement*) which is signed by the officer attempting to serve the citation.

Whenever citation by publication is authorized a court may, on motion, prescribe a different method of substituted service. [Rule 109(a), T.R.C.P.] the court must recite in its order that the prescribed method would be as likely as publication to give the defendant actual notice. Return of this kind of substituted service shall state particularly the manner in which service is accomplished, and shall attach any return receipt, returned mail, or other evidence showing the result of the service.

#### **§2.03.04 Service of Citation on a Business**

The general rules for service on certain corporate business agents are statutory, and provide that service may generally be accomplished by serving an officer, agent, or partner. Section 17.021, Civil Practices and Remedies Code states:

“(a) [I]n an action against an individual, partnership, or unincorporated association, that arises in a county in which the individual, partnership, or unincorporated association has an office, place of business, or agency for transacting business in this state, citation or other civil process may be served on an agent or clerk employed in the office, place of business, or agency if:

1. The action grows out of or is connected with the business transacted in this state; and
2. The individual, partnership, or association:

- A. Is not a resident of the county;
- B. Is not a resident of this state; or
- C. Is a resident of the county but has not been found for service of process.

“(b) To serve process on an agent or clerk under Subsection (a)(2)(C), the officer making the return of unexecuted process must certify that after diligent search and inquiry the individual, partnership, or association cannot be found and served. The process in the suit may be served on the agent or clerk in any succeeding term of court.

“(c) Service of process on an agent or clerk under this section has the effect of personal service on the principal individual, partnership, or unincorporated association and subjects the principal’s nonexempt property to the jurisdiction and judgment of the court.” [§17.021, V.A.C.P.R.C.; See. e.g., *Ashley forest Apts. v. Almy*, 762 S.W. 2d 293, 295 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1988, no writ) (stating, “For the issuance, service and return of process to be valid in this as it must appear on the face of the record that there was strict compliance with §17.021(a)...There is no allegation in respondent’s original petition or any other showing on the face of the record that the defendant is an individual, partnership or unincorporated association. There is no showing on the face of the record that petitioner has an office, place of business or agency for transacting business in this state. Also there is no showing that the person served with process was in fact an agent or clerk employed in office, place of business, or agency of petitioner. Furthermore, there is no showing on the face of the record that the defendant is or is not a resident of Brazoria County or of the State of Texas...”)].]

There are several other statutory rules for service on business entities:

1. Corporations. [Art. 2.11. V.A.B. & C.C.]

The president and all vice presidents of the corporation and the registered agent of the corporation shall be agents of such corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with reasonable diligence be

found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any process, notice, or demand shall be made by delivering to and leaving with the Secretary, or with the Deputy Secretary of State, or with any clerk having charge of the corporation department of the office, duplicate copies of such process, notice, or demand. In the event any such process, notice, or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered mail, addressed to the corporation at its registered office. Any service so had on the Secretary of State shall be returnable in not less than thirty (30) days.

The Secretary of State shall keep a record of all processes, notices and demands served upon the defendant under this Article, and shall record therein the time of such service and action taken with reference thereto.

Service of process, notice, or demand required or permitted by law to be served by a political subdivision of this state or by a person, including another political subdivision or an attorney, acting on behalf of a political subdivision in connection with the collection of a delinquent *ad valorem* tax may be served on a corporation whose corporate privileges are forfeited under Section 171.251, Tax Code, or in involuntarily dissolved under Article 7.01 of this Act by delivering the process, notice, or demand to any officer or director of the corporation, as listed in the most recent records of the secretary of state. If the officer or directors of the corporation are unknown or cannot be found, service on the corporation may be made in the same manner as service is made on unknown shareholders under law. Notwithstanding any disability or reinstatement of a corporation, service of process under this section is sufficient for a judgment against the corporation or a judgment in rem against any property to which the corporation holds title.

## 2. Partnerships. [§17.022, V.A.C.P.R.C.]

Citation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served.” [See, *Shawell v. Pend Oreille Oil & Gas Co.*, §823 S.W. 2d 336, 337-38 (Tex. App. –Texarkana 1991, writ denied) (holding “[i]n a suit brought against a partnership, it is unnecessary to serve all the partners to support a judgment against the partnership.)] In general, service on one partner authorizes a judgment against the partnership and the partner actually served [*Bentley Village Ltd. V. Nasits Bldg. Co.*, 736 S.W. 2d 919, 923 (Tex. App. –Tyler 1987, no writ) (stating, “Sections 17.022 and 31.003 authorize judgment against a partnership if one or more, but not all, partners are



served with citation and judgment against the partners actually served.”)] The return must correctly show that service is made on one of the partners. [See, e.g., *Radio Corp. of America v. C.O. Shurtleff Pump Co.*, 418 S.W. 2d 314 (Tex. Civ. App. 1967, no writ) (holding service of citation on one of two partners, which service was accompanied by a sheriff’s certificate of delivery indicating service on a person whose name was different than a partner, was not service on the partnership.)]

3. Joint-stock associations. [§17.023, V.A.C.P.R.C.]

In an action against an unincorporated joint stock company or association, citation may be served by:

- A. Serving the president, vice-president, secretary, cashier, assistant cashier, or treasurer of the association;
- B. Serving the local agent of the association in the county in which the suit is brought; or
- C. Leaving a copy of the citation at the principal office of the association during office hours.

If no officer on whom citation may be served resides in the county in which suit is brought and the association has no agent in that county, citation may be served on any agent representing the association in this state. Service on the trustees of an unincorporated joint stock company or association is sufficient to bring in the company, and to bind the association, as well as the officers served, with respect to any claim that was the subject of the suit. [*Golden West Oil Co. No. 1 v. Golden Rod Oil Co. No. 1*, 285 S.W. 631 (Tex. Civ. App. Waco 1926, aff’d, 293 S.W. 167 (Tex. Comm’n App. 1927); *Moss v. Republic Supply Co.*, 240 S.W. 326 (Tex. Civ. App. Amarillo 1922).]

4. Political subdivisions. [§17.024, V.A.C.P.R.C.]

In a suit against a county, citation must be served on the county judge. In a suit against an incorporated city, town, or village, citation may be served on the mayor, clerk, secretary, or treasurer. In a suit against a school district, citation may be served on the president of the school board or on the superintendent. [See, *Skaggs v. City of Keller*, 880 S.W. 2d 264, 266 (Tex. App –Fort Worth

1994, writ denied); and see, *City of Mesquite v. Bellingar*, 701 S.W. 2d 335, 336 (Tex. App. –Dallas 1985, no writ).]

Strict compliance with requirements for issuance, service, and return of citation are required for “good service” to take place. [*Promate Constr., Inc. v. Silver*, 884 S.W. 2d 151, 152 (Tex. 1994); see, *Herbert v. greater Gulf Coast Enter.*, 915 S.W. 2d 866, 871 (Tex. App. –Houston [1<sup>st</sup> Dist.] 1995, n.w.h.)(stating “[s]trict compliance with the rules regarding service of citation is required to confer jurisdiction on the trial court.”).]

### **§2.03.05 Service of Citation by Publication**

Before actual service by publication can take place, certain formal requirements must be met. [See Rule 109, T.R.C.P.] The citation itself must be directed to the defendant or defendants, by name if their names are known or as designated in the petition, name the parties, and give a brief statement of the nature of the suit. [Rule 114, T.R.C.P. (Rule 114 contains other requirements and should be consulted for the complete list of specifications.)]. In suits involving land, the citation shall state the kind of suit, the number of acres involved, special descriptions concerning the location of the land, and special pleas being relied upon. [Rule 115, T.R.C.P. (Rule 115 contains other requirements and should be consulted for the complete list of specifications).] Certain kinds of suits are practically guaranteed to involve citation by publication; they include:

1. Actions against unknown heirs or stockholders of defunct corporations [Rule 111 (See Rule for proper style of citation).];
2. Actions against unknown owners or claimants of interest in land [Rule 113, T.R.C.P. (See Rule for language or affidavit)]; and
3. Parties to actions against unknown owners or claimants of interest in land. [Rule 112, T.R.C.P. (See Rule for style of citation).]

Service by publishing a notice in a newspaper is used when permitted by statute. [Rule 116, T.R.C.P.] Citation by publication usually occurs in a suit involving real property or when a court authorizes such services as the most effective method under the specific circumstances of a case. The rule is very specific in mandating how citation is to be served:

1. It shall be served by any sheriff or constable of any county of the State of Texas or by the clerk of the court in which the case is pending. The

clerk's authority to serve citation is derived from the citation and this authority also applies to deputies.

It shall be made by having the citation published once each week for four weeks in a row. For example, if it is first published on Thursday, January 3<sup>rd</sup>, 2002 the following publication dates should be the 10<sup>th</sup>, 17<sup>th</sup> and 24<sup>th</sup>. It is not necessary to have publication on the same day each week, but this practice is probably easier to arrange and verify.

2. The first publication shall be at least 28 days before the return day of the citation. Note the return day and then count back 29 days from that date. The first publication should occur no later than that date. (For Example: The return date is March 31. Count March 30 as day number 1. Count back to March 2<sup>nd</sup> to find 29 days before the return day. Make the first publication no later than March 2<sup>nd</sup>.)

If the suit does not involve title to land or the partition of real estate:

1. Publish the citation in the newspaper in the county where the suit is to be tried; this means the county where the trial will be held. The location where the suit is to be tried should appear on the citation and petition. If it cannot be determined whether or not the suit involves the title to land or the partition of real estate, then call the court clerk or the attorney whose name is on the petition. Either one of them can determine the nature of the suit.
2. If no newspaper is published in the county where the suit is to be tried then citation should be published in the newspaper of an adjoining county. An adjoining county is one that is located next to the county where the suit is to be tried. [Rule 116, T.R.C.P.]

If the suit does involve the title to land or the partition of real estate:

1. Publish the citation in the county where the land (either all or part of it) is located.
2. If no newspaper is published in the county where the land is located, then citation may be published in a newspaper in an adjoining county. [Rule 116, T.R.C.P.]

3. If two or more newspapers are published in the county where citation is served, the sheriff or constable may choose the newspaper in which to publish. Pick the newspaper with the widest circulation. Remember that the purpose of serving citation of any kind is to give the defendant the best notice possible of the action pending. Citation by publication which appears in the Sunday newspaper is valid. [Rule 6, T.R.C.P.]

**COMMENT**

Service of Citation by Publication in cases' affecting Parent-Child Relationships shall be published one time [§ 102.010, V.A.FAM.C.]

See Taxes, Topic XII

**§2.03.06 Service on Military Reservations**

There are no specific statutes pertaining to service on military reservations. Each reservation has various regulations concerning access, therefore a check with the military legal affairs office for each base is recommended. Military bases are federal land and this fact alone raises legal questions. The lawyers in the Judge Advocate General's (JAG) office will assist the constable by answering questions regarding service.

**§2.03.07 Service on Financial Institutions**

The Finance Code defines a financial institution and governs service of process on those institutions. Service may be made by serving the registered agent or the president or a branch manager of the financial institution at any office located in this state. In an action against a credit union organized under the laws of this state, another state or federal law, the citation may be served to the registered agent or the president or vice-president. A citation served on a credit union that is located in a place of worship may not be served during a worship service. [ § 17.028. V.A.C.P.R.C.]

**Citation in Ad Valorem Tax Suits (see § 12.02 herein)****§2.04 RETURN OF SERVICE****§2.04.01 Requisites of Return on Personal Service**

The return of the officer or authorized person serving citation should be made on the citation itself, or if on another piece of paper it should be attached to the citation. The executing officer shall complete an officer's return which shall include:

1. The date and time received;
2. The manner in which executed, that is, how the notice was served;
3. The time and place the process was served; and
4. The executing officer's signature;
5. The department name
6. The elected official's name (If applicable);
7. If not executed, diligence used to try to execute the notice and reason(s) it was not executed [Rule 107, T.R.C.P. (governing return of service).]

The return is then sent to the issuing court or plaintiff's attorney of record, if requested.

#### **§2.04.02 Return of Service by Mail**

If service was made by registered or certified mail, the following must be included on the return;

1. The return receipt that is mailed back to the officer must be included [See, *e.g.*, *American Bankers Ins. Co. v. State*, 749 S.W. 2d 195, 197 (Tex. App. –Houston [14<sup>th</sup> Dist.] 1988, no writ) (holding Rule 107 required that, when service is made by registered mail, the return of the officer must contain the return receipt with the addressee's signature.).]
2. The receipt must have the addressee's signature on it. The signature shows that the citation and petition were received by the person to whom they were mailed. [*id.*]

#### **§2.04.03 Return of Service by Substituted Service**

When an alternate method of service has been authorized, the court's record must show that there is strict compliance with the method authorized. [Rules 107 and 536a, T.R.C.P.] The return must include facts of how, when, where, and to whom service was made.

**§2.04.04 Return of Service by Publication**

In addition to the requisites listed in § 2.04.05, the return of the officer executing citation by publication shall be endorsed or attached to the same and;

1. Show how and when the citation was executed;
2. Specify the dates of publication; and
3. Be signed by the officer and accompanied by a printed copy of the publication. [Rule 117, T.R.C.P.]

**§2.04.05 Return of Service on Unexecuted Citations**

If the citation has not been served, the return must show the “due diligence” (degree of persistence) used in attempting to serve the citation. It is preferable that the description of the diligence used include each attempt at service specifying the address, date and time when service was attempted. These facts will be important to the attorney who may request some substituted form of service when personal service cannot be accomplished. The information concerning the inability to serve should be sufficient to support an inference that neither method of service (by delivery or by registered mail) is practical. The return must also include the reason the defendant was not served and the defendant’s present location, if known. [Rule 107, T.R.C.P.]

**Commentary – Return of Service of Citation**

Fill in every return as if it will be contested. [See, e.g., *Curry Motor Freight, Inc. v. Ralston Purina Col*, 565 S.W. 2d 105, 106-107 (Tex. App.--Amarillo 1978, no writ) (stating, “[t]his return is fatally defective because it does not state the manner of serving Curry Motor Freight, “ (citing *Continental Ins. Co. v. Milliken*, 64 Tex. 46, 47-8 (1885), wherein the court stated: ‘To state that an officer executed process by serving it upon a named person is not to state the manner of service, but to give only the legal conclusion of the officer as to the compliance of his acts with the requirements of the statute. It is to state no more than that he served process by serving it upon a particular person, the manner of service is left untold.’).]

The return must include the official signature of the serving officer. [See, e.g., *Hot Shot Messenger Serv., Inc. v. State*, 818 S.W.2d 905, 907 (Tex. App. – Austin 1991, no writ)(stating “The officer’s failure to sign the return of citation renders the return fatally defective so that it will not support a default judgment

on direct attack.”).] The officer’s official signature is essential. [ Rule 107, T.R.C.P.]

The importance of the return cannot be overemphasized. The best way to ensure that service will be complete and correct is to tell the facts of what was done to accomplish service. A statement such as, “Served citation as directed,” does not tell the facts. The facts have to provide enough information to the court so that a legal decision can be made as to the adequacy of service. No additional facts can be added later to explain or complete the return if the defendant questions the sufficiency of service. A return of service may be amended to add or change facts after it is returned; however, an amendment required permission of the court. [Rule 118, T.R.C.P.; *Barker CATV Const., Inc. v. Ampro, Inc.*, 989 S.W. 2d 789, 793 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1999, no writ).] If an amendment is made with the court’s permission, the amended return is regarded as filed when the original return was filed. [*Bavarian Autohaus, Inc. v. Holland*, 570 S.W. 2d 110, 113 (Tex. Civ. App. – Houston [1<sup>st</sup> Dist.] 1978, no writ).] The date of service is especially important in determining when the defendant should have answered or appeared in order to avoid or affirm a default judgment.

**FORM 3      Return of Service of Citation—In Person, by Mail, or Substituted Service**  
 [Rule 107, T.R.C.P.]

**CONSTABLE'S RETURN**

Received on the \_\_ day of \_\_\_\_, 20 \_\_\_\_, at \_\_ o'clock \_\_.m. and executed on the \_\_ day of \_\_ 20 \_\_\_\_, at \_\_ o'clock \_\_.m. by delivering subpoena \_\_\_\_\_, in person, a true copy of this preliminary or temporary injunction with plaintiff's complaint attached. Physical address of delivery: \_\_\_\_\_, City County, Texas, Zip Code. If not executed, state why:

Additional Information and Explanation: (Return receipt attached, additional explanation of alternative service authorized by court, reason returned unexecuted, etc.)

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_  
 DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME



### III. NOTICES

#### **§3.01 NOTICE TO SHOW CAUSE**

##### **§3.01.01 Definition and Issuance**

An order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief. [*Black's Law Dictionary* 1130 (8<sup>th</sup> ed. 2004).]

A common instance where a constable may see a show cause order occurs when a party has disobeyed an injunction. [Rule 692, T.R.C.P. (providing that disobedience of an injunction may be punished as a contempt. The judge may issue either a writ of attachment or a show cause order.).] The court has the option of ordering the arrest of the disobedient party or directing the disobedient party to appear and show cause why the party should not be held in contempt [Id.] The party's appearance is most often secured through a show cause order [Id.; see *Ex parte Jackman*, 663 S.W. 2d 520, 524 (Tex. App. – Dallas 1983, no writ)(stating that the “injunction must be obeyed irrespective of the ultimate validity of the order, and a defendant cannot avoid compliance with the commands, or excuse his violation, by moving to dissolve it or by the pendency of a motion to modify it.”).]

Rule 670, T.R.C.P., provides that if a garnishee (third party having property of a defendant) fails or refuses to deliver property of the defendant in the garnishee's possession, the constable shall make a return to that effect. The plaintiff may file a motion requesting that the garnishee be cited to show cause why the garnishee should not be held in contempt.

In child support cases where child support is not being paid or possession of or access to a child is being denied, the court may issue a show cause order to the party failing to comply with the existing order. [§ 157.062(c), V.A.Fam.C.]

##### **§3.01.02 Requisites of Show Cause Orders**

Every pleading, plea, motion, or application to the court for an order shall be filed with the clerk of the court in writing, served on all other parties, and noted on the docket. The notice shall be served upon all other parties not less than three days

before the time specified for the hearing unless otherwise provided by the Texas Rules of Civil Procedure or shortened by the court. [Rule 21 T.R.C.P.]

Similar to precepts, show cause notices are undefined by law but are authorized process. [*Brown v. Dixon*, 776 S.W. 2d 599 (Tex. App. – Tyler 1989, no writ)(stating a “precept to serve the order on the Holcombes and citation were issues...”).] Nevertheless, a deputy constable is required to endorse a precept as any other process. [§ 86.021, V.A.L.G.C.; *Merritt v. Harris County*, 775 S.W. 2d 17,23 (Tex. App. –Houston [14<sup>th</sup> Dist.] 1989 writ denied; *cf.*, *Munoz v. Cameron County*, 725 S.W. 2d 319 (Tex. App. – Corpus Christi 1986, No writ)(stating “we have not found Article 6873 to be applied to any criminal proceeding nor to include the definition of precept to include a criminal warrant.”).]

### **§3.01.03 Who May Serve Show Cause Orders**

Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. [Rule 21a, T.R.C.P.]

### **§3.01.04 Service of Show Cause Orders**

Every notice, pleading, plea, motion, or other process requiring service under Rule 21, except a citation, may be served by:

1. Delivering a copy to the party served, or the party's duly authorized agent or attorney of record either in person or by agent;
2. Courier receipted delivery;
3. Certified or registered mail to the party's last known address;
4. Telephonic document transfer to the recipient's current telecopier number; or
5. Any other manner as the court in its discretion may direct. [Rule 21a, T.R.C.P.]

Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00p.m. local time of recipient shall be deemed served on the following day. If the party is required to do some act within a prescribed

period after the service of a notice and it is served by mail or by telephonic document transfer, three days shall be added to the prescribed period. [Rule 21a, T.R.C.P.]

Generally, all notices and motions are served under Rule 21A; however, other rules or statutes may modify the application of Rule 21a. For example, in cases of enforcement for child support or possession of or access to a child, notice of the court's order shall be served on the respondent in person, but not less than ten days prior to the hearing on the show cause order. [§ 157.062(c), V.A.Fam.C.; Rule 308a, T.R.C.P.]

### **§3.01.05 Return of Service for Show Cause Orders**

A certificate by a party or an attorney of record, or the return of an officer or the affidavit of any person showing service of a notice shall be *prima facie* evidence of the fact of service. [Rule 21a; T.R.C.P.] Every officer or authorized person shall endorse on all process and precepts coming to his hand the day and hour on which they were received, the manner in which they were executed, and the time and place the process was served, and shall sign the returns officially. [Rule 16 T.R.C.P.] The return is then sent to the issuing court, plaintiff's attorney of record or issuing party, if requested.

## **§3.02 PRECEPTS**

### **§3.02.01 Definition**

Precept is not defined in Texas law although reference to precept is made in the Rules of Civil Procedure. [Rule 16, T.R.C.P.; Tex. Att'y Gen. Op. No. MW-117 (1979).] Black's Law Dictionary defines a precept as: "[a] writ or warrant issued by a authorized person demanding another's action, such as a judge's order to an officer to bring a party before the court. "[*Black's Law Dictionary* 1215 (8<sup>th</sup> ed. 2004).]

### **§3.02.02 Requisites of Precept**

Precepts, although undefined by law, are authorized even though they are relatively uncommon. [*Brown v. Dixon*, 776 S.W. 2d 599 (Tex. App. –Tyler 1989, no writ)(stating a "precept to serve the order on the Holcombes and citation were issued...").] Nevertheless, a deputy constable is required to endorse a precept as any other process. [*Merritt v. Harris County*, 775 S.W. 2d 17, 23 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1989, writ denied); *cf.*, *Munoz v. Cameron County*, 725 S.W. 2d 319 (Tex. App. –Corpus Christi, 1986, no writ)(stating "we have not found Article 6873 to be applied to any criminal proceeding nor to include the definition or precept to include a criminal warrant").]

**§3.02.03 Service**

Rule 16 governs service and return of precepts. Every officer or authorized person shall endorse on all process and precepts coming to hand the day and hour on which they are received, the manner in which they are executed, and the time and place the process was served, and shall sign the returns officially. [Rule 16, T.R.C.P.] This rule has generally eliminated the use of precepts; nevertheless, a constable will occasionally see a precept. For example, a precept may serve notice of interrogatories.

**§3.02.04 Return**

The executing officer's return shall include:

1. The date and time received;
2. The manner in which executed, that is, how the notice was served;
3. The time and place the process was served;
4. The executing officer's signature;
5. The department name;
6. The elected official's name (if applicable);
7. If not executed, diligence used to try to execute the notice and reason(s) it was not executed. [Rule 107, T.R.C.P.]

The return is then sent to the issuing court or issuing party if requested.

**§3.03 POSTING****§3.03.01 Definition and Issuance**

Posting is a method of substituted service of process by displaying the process in a prominent place (such as the courthouse door) when other forms of service have failed. [*Black's Law Dictionary* 1205 (8<sup>th</sup> ed. 2004).]

**§3.03.02 Requisites of Posting**

The Rules of Civil Procedure also provide for several situations where posting is authorized as the appropriate means of giving notice. [Rule 117a, T.R.C.P. (providing for citation in suits for delinquent *ad valorem* taxes); Rule 647, T.R.C.P. (governing notice of sale of real estate); Rule 650, T.R.C.P. (governing

notice of sale of personal property)]. Posting is generally permitted when notice by publication in a newspaper is not available or the cost exceeds permissible limits. [Rules 117a and 647, T.R.C.P.] Citation by posting is also permitted in certain proceedings under the Probate Code. [§§ 33, 34, 632 and 633, V.A.Prob.C.]

### **§3.03.03 Service of Citation by Posting**

Service of citation is made by posting a copy of the citation on the courthouse door. [Rules 117a, 647, and 650, T.R.C.P.] *Courthouse door* is defined as: "...either of the principal entrances to the house provided by the proper authority for the holding of the district court. If from any cause there is no such house, the door of the house where the district court was last held in that country shall be deemed to be the courthouse door. Where the courthouse, or house used by the court, has been destroyed by fire or other cause, and another has not been designated by the proper authority, the place where such house stood shall be deemed to be the courthouse door." [Rule 648 T.R.C.P.]

### **§3.03.04 Posting of Sale of Real Property**

The time and place of sale of real property under execution, order of sale, or *venditioni exponas* (Latin for "you expose to sale;" it is the name of a writ of execution.) can be accomplished by posting, if publication of notice is not feasible. The officer shall post the notice in three public places in the county, one of which shall be at the courthouse door of the county. [Rule 647, T.R.C.P.] The notice must be posted for twenty days successively next before the day of sale. The officer making the levy shall give the defendant, or defendant's attorney, written notice of such sale, either in person or by mail, which notice shall conform to statutory requirements. [*Id.*]

### **§3.03.05 Posting Sale of Personal Property under Execution**

Previous notice of the time and place of sale of personal property levied on under execution shall be given by posting notice for ten days successively immediately prior to the day of sale at the courthouse door of any county and at the place where the sale is to be made. [Rule 650, T.R.C.P.]

### **§3.03.06 Posting of Citation in *Ad Valorem* Tax Suits**

Citation in *ad valorem* tax suits may be made by posting. [Rule 117a 5., T.R.C.P.] Service of citation is made by posting a copy of the courthouse door of the county in which the suit is pending for at least twenty-eight days prior to the return fixed in the citation. Proof of the posting shall be made by affidavit by the attorney for the plaintiff or the person posting it. [*Id.*]

**§3.03.07 Return of Posting**

The executing officer's return shall include:

1. The date and time received;
2. The manner in which executed, (how the notice was served);
3. The time and place the process was served;
4. The executing officer's signature;
5. The department name;
6. The elected official's name (if applicable);
7. If not executed, diligence used to try to execute the notice and reason(s) it was not executed. [Rule 15, T.R.C.P.]

The return is then sent to the issuing court, plaintiff's attorney of record, or issuing party, if requested.

**FORM 4 Return of Service by Posting**

[Rule 117a, and 650, T.R.C.P.]

**CONSTABLE'S RETURN**

Received the \_\_\_\_\_ day of \_\_, 20 \_\_\_\_, at \_\_\_\_\_ o'clock \_\_.m. and executed on the \_\_ day of \_\_20\_\_, at \_\_ o'clock \_\_.m., by posting a copy of the (citation/notice) \_\_\_\_ for \_\_ days, exclusive of posting, before the return day hereof, at the County Courthouse door of \_\_\_\_ County, Texas or at the place in or near the said courthouse where public notices customarily are posted.

Additional Information and Explanation: (Return receipt attached, additional explanation of alternative service authorized by court, reason returned unexecuted, etc.)

FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence used):

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
COUNTY,  
TEXASBY: \_\_\_\_\_  
DEPUTY NAME\_\_\_\_\_  
PRINTED NAME

**FORM 5 Return of Service of Precept**  
 [Rule 16 T.R.C.P.]

**CONSTABLE'S RETURN**

Received the \_\_\_\_\_ day of \_\_, 20 \_\_\_\_, at \_\_\_\_\_ o'clock \_\_.m. and executed on the \_\_ day of \_\_20\_\_, at \_\_ 'clock \_\_.m., by delivering to the within named defendant \_\_\_\_\_, in person, a true copy of the (notice and interrogatories)(and a true copy of this process). Defendant located at (address) \_\_\_\_\_ in \_\_\_\_\_ County, Texas.

Additional Information and Explanation: (Return receipt attached, additional explanation of alternative service authorized by court, reason returned unexecuted, etc.)

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence used):

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME



**FORM 6 Return of Service On Notice to Show Cause – Personal Service**  
 [Rule 16 T.R.C.P.]

**CONSTABLE'S RETURN**

Received the \_\_\_\_\_ day of \_\_, 20 \_\_\_\_, at \_\_\_\_\_ o'clock \_\_.m. and  
 executed on the \_\_ day of \_\_20, at \_\_ o'clock \_\_.m., by delivering to the within  
 named defendant \_\_\_\_\_, in person, a true copy of the (notice and  
 interrogatories)(and a true copy of this process). Defendant located at (address) .  
 \_\_\_\_ in\_\_\_\_ County, Texas.

Additional Information and Explanation: (Return receipt attached, additional  
 explanation of alternative service authorized by court, reason returned  
 unexecuted, etc.)

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence used):

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

## IV. SUBPOENAS

### §4.01 CIVIL SUBPOENAS

#### §4.01.01 Definition and Issuance

A writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. [*Black's Law Dictionary* 1460 (8<sup>th</sup> ed. 2004).] The clerk of the appropriate district, county court, justice court, a licensed attorney, or an officer authorized to take depositions may issue a civil subpoena [Rule 176.4, T.R.C.P.] for any witness who is represented to reside 150 miles or less from a county in which a suit is pending. [Rule 176.3, T.R.C.P.; § 22.002, V.A.C.P.R.C.] A court may also issue an **instanter subpoena** requiring a witness to appear instantly or at once, but not commanding the officer to produce the witness to court as does an attachment.

#### §4.01.02 Requisites for Civil Subpoena

The subpoena must be issued in the name of "The State of Texas." The subpoena must:

1. State the style of the suit (name of plaintiff and defendant) and its cause number;
2. State the court in which the suit is pending;
3. State the date on which the subpoena is issued;
4. Identify the person to whom the subpoena is directed;
5. State the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2, Rules of Civil Procedure;
6. Identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;
7. State of text of Rule 176.8(a), Rules of Civil Procedure; and
8. Be signed by the person issuing the subpoena. [Rule 176, T.R.C.P.]

**§4.01.03 Witness Fee-Civil Subpoena**

Before a witness may be compelled to attend, the party subpoenaing the witness must have paid or tendered all lawful fees to the witness. [Rule 176.8, T.R.C.P.; § 22.001, V.A.C.P.R.C.; *Kieffer v. Miller*, 560 S.W. 2d 431, 432 (Tex. App. – Beaumont 1977, writ ref'd n.r.e.)(stating “[p]laintiff’s motion for a writ of attachment for [the witness] contained no affidavit that ‘all lawful fees’ had been paid or tendered to [the witness].] Each witness subpoenaed is entitled to a copy of the subpoena. Other witness fees and expenses are paid in accordance with statute. [§ 22.001, V.A.C.P.R.C. (providing, in part, “a witness is entitled to ten (\$10.00) dollars for each day the witness attends court. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled.”)].

Previously, the Rules contained another type of subpoena, a *subpoena duces tecum*, which required a person to produce books, papers, documents or tangible things named in the subpoena. However, that old definition has been removed, and, although the Rule still permits a subpoena to be used to require production of books and other tangible pieces of evidence, the term used is *subpoena*. (Rules 176.2(b) and 176.6(c), T.R.C.P.] The person ordered to produce the evidence may file a motion for a protective order to limit or prohibit the production requested under Rule 192.6(b), T.R.C.P. A *subpoena* for production of documents is subject to control by the Discovery Rules. [Rule 192, *et seq.*, T.R.C.P.] Failure to obey a civil subpoena is punishable by contempt of court. [Rules 176.8, 180 and 743, T.R.C.P.] A custodian of a record who receives a request for production or certification of a record under a subpoena, a request for production, or other instrument issued under the authority of a tribunal that compels production or certification of a record is entitled to \$1 for production or certification of the record. The party who requests production or certification of a record shall pay the fee required for the record, as provided by this section, at the time the subpoena, request, or other instrument is served. [ § 22.004(a) and (c), V.A.C.P.R.C.]

NOTE: The Code of Criminal Procedure still contains the term *subpoena duces tecum*, and it retains the same meaning as it once had in the Civil Rules.

**§4.01.04 Service of Civil Subpoena**

Civil subpoenas may be served at any place within the State of Texas by any sheriff or constable, or by any person who is not a party and is at least eighteen years of age or older. The subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. [Rule 176.5(a),

T.R.C.P.; *Keiffer v. Miller*, 560 S.W. 2d 431 (Tex. Civ. App. – Beaumont 1977, writ ref'd n.r.e.)] If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record [*Id.*]

#### **§4.01.05 Return – Civil Subpoena**

Proof of service must be made by filing either: (1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or (2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served. [Rule 176.5(b), T.R.C.P.]

The officer's return should include:

1. The date and time received;
2. The manner in which executed, that is, how the notice was served;
3. The time and place the process was served;
4. The executing officer's signature;
5. The department name;
6. The elected official's name (if applicable); and
7. Whether or not a witness fee was paid or tendered.

The return is then sent to the issuing court or plaintiff's attorney of record, if requested.

### **§4.02 CRIMINAL SUBPOENAS**

#### **§4.02.01 Definition and Issuance**

The Code of Criminal Procedure provides a chapter on the rules controlling the issuance and enforcement of subpoenas in the criminal context. (Arts. 24.01-.29, V.A.C.C.P.) In general, a subpoena may summon one or more persons to testify in a criminal action at a specific court or on a specific day at: (1) an examining trial; (2) a coroner's inquest; (3) a grand jury proceeding [Art. 24.15, V.A.C.C.P.] or (4) a *habeas corpus* hearing. [Art. 24.01, V.A.C.C.P.] A criminal subpoena may also require that evidence be brought to court by a witness (*subpoena*

*duces tecum*). (Art. 24.02, V.A.C.C.P.] Special provisions govern issuance of subpoenas for child witnesses [Art. 24.011, V.A.C.C.P.] and out-of-state witnesses. [Art. 24.28, V.A.C.C.P.]

Failure to obey a criminal subpoena may result in a fine not to exceed \$500 in a felony case or \$100 in a misdemeanor case. [Art. 24.05, V.A.C.C.P.] A writ of attachment may issue commanding some peace officer to take the body of a witness and bring the witness to court to testify. [Art. 24.11, V.A.C.C.P.]

#### **§4.02.02 Who May Serve – Criminal Subpoena**

The person named in the subpoena to summon the person whose appearance is sought must be a peace officer or at least 18 years old and, at the time the subpoena is issued, not a participant in the proceeding for which the appearance is sought. [Art. 24.01(b), V.A.C.C.P.]

#### **§4.02.03 Service – Criminal Subpoena**

In criminal cases, a subpoena is served by: reading the subpoena in the hearing of the witness (but not over the telephone); delivering a copy of the criminal subpoena to the witness; electronically transmitting a copy of the subpoena, acknowledgment of receipt requested, to the last known electronic address of the witness; or mailing a copy of the subpoena by certified mail, return receipt requested, to the last known address of the witness unless the applicant for the subpoena requests in writing that the subpoena not be served by certified mail or the proceeding for which the witness is being subpoenaed is set to begin within seven business days after the date the subpoena would be mailed. Proper return is accomplished by showing the time and manner of service. When the witness has not been found then the officer should state the diligence (degree of persistence) the constable used in trying to locate the witness including information as to the whereabouts of the witness. [Arts. 24.04(b), 24.17(b) V.A.C.C.P.]

#### **§4.02.04 Return – Criminal Subpoena**

The officer shall make due return showing the time and manner of service if served in person or by the reading the subpoena. If the subpoena was served by electronic transmission, the acknowledgement of receipt or, if served by certified mail, the return receipt must accompany the return. If the subpoena is not served, the officer shall show in the officer's return the cause of the officer's failure to serve it, the diligence used and any information as to the whereabouts of the witness. [Arts. 24.04(b), 24.17(b) V.A.C.C.]

**§4.03 JUVENILE SUMMONS****§4.03.01 Definition and Issuance**

The juvenile court shall direct issuance of a summons to the child named in the petition, the child's parent, guardian, or custodian, the child's guardian *ad litem* and any other person who appears to the court to be a proper or necessary party to the proceeding. The court may also endorse on the summons an order directing a person having the physical custody or control of the child to bring the child to the hearing. In addition, the court may endorse on the summons an order that a law enforcement officer serve the summons and immediately take the child into custody and bring him before the court. [§ 53.06, V.A.Fam.C.]

**§4.03.02 Who May Serve – Juvenile Summons**

A law enforcement officer may serve the summons if the court orders the child be taken into custody. [§ 53.06 (d), V.A.Fam.C.] Service of the summons may be made by any suitable person under the direction of court. [§ 53.06(c), V.A.Fam.C.]

**§4.03.03 Service – Juvenile Summons**

If the subject is found in the state, the summons shall be served personally at least two days before the day of the adjudication hearing. If the subject is in the state and cannot be found, but the subject's address is known or can be ascertained with reasonable diligence, the summons may be served by mailing a copy by registered or certified mail, return receipt requested, at least five days before the day of the hearing. If the subject is outside of the state, service can be made by delivering to the subject personally or by mailing a copy by registered or certified mail, return receipt requested, at least five days before the day of the hearing. [§ 53.07 V.A.Fam.C.]

**§4.03.04 Return – Juvenile Summons**

The Family Code states that witnesses may be subpoenaed in accordance with the Texas Code of Criminal Procedure. [§ 53.07(e), V.A.Fam.C.] The return for a summons is made in the same manner as a criminal subpoena. The officer shall make due return showing the time and manner of service if served in person or by reading the subpoena. If the subpoena was served by certified mail, the return receipt must accompany the return. If the subpoena is not served, the officer shall show in the return the cause of the officer's failure to serve it. [Art. 24.17(b) V.A.C.C.P.]

**§4.04 ADMINISTRATIVE SUBPOENAS**

Administrative subpoenas or summonses are often issued by governmental agencies such as the Texas Workforce Commission, Civil Service, Attorney General, and others for administrative hearings. These notices are generally served in the same manner as other civil **subpoenas**.

**FORM 7 Return on Civil Subpoenas**  
 (Part 1) [Rule 176.5 (b) T.R.C.P.]

**CONSTABLE'S RETURN**

Received on the \_\_\_\_\_ day of \_\_, 20 \_\_\_\_, at \_\_\_\_\_ o'clock \_\_.m. and executed on the \_\_ day of \_\_20\_\_, at \_\_ 'clock \_\_.m. by delivering subpoena to \_\_\_\_, in person, a true copy of the subpoena (with/without fee attached). Witness was served at (address) \_\_\_\_\_ in \_\_\_\_\_ County, Texas.

Additional Information and Explanation: (Return receipt attached, additional explanation of alternative service authorized by court, reason returned unexecuted, etc.)

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence used):

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME



**FORM 8     Return on Civil Subpoenas**  
(Part 2)

**MEMORANDUM OF ACCEPTANCE**

I accept service of a copy of this subpoena on the \_\_\_\_ day of \_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
*(Signature of witness)*

\_\_\_\_\_  
*(Printed name)*

## V. INJUNCTIONS

### §5.01 INJUNCTIONS

#### §5.01.01 Definition and Issuance

An injunction is a court order commanding or preventing an action. [*Black's Law Dictionary* 800 (8<sup>th</sup> ed. 2004).] "In a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating in *personam* by which, upon certain established principles of equity a party is required to do or refrain from doing a particular thing. An injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it esteems as contrary to equity and good conscience; as a remedial writ issuing by the order and under seal of a court of equity." [Joyce, *A Treatise on the Law Relating to Injunctions*, §§ 1,2, and 3 (1909).]

There are three types of injunctions: *temporary restraining orders*, *preliminary or temporary injunctions*, and *permanent injunctions*. A temporary restraining order operates only pending a hearing on an application for a *temporary injunction*. It automatically ends on the date set for such hearing and it is not appealable. A *temporary injunction* (also called interlocutory injunction, preliminary injunction and even permanent injunction) operates, unless dissolved by a further order, until final judgment. A permanent injunction (also called a perpetual injunction) is a restraining provision of a final judgment. When granted, it is as a part of the final judgment, which was sought by the suit. An injunction is a remedial writ that can be heard by only a district or county court. [§§ 65.021, V.A.C.P.R.C.; *Mickle v. Garrett*, 110 S.S. 2d 1235, 1236 (Tex. Civ. App. –Eastland 1937, no writ) (citing *Riggins v. Thompson*, 71 S.W. 14 (Tex. 1902); *Ex Parte Zuccaro*, 163 S.W. 579 (Tex. 1914), *Ex Parte Rains*, 257 S.W. (Tex. 1923).]

To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law, and that an irreparable injury will result unless relief is granted [*Id.*]

### §5.02 TEMPORARY INJUNCTION

#### §5.02.01 Definition and Issuance

A *temporary injunction* is a court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. A *temporary injunction* will be issued only after the defendant receives notice and an opportunity to be heard. [Black's Law Dictionary 800 (8<sup>th</sup> ed. 2004).] To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless granted. . [/*d.*] A temporary injunction operates prior to litigation and a final hearing on the matter. A temporary injunction can be issued before or during trial to prevent irreparable injury from occurring before the court before the court has a chance to decide the case. [/*d.*]

A *temporary injunction* is an emergency remedy of brief duration that may be issued only in exception circumstances and only until the trial court can hear arguments or evidence, as the circumstances require, on the subject matter of the controversy and otherwise determine what relief is appropriate [§ 65.011, V.A.C.P.R.C.; see, *Crestview Ltd. V. Foremont Ins. Co.*, 621 S.W. 2d 816, 827-28 (Tex. App. Austin 2001, writ ref'd n.r.e.) (stating "[t]he function of a temporary injunction is obviously to preserve the status quo, or the 'last , actual, peaceable, non-contested status which preceded the pending controversy'... [however, it] is not *per se* a basis for its issuance.".)]

A party must plead and prove a probable injury if temporary equitable relief is denied, and a probable right to recovery; the party need not establish final success in the litigation. The *temporary injunction* is a part of the procedural machinery by which the court keeps control of the case pending trial on the merits. [*Center for Economic Justice v. American Ins. Assoc.*, 39 S.S. 3d 337, 343-44 (Tex. App. –Austin 2001, n.w.h.); *Burkland v. Hachett*, 575 S.W. 2d 389-393 (Tex. Civ. App. – Tyler 1978, no writ).] At a hearing for a temporary injunction, the only question before the trial court is whether the applicant is entitled to preservation of the status quo of the subject matter of the suit pending trial on the merits. [*Davis v. Huey*, 571 S.W. 2d 859-862 (Tex. 1978).]

Other rules require that no writ of injunction shall b granted unless the applicant presents the petition to the judge verified by affidavit that contains an intelligible (clear and understandable) statement of the grounds for relief. [Rule 682, T.R.C.P.] No temporary injunction shall be issued without notice to adverse party. [Rule 681, T.R.C.P.] Constructive notice includes the defendant's knowledge of the existence of the *temporary injunction* and knowledge of the fact that orders must be followed. [Rule 683 T.R.C.P.] The order (injunction or restraining order)

shall set forth specifics as to why it was granted and the conditions that must be met by the adverse parties. [Rule 683, T.C.R.P.; *Interfist Bank San Felipe v. Paz Construction Co.*, 715 S.W. 2d at 641 (Tex. 1986) (stating, “The requirements of Rule 683 are mandatory and must be strictly followed.”).] Additionally, the applicant must post a bond in the amount set by the court to protect the interests of the adverse party. [(Rule 684, T.R.C.P.); see *Ex parte Leshner*, 651 S.W. 2d 734, 736 (Tex. 1983) (quoting *Lancaster v. Lancaster*, 291 S.W. 2d 303 (Tex. 1956). “The provisions of Rule 684 are mandatory and an order of injunction issued without a bond is void on its face.”).]

### **§5.02.02 Requisites of a Preliminary or Temporary Injunction**

A preliminary or temporary injunction shall:

1. Be styled The State of Texas;
2. Be directed to any sheriff or constable within the State of Texas;
3. Be directed to the person or persons enjoined;
4. State the court of issuance;
5. State cause number;
6. State the names of the parties to the proceedings, and the nature of the plaintiffs application with the action of the judge;
7. Command the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined, or to obey and execute such order as the judge has seen proper to make;
8. Date and time set for the hearing—
  - A. Temporary restraining orders – no more than 14 days from the date the court order is granted;
  - B. Injunctions – be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from date of service;
9. Be dated and signed by the county or district clerk; and

10. Bear the seal of court if issued by county or district court. [Rule 15 and 687, T.R.C.P.]

### **§5.02.03 Service**

The officer receiving the writ of injunction shall log in the date it was received and immediately deliver the writ to the named party by **personal delivery only**. [Rule 689 T.R.C.P.] The writ can be served any day of the week [Rule 6, T.R.C.P.] The original writ shall be returned to the court from which is issued on or before the hearing with the action of the officer written on the writ along with the time the officer executed the writ [§ 65.022, V.A.C.P.R.C.; Rule 689, T.C.R.P.] The officer also may detail the action taken on a spare piece of paper and attach it to the original writ. The return must reflect the diligence (degree of persistence) exercised by the officer in attempting to serve the temporary injunction. The executing officer shall sign the writ in his official capacity. The injunction expires on the hearing date stated on the order. [Rule 689, T.R.C.P.]

### **§5.02.04 Return**

The delivering officer shall complete an officer's return, which shall show;

1. The date and time received;
2. The complete address of delivery;
3. Name of defendant;
4. Name of person to whom document was delivered;
5. Explanation of how delivery was made;
6. If not delivered, diligence used in attempting delivery;
7. Officer's signature showing official capacity; and
8. Return to court or attorney of record if requested. [Rule 689, T.R.C.P.]

### **§5.02.05 Liability**

Generally, an officer is not liable for damages resulting from execution of a writ if the officer acts in good faith in executing the writ and uses reasonable diligence in performing official duties. [§7.003, V.A.C.P.R.C.] Section 7.003 provides;

'(a) Except as provided by section 34.061, an officer is not liable for damages resulting from the execution of a writ issued by a court of this state if the officer;

1. In a good faith executes the writ as provided by law and by the Texas Rules of Civil Procedure; and
2. Uses reasonable diligence in performing in performing his official duties.

See also: Family Law, §10.02 Temporary *Ex Parte Orders*

## **§5.03 MANDAMUS**

### **§5.03.01 Definition and Issuance**

The writ of mandamus is an order of a superior court to compel a lower court or government officer to perform mandatory or purely ministerial duties correctly. [*Black's Law Dictionary* 980 (8<sup>th</sup> ed. 2004).] Mandamus is called an "extraordinary remedy", and it will lie only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy at law. [*Walker v. Packer*, 827 S.W.2d 833, 841 (Tex.1992, orig. proceeding); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex.1985); *O'Donniley v. Golden*, 860 S.W.2d 267 (Tex.App.-Tyler 1993, orig. proceeding).] It is governed by the Rules of Civil Procedure. [*Vondy v. Commissioners Court of Uvalde County*, 620 S.W.2d 104, 107 (Tex. 1981, orig. proceeding).] An original proceeding for a writ of mandamus initiated in the trial court is a civil action subject to trial and appeal on substantive issues and rules of procedure as any other civil suit. Nevertheless, in many respects the procedure related to obtaining the writ is *sui generis* (of its own kind or class; unique or peculiar). These writs are original proceedings in the courts of appeals (or Supreme Court or Court of Criminal Appeals) so most of the rules governing writs of mandamus are found in the Texas Rules of Appellate Procedure. [ T.R.A.P. 52.]

A writ of mandamus that forbids or prohibits an action is also known as a "writ of prohibition". [*DeLeon v. Aguilar*, 127 S.W.3d 1, (Tex. Crim. App. 2004).] These writs can be used in a civil matter or a criminal one. The power to grant writs of mandamus and prohibition was given to the Court of Criminal Appeals in 1978 by constitutional amendment, and the previous arrangement for the Supreme Court to issue the writs in criminal cases was repealed. [ Tex. Const. Art. 5, § 5(c); art. 4.04, V.A.C.C.P.; see *State v. Vance*, 571 S.W.2d 903, 905 (Tex. Ct. Crim. App. 1978, n.w.h.).]

The supreme court or, in vacation, a justice of the supreme court may issue a writ of mandamus to compel a statutory county court judge, a statutory probate court judge, or a district judge to proceed to trial and judgment in a case agreeable to the principles and usages of law, returnable to the supreme court on or before the first day of the term, or during the session of the term, or before any justice of the supreme court as the nature of the case requires. [ § 22.002(b), V.A.G.C.] A judge of a district court may, either in term time or vacation, grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari, and supersedeas and all other writs necessary to the enforcement of the court's jurisdiction. [ § 24.011, V.A.G.C.]

As in other civil suits, properly-related causes of action may be joined in a mandamus proceeding. Thus, where a party has a right or claim against another party, the full exercise or enjoyment of which is dependent on some ministerial act of a public officer, that officer properly may be joined in an action to establish a right to the claim, and in the one action obtain adjudication of the right or claim and enforcement of the official duty necessary to protect it. [*Hughes v. McDonald*, 122 S.W.2d 366 (Tex. Civ. App. Austin 1938, orig. proceeding).]

Although proceedings for a writ of mandamus are usually instituted in the name of the state, this procedure is a mere matter of form when they are prosecuted on behalf of a private relator. The private relator is the real party, and it accords with the Texas system of jurisprudence that the suit should proceed in his or her name. Accordingly, in such circumstances the suit may be prosecuted in the name of the state or in the name of the relator. [38 Tex. Jur. 3d Extraordinary Writs § 338.] Where the state is authorized to bring a mandamus suit, the attorney general has the power to institute it; under the attorney general's direction, the action may be brought by a county attorney in the name of the state. [*Yett v. Cook*, 115 Tex. 175, 268 S.W. 715 (1925, orig. proceeding).]

An “alternative writ of mandamus” may sometimes be used to command the party to whom it is directed either to do the act required to be performed or to show cause before the court why the party has not done so. Thus, in some circumstances, a court may issue an order in the alternative rather than peremptory form.[ 38 Tex. Jur. 3d Extraordinary Writs § 330.]

A party seeking an alternative writ of mandamus still must allege matters which *prima facie* entitle the party to such extraordinary remedy. No mandamus shall be granted by the district or county court on ex parte hearing, and any peremptory mandamus granted without notice shall be abated on motion.

[T.R.C.P. 694.]

### **§5.03.02 Requisites of Writ of Mandamus**

An original appellate proceeding seeking extraordinary relief--such as a writ of habeas corpus, mandamus, prohibition, injunction, or *quo warranto* -- is commenced by filing a petition with the clerk of the appropriate appellate court. The petition must be captioned "*In re* [name of relator]." [T.R.A.P. 52.1]

The petition must, under appropriate headings and in the order set out below, contain the following:

1. *Identity of Parties and Counsel*: a complete list of all parties, and the names, and addresses of all counsel.
2. *Table of Contents*: with references to the pages of the petition, indicating the subject matter of each issue or point, or group of issues or points.
3. *Index of Authorities*: authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.
4. *Statement of the Case*: should seldom exceed one page and should not discuss the facts. The statement must contain the following:
  - Concise description of the nature of any underlying proceeding (e.g., a suit for damages, a contempt proceeding for failure to pay child support, or the certification of a candidate for inclusion on an election ballot);
  - If the respondent is a judge, the name of the judge, the designation of the court in which the judge was sitting, and the county in which the court is located; and if the respondent is an official other than a judge, the designation and location of the office held by the respondent;
  - Concise description of the respondent's action from which the relator seeks relief;
  - If the petition is filed in the Supreme Court after a petition requesting the same relief was filed in the court of appeals;



- A. The date the petition was filed in the court of appeals;
  - B. The district of the court of appeals and the names of the justices who participated in the decision;
  - C. The author of any opinion for the court of appeals and the author of any separate opinion;
  - D. The citation of the court's opinion;
  - E. The disposition of the case by the court of appeals, and the date of the court of appeals' order.
5. *Statement of Jurisdiction:* state, without argument, the basis of the court's jurisdiction. If the Supreme Court and the court of appeals have concurrent jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so. If the petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.
6. *Issues Presented:* state concisely all issues or points presented for relief. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.
7. *Statement of Facts:* The petition must state concisely and without argument the facts pertinent to the issues or points presented. Every statement of fact in the petition must be supported by citation to competent evidence included in the appendix or record.
8. *Argument:* The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the appendix or record.
9. *Prayer:* The petition must contain a short conclusion that clearly states the nature of the relief sought.
10. *Certification:* The person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix

or record.

11. *Appendix:*

- Necessary Contents. The appendix must contain:
  - A. A certified or sworn copy of any order complained of, or any other document showing the matter complained of;
  - B. Any order or opinion of the court of appeals, if the petition is filed in the Supreme Court;
  - C. Unless voluminous or impracticable, the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based; and
  - D. If a writ of habeas corpus is sought, proof that the relator is being restrained.
- Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition. The appendix should not contain any evidence or other item that is not necessary for a decision.

A writ of mandamus must run singly to the person whose duty it is to perform the act required. However, a judgment awarding the writ conditioned on the performance of certain acts by persons who are not parties to the suit is not necessarily erroneous. [38 Tex. Jur. 3d Extraordinary Writs § 373.] Where the duty sought to be enforced is one owing by a municipal corporation, the writ may be directed to it in its corporate name. A writ against a board must go against all of the members of the board or against none. [*Id.*]

- Filing by Relator Required. Relator must file with the petition:
  1. A certified or sworn copy of every document that is material to the relator's claim for relief and that was filed in any underlying proceeding;

and

2. A properly authenticated transcript of any relevant testimony from any underlying proceeding, including any exhibits offered in evidence, or a statement that no testimony was adduced in connection with the matter complained.

(b) *Supplementation Permitted.* After the record is filed, relator or any other party to the proceeding may file additional materials for inclusion in the record. [T.R.A.P. 52.7.]

### **§5.03.03 Service**

Relator and any party who files materials for inclusion in the record must--at the same time--serve each party, including

1. Those materials not previously served on that party as part of the record in another original appellate proceeding in the same or another court; and
2. An index listing the materials filed and describing them in sufficient detail to identify them. [T.R.A.P.52.7.]

At or before the time of a document's filing, the filing party must serve a copy on all parties to the proceeding. But a party need not serve a copy of the record. Service on a party represented by counsel must be made on that party's lead counsel. Service may be personal, by mail, by commercial delivery service, or by fax. Personal service includes delivery to any responsible person at the office of the lead counsel for the party served. [T.R.A.P. 9.5.] The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

- If the respondent is a judge, the name of the judge, the designation of the court in which the judge was sitting, and the county in which the court is located; and
- If the respondent is an official other than a judge, the designation and location of the office held by the respondent [T.R.A.P. 52.3(d)(2).]

Service is complete as follows:

1. Service by mail is complete on mailing.
2. Service by commercial delivery service is complete when the document is placed in the control of the delivery service.
3. Service by fax is complete on receipt.

A document presented for filing must contain a proof of service in the form of either an acknowledgment of service by the person served or a certificate of service. Proof of service may appear on or be affixed to the filed document. The clerk may permit a document to be filed without proof of service, but will require the proof to be filed promptly. A certificate of service must be signed by the person who made the service and must state:

1. The date and manner of service;
2. The name and address of each person served; and
3. If the person served is a party's attorney, the name of the party represented by that attorney. [T.R.A.P. 9.5(e).]

#### **§5.03.04 Return**

A petition for mandamus which does not contain a certificate of service, does not identify the judge or court against whom the petitioner seeks mandamus relief, and does not include a certified or sworn copy of every document that is material to the petitioner's claim is deficient under the appellate procedural rules. Failure to timely file proof of service of a petition for writ of mandamus if the court requests it may result in denial of the petition.[*cf. In re Hensler*, 27 S.W.3d 719 (Tex.App.-Waco 2000, orig. proceeding) (*court of appeals requested missing certificate of service be filed within 10 days of the date of the letter, and, failing that, the petition was dismissed*).]

**FORM 9 Return of Preliminary or Temporary Injunction**  
 [Rule 689, T.R.C.P.]

**CONSTABLE'S RETURN**

Received on the \_\_ day of \_\_\_\_, 20 \_\_\_\_, at \_\_ o'clock \_\_.m. and executed on the \_\_ day of \_\_ 20 \_\_\_\_, at \_\_ o'clock \_\_.m. by delivering subpoena \_\_\_\_\_, in person, a true copy of this preliminary or temporary injunction with plaintiff's complaint attached. Physical address of delivery: \_\_\_\_\_, City County, Texas, Zip Code. If not executed, state why:

Additional Information and Explanation: (Return receipt attached, additional explanation of alternative service authorized by court, reason returned unexecuted, etc.)

MILEAGE: \_\_\_\_ FEE: \_\_\_\_

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

## VI. WRITS – PRE-JUDGMENT FOR PROPERTY

### §6.01 WRIT OF ATTACHMENT

#### §6.01.01 Definition and Issuance

A writ of attachment is a prejudgment attachment in which the debtor's property is seized so that if the creditor ultimately prevails, the creditor will be assured of recovering on the judgment through the sale of the seized property. [*Black's Law Dictionary* 136 (8<sup>th</sup> ed. 2004).] A writ of attachment may be levied only on property that by law is subject to levy under a writ of execution. [§ 61.041, T.C.P.R.C.] The property need not be in the debtor's possession to be attached. [*Gulf Oil Co. v. First Nat. Bank of Hereford*, 503 S.W. 2d 300 (Tex. Civ. App. – Amarillo 1973, n.w.h.).] The writ of attachment commands the constable to attach and hold property. When an officer sets apart the property, a levy has occurred. The terms "levy" and "Seizure" are synonymous. In any event, it is the act of making the levy that gives effect to the writ of attachment.

The plaintiff may file an application for the issuance of a writ of attachment either at the commencement of a suit or at any time during its progress. [Rule 592, T.R.C.P.] A writ of attachment may not be issued before a suit has been initiated; however, if citation is served by publication, an attachment may be issued and levied on land after the publication of the citation is complete. [*Id.*; *Milburn v. Smith*, 33 S.W. 910 (Tex. Civ. App. 1895, n.w.h.).] The writ is issued by written order of the court after a hearing, which may be *ex parte*. [Rule 592, T.R.C.P.] In a writ of attachment levy the defendant owns and generally possesses the property. [Rules 592-609, T.R.C.P.] Attached property taken from the defendant is kept safe in the custody of the officer. [Rule 593, T.R.C.P.]

A writ of attachment may issue even though the plaintiff's debt or demand is not due. [§ 61.044, T.C.P.R.C.] The proceedings relating to the writ shall be as in other cases, except that final judgment may not be rendered against the defendant until the debt or demand becomes due. [*Id.*] Note that nothing in the Civil Practice and Remedies Code prevents issuance of a writ of attachment in a suit founded in tort or on an unliquidated demand against an individual, partnership, association, or corporation on whom personal service cannot be obtained in this state. [§ 61.005, T.C.P.R.C.]

A writ of attachment may be issued by the court in suits filed to cover the cost of counseling and medical needs of the plaintiff after the occurrence of a sexual

assault [ §61.0021 T.C.P.R.C. ]. The suit for personal injury must arise from a violation of Texas Penal Code Sections 22.011(a)(2) (sexual assault of a child), 22.021(a)(1)(B) (aggravated sexual assault of a child), 21.02 (continuous sexual abuse of young child or children), or 21.11 (indecent with a child).

The judge or clerk of a district or county court or a justice of the peace may issue a writ of original attachment returnable to the issuing court. [§ 61.021, T.C.P.R.C] When applying for a writ of attachment, the plaintiff or plaintiff's agent or attorney must file with the court an affidavit that states:

1. The general grounds for issuance;
2. The amount of the demand; and
3. The specific grounds for issuance. The affidavit shall be filed with the papers of the case. [§ 61.022, T.C.P.R.C.]

Note that the remedy of attachment is considered "oppressive and harsh and therefore is subject to rigid rules of construction." [*Carpenter v. Carpenter*, 476 S.W. 2d 469 (Tex. Civ. App. 1972, n.w.h.)] This means that the rules governing attachment must be followed exactly.

#### **§6.01.02 Plaintiff's Attachment Bond**

Before the writ of attachment will issue the plaintiff must execute a bond that:

1. Has two or more good and sufficient sureties;
2. Is payable to the defendant;
3. Is in an amount fixed by the judge or justice issuing the writ;
4. Is conditioned on the plaintiff prosecuting the suit to effect and paying all damages and costs adjudged against plaintiff for wrongful attachment. [§ 61.023, T.C.P.R.C.]

The plaintiff shall deliver the bond to the officer issuing the writ for that officers' approval. [*FDIC v. Texarkana Nat. Bank*, 673 S.W. 2d 262, 263 (Tex. App. – Texarkana 1984, n.w.h.)(holding, "As the writ of attachment was issued without bond, it was void.")] The bond and affidavit requirements are restated in the Rules of Civil Procedure. Rules 592 and 592a, T.R.C.P]

**§6.01.03 Requisite of a Writ of Attachment**

A writ of attachment shall:

1. Be styled "The State of Texas" [Rule 594, T.R.C.P.];
2. Be directed to any sheriff or constable within the State of Texas [Rule 593, T.R.C.P.];
3. State the cause number;
4. State the issuing court and location;
5. State the name of the parties;
6. State the date of issuance;
7. State the name of the defendant;
8. State the seizure amount;
9. Command the officer to attach and hold, unless replevied, subject to further order of the court, so much of the property of the defendant, of a reasonable value in approximately the amount fixed by the court as shall be found within the officer's county [Rule 593, T.R.C.P.]; and
10. Advise the defendant of the right of replevy. [Rule 594, T.R.C.P.]

There shall be prominently displayed on the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents, the following:

"To \_\_\_, Defendant:

"You are hereby notified that certain properties alleged to be owned by you have been attached. If you claim any rights such property, you are advised;

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPOERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT." [Rule 598a, T.R.C.P.]



**§6.01.04 Service**

The writ of attachment shall be dated and tested as other writs, and may be delivered to the sheriff or constable by the officer issuing it, or the officer may deliver to the plaintiff or the plaintiff's agent or attorney for that purpose. [Rule 596, T.R.C.P.]. The writ of attachment must be directed to the sheriff or any constable within the State of Texas. The sheriff or constable receiving the writ shall immediately proceed to execute the writ by levying upon so much of the property of the defendant subject to the writ, and found within the officer's county as may be sufficient to satisfy the command for the writ. [Rule 597, T.R.C.P.] Writs of attachment may be levied on any day of the week. [Rule 6 T.R.C.P.]

The defendant is served in any manner prescribed for service of citation, or as provided in Texas Rule of Civil Procedure 21a. [Rule 598a, T.R.C.P.] The plaintiff may also request that several writs be issued at the same time or in succession and sent to different counties, until enough property is attached to satisfy the writ. [Rule 595, T.R.C.P.]

**§6.01.05 Defendant's Rights – Writ of Attachment**

The rules provide that a defendant has the right to replevy the attached property at any time before judgment. [Rule 599, T.R.C.P.]. A defendant seeking to replevy attached property must post a bond as directed by statute, to be approved by the officer who levied the writ, payable to the plaintiff. The bond amount is fixed by the court, or, at the defendant's option, for the value of the property sought to be replevied (to be estimated by the officer), plus one year's interest. Either side may contest the amount of the bond that is set. The defendant also has the right to ask the court for a substitution of property of equal value as the attached property. [*Id.*]

**§6.01.06 Levy**

An officer must proceed without delay to levy on the property of the defendant once the writ of attachment is received. [Rules 598, 637, T.R.C.P.] The officer must call upon the defendant, if defendant can be found, or if absent, upon defendant's agent within the county, if known, to point out property to be levied upon if the writ does not specify the property to be seized. The levy shall first be made on the property pointed out by the defendant. [Rule 637, T.R.C.P.] The officer may require that the defendant designate additional property for attachment if, in the opinion of the officer, the original designation would not satisfy the writ. If the defendant does not designate property then that officer may levy on property subject to execution [*Id.*]

**§6.01.07 Replevy**

When property has been replevied, the constable shall deliver the replevy bond to the clerk or justice of the peace. [Rule 606, T.R.C.P.] Additionally, when the property levied on is claimed, replevied or sold, or disposed of after the writ has been returned, the officer having the custody of the property shall immediately make a report in writing, signed in the officer's official capacity, to the clerk or justice of the peace. The report must show what happened to the property. [Rule 607, T.R.C.P.]

**§6.01.08 Return**

An officer's return for writ of attachment for property shall:

1. State the date and time received;
2. Record the date and time of seizure;
3. Record the complete address of the delivery of notice;
4. Describe completely all actions taken;
5. Describe all seized property with sufficient certainty as to identify it;
6. If property replevied, deliver replevy bond to the clerk of issuing court;
7. Contain officer's signature in officer's official capacity; and
8. Be returned to court at or before 10 o'clock of the Monday next after fifteen days from the date of issuance. [Rule 606, T.R.C.P.]

Clerical errors in the return may be amended only if application is made by the officer in writing to the judge or justice of the appropriate court. Notice of the application shall be given to the defendant. [Rule 609, T.R.C.P.]

**§6.01.09 Officer's Liability**

Generally, an officer is not liable for damages resulting from execution of a writ if the officer acts in good faith in executing the writ and uses reasonable diligence in performing official duties. [§ 7.003, V.A.C.P.R.C. (providing, "Except as provided by Section 34.061, an officer is not liable for damages resulting from the execution of a writ issued by a court of this state if the officer: (1) in good faith executes the writ as provided by law and by the Texas Rules of Civil Procedure; and (2) uses reasonable diligence in performing his official duties.")].] Additionally, an officer cannot require that a bond be posted for the officer's indemnification

before executing a writ. [*Id.* At (b) (providing, “An officer shall execute a writ issued by a court of this state without requiring that bond be posted for the indemnification of the officer.”).]

In spite of the statutory protection given to constables, they may still be found negligent if they fail to properly care for property they have levied on. The officer and officer’s sureties are liable for the value of the property lost or damaged. [§ 34.061 (b), V.A.C.P.R.C..]

## **§6.02 WRIT OF SEQUESTRATION**

### **§6.02.01 Definition of Issuance**

Sequestration is the temporary seizure by the constable of specific property to which a party to a suit has a claim of ownership. [Rule 699, T.R.C.P]. It is the process by which property is removed from the possessor pending the outcome of a dispute in which two or more parties contend for it. [*Black’s Law Dictionary* 1397 (8<sup>th</sup> ed. 2004).] A writ of sequestration may be issued at the initiation of a suit or at any time before final judgment. [§62.002, T.C.P.R.C.] A district or county court judge or a justice of the peace may issue a writ of sequestration returnable to the issuing court. [§62.021, T.C.P.R.C.]

No writ of sequestration shall issue until the party that has applied for it files a bond payable to the defendant in an amount fixed by the court. The bond is required to ensure that the defendant will be paid for the loss of his or her property if the plaintiff does not carry through with his or her lawsuit. After notice to the opposite party, either before or after issuance of a writ, the defendant or plaintiff may file a motion to increase or reduce the amount of bond. [Rule 698, T.R.C.P.]

### **§6.02.02 Requisites of a Writ of Sequestration**

A writ of sequestration shall:

1. Be styled “The State of Texas”;
2. Be directed to any sheriff or constable with the State of Texas;
3. State the cause number;
4. State the names of plaintiff and defendant;
5. Command the officer to take described property into his possession and keep it safely, unless replevied or further ordered by the court;

6. Contain the required statement of defendant's rights;
7. State the amount of replevy bond;
8. State specific facts of plaintiff's case;
9. State the amount in controversy;
10. State facts justifying issuance of writ;
11. Be signed by district clerk, county clerk, justice of the peace clerk, or the justice of the peace; and
12. Bear the seal of the court, if issued by county or district court. [Rules 15 and 699, T.R.C.P.]

There shall be a notice prominently displayed on the face of the copy of the writ served on the defendant, in ten-point type and in a manner calculated to advise a reasonably attentive person of its contents that states:

"To \_\_\_, Defendant:

"You are hereby notified that certain properties alleged to be owned by you have been sequestered. If you claim any rights in such property, you are advised:

"YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT." [Rule 700a, T.R.C.P.]

### **§6.02.03 Service**

The defendant is served in any manner prescribed for service of citation, or as provided in Texas Rule of Civil Procedure 21a. [Rule 700a, T.R.C.P.] Service shall include a copy of the writ, the application, accompanying affidavits, and orders of the court as soon as practicable after the property is seized. [*Id.*] Writs of sequestration may be served on any day of the week. [Rule 6, T.R.C.P.]

### **§6.02.04 Levy and Replevy**

The writ of sequestration shall command the officer to take possession of the property described in the writ, and keep it until directed to do otherwise by the court, unless the property is replevied. [Rule 699, T.R.C.P.] The property to be sequestered must be described with such certainty that it may be identified and distinguished from property of a like kind. [Rule 696, T.R.C.P.] Note, before the

constable can take the property into the constables' possession, a proper surety bond must be filed with the court. [Rule 698, T.R.C.P.] The court must include in its order granting the application for the writ specific findings of fact that support the statutory grounds for the writ. [§62.001, T.C.P.R.C.; Rule 696, T.R.C.P.]

If the defendant fails to replevy perishable property within ten days after the levy, the plaintiff or defendant may ask that the property be sold. The party seeking sale shall make affidavit and ask the court to order the sale of property. [Rule 710, T.R.C.P.; see Rule 713, T.R.C.P. (allowing sale of perishable property in a suit for debt or demand not yet due; Rule 714, T.R.C.P. (purchaser in a sale of perishable property in a suit for debt not yet due) shall post bond payable to officer of not less than double the amount of purchase.).] The officer having possession of the property shall certify to the truth of the affidavit. [*Id.*] The sale of perishable property under a writ of sequestration takes place in the same manner as an execution. [Rule 711, T.R.C.P.] The officer making the sale shall return the order of sale (see "Writs – Post Judgment for Property," Order of Sale, § 7.04) and the proceeds within five days of the sale. [Rule 711, T.R.C.P.]

#### **§6.02.05 Defendant's Rights**

The defendant has a right to replevy the sequestered property or proceeds from the sale at any time before judgment by giving a proper bond. [Rule 701 T.R.C.P.; see *Commercial Sec. Co. v. Thompson*, 239 S.W. 2d 911, 914 (Tex. App.-Fort Worth 1951, n.w.h.) (stating "a replevy bond is to insure that the property will be forthcoming after judgment in the same condition as replevied").] The Rules of Civil Procedure contain individual bond requirements for personal and real property. [See Rules 702 and 703 T.R.C.P.]

Within ten days after notice by personal service of the writ, the defendant may deliver the personal property in question to the plaintiff or officer who levied the writ. [Rule 705, T.R.C.P.] The defendant has the exclusive right to replevy the property within the first ten days after the service of notice of the writ. [Rule 708, T.R.C.P.] After the first ten days after the time of judgment, the defendant continues to have a right to replevy as does the plaintiff. [*Id.*]

Within ten days after the final judgment, the defendant may deliver the personal property to the plaintiff or to the officer who levied the sequestration, or to the officer demanding the property under execution on the judgment. The officer is required to give a receipt to the defendant for the property. [Rule 705 T.R.C.P.] Return of the property will not prejudice the rights of the plaintiff under the replevy bond. [*Id.*] When the property is given back to the officer who

sequestered it, the officer shall deliver it to the plaintiff upon demand or will hold or dispose of the property as ordered by the court. [Rules 705 and 706, T.R.C.P.] A sale will not affect the plaintiff's rights under the bond. [*Id.*] The replevy bond is very important to the plaintiff because it ensures that the plaintiff will receive the value of the property replevied plus the fruits, hire, or revenue thereof. [Rule 702, T.R.C.P.] For this reason, the rules are explicit in stating that the bond is not affected simply because the property has been returned.

If the defendant does not return the replevied property, they execution shall issue upon the judgment as in other cases. [Rule 707, T.R.C.P.] The defendant also has the right to ask the court by sworn, written motion to dissolve or modify the writ of sequestration. [§§62.041-.045 T.C.P.R.C.; Rule 712a, T.R.C.P.]

#### **§6.02.06 Plaintiff's Rights**

The plaintiff has the right of replevy. This process only occurs when the defendant fails to replevy the property within ten days after the levy of the writ. [Rule 708 T.R.C.P.]. The plaintiff must file a bond in an amount fixed by the court issuing the writ. The sureties on the bond are liable for the value of the property when judgment is against the plaintiff but the bond is not chargeable for depreciation in market value of the property. [Rules 702 and 709 T.R.C.P.] The plaintiff may further condition the bond pursuant to the provisions of Rule 708, in which case the plaintiff shall not be required to give additional bond to replevy unless so ordered by the court. [Rule 698, T.R.C.P.]

#### **§6.02.07 Return**

An officer's return for a writ of sequestration shall;

1. State the date and time received;
2. Record name of defendant;
3. Record to whom delivery was made;
4. Record the complete address of the delivery of writ;
5. Describe all seized property with sufficient certainty as to identify it;
6. If not executed, state what diligence was used in attempting execution and state the reasons not executed;
7. If property is replevied, the officer shall deliver replevy bond to the clerk of issuing court;

8. State the disposition of all property;
9. Officer's signature in his official capacity;
10. Return to court of issuance or to attorney of record if requested. [Rule 15, T.R.C.P.]

### **§6.02.08 Liability**

An officer who executes a writ of sequestration must care for and manage in a prudent manner the property kept in custody. [§ 62.061, V.A.C.P.R.C.; see, *Multi-Moto Corp. v. ITT Comm. Fin. Corp.*, 806 S.W. 2d 560, 569 (Tex. App. – Dallas 1990 writ denied)(stating, “[n]either party controls the manner in which the constable shall perform his obligation of looking after the property. Further, the constable acts as neither the agent nor the servant of either party.”).] If the officer entrusts the property to another, the officer is still responsible for the acts of such person relating to the property. [§ 62.061(b), V.A.C.P.R.C.] The officer is liable for damage to the sequestered property from the officer's neglect or mismanagement or from the neglect or mismanagement of a person to whom the officer entrusts the property. [*Id.* at (c).]

An officer is entitled to compensation and reasonable charges for managing or caring for sequestered property, which shall be taxed and collected as a cost of court. [§ 62.063, V.A.C.P.R.C.]

## **§6.03 TRIAL OF RIGHT OF PROPERTY**

### **§6.03.01 Definition and Issuance**

A trial of right of property is a statutory proceeding to try the validity of a person's claim only to personal property that has been seized under the process of law, e.g., a writ of attachment, writ of sequestration, writ of execution, or other like writ, when the person claiming the personal property is not a party to the writ. [Rule 717, T.R.C.P.]. Proceedings for trial of right of property shall in no case prevent the plaintiff in the writ from having a levy made upon other property of the defendant. [Rule 734, T.R.C.P.].

A person trying to recover personal property seized under a writ may apply for a trial of right of property in the court which issued the writ, [Rule 717, T.R.C.P.] or if no suit is pending, the court of competent jurisdiction (monetary). The person claiming the property must be either the owner of the property or entitled to its possession at the time of levy. [*White v. Jacobs*, 1 S.W. 344, 345 (Tex. 1886)].

Since the claim must be based on ownership or right to possession, a lien holder cannot bring a trial of right to property suit unless the lien holder was in possession of the property at time of levy. [*White v. Jacobs*, 1 S.W. 344, 345 (Tex. 1886)], and the lien gave the lien holder the right possess the property at the time of the levy. [*State Exchange Bank v. Smith*, 166 S.W. 668 (Tex. Civ. App. – Dallas 1914, writ ref'd.).] Trial of right of property suit cannot be brought to determine the priority of liens on property. [*Long v. Castaneda*, 475 S.W. 2<sup>nd</sup> 578, 782 (Tex. Civ. App. – Corpus Christi 1971, writ ref'd n.r.e.).]

No property shall be delivered to the claimant except on written order of the court after a hearing pursuant to Rule 718. The court in its order granting the application shall make specific finding of facts to support the statutory grounds found to exist and shall specify the amount of the bond required of the claimant. [Rule 717, T.R.C.P.]

No property shall be put in the custody of the claimant until the claimant has filed with the officer who made the levy, a bond in a amount fixed by the court's order equal to double the value of the property claimed, payable to the plaintiff in the writ, with sufficient surety or sureties as provided by statute to be approved by the officer. [Rule 719, T.R.C.P.] The bond must be conditioned that the claimant will return the property to the officer in as good condition as received and shall pay the reasonable value of the use, hire, increase, and the fruits of the property from the date of the bond. [*Id.*]

Where any claimant has obtained possession of property and fails to establish his right of possession, judgment may be rendered against the claimant and his sureties for the value of the property with legal interest from date of bond. [Rule 730, T.R.C.P.] Such judgment shall be rendered in favor of plaintiff or defendant in the writ or of several plaintiffs or defendants, if more than one and shall fix the amount of the claim of each. [*Id.*]

Within ten days from the rendition of judgment, the claimant shall return the property in as good condition as he received it, and pay for the use of the property together with damages and costs. Such delivery and payment shall operate as a satisfaction of judgment. [Rule 732, T.R.C.P.]

If the judgment is not satisfied by the return of the property, then after expiration of ten days from date of judgment, execution shall issue in the name of plaintiff or defendant for the amount of the claim, or of all the plaintiffs or defendants for the sum of their several claims, providing the amount of judgment shall inure to the benefit of any person who shall show superior right or title to the property claimed



as against the defendant, but if such judgment be for a less amount than the sum of all the plaintiffs' or defendants' claims, then the respective rights and priorities of the plaintiffs and defendants shall be fixed and adjusted. [Rule 731, T.R.C.P.]

A claim made to the property, under provisions of the Texas Rules of Civil Procedure Rules 717 to 734, shall operate as a release of all damages by the claimant against the officer who levied upon the property claimed. [Rule 733, T.R.C.P.]

### **§6.03.02 Requisites of a Trial of Right of Property**

A trail of right of property notice shall:

1. Be styled The State of Texas [Rule 15, T.R.C.P.];
2. Be directed to the named parties [See, Rule 718, T.R.C.P.];
3. Be signed by the district clerk, county clerk, or justice of the peace [Rule 15 T.R.C.P.]
4. Bear the seal of the court if issued by county or district court [Rule 15, T.R.C.P.]; and

Describe the property as completely as possible that the claim is made against. [See Rule 717, T.R.C.P.]

### **§6.03.03 Service**

The receiving officer shall stamp the date and time the officer received the notice. A notice of Trial of Right of Property shall be delivered by a sheriff or constable without delay by personal service only to the plaintiff on whom the original writ for the property was levied or removed. The notice can be delivered any day of the week, except Sunday. [Rule 6, T.R.C.P.] The officer shall follow the directions from the issuing court, including orders concerning the care, preservation, or disposition of property, or the proceeds of the property if directed to sell the same. [Rule 718, T.R.C.P.] The officer shall endorse upon the original writ (if still in officer's possession) that such claim has been made and by whom and attach a copy of the order with the approved bond, if applicable. [Rule 722, T.R.C.P.] The officer receiving the bond shall endorse on the bond the value of the property as assessed by the officer. [Rule 720, T.R.C.P.] The officer shall return the bond and the original writ to court of issuance, noting the issuance of Trial of Right of Property. If not delivered, officer must note what diligence was used to try to deliver and reasons why it was not delivered. [Rule 722, T.R.C.P.]

When the writ under which the levy was made was issued by a justice of the peace or court of a county other than that in which the levy was made, the officer receiving the bond shall endorse on the bond the value of the property as assessed by the officer. [Rule 721, T.R.C.P.]. The officer shall return the bond with a copy of the writ to the proper court having jurisdiction to try the claim. [*Id.*]

#### **§6.03.04 Return**

The officer's return shall:

1. State date and time received;
2. State complete address of delivery;
3. Record disposition of property;
4. Be endorsed on original writ, if still in possession, that such claim has been made and by whom;
5. Attach approved bond, if applicable;
6. Return original writ forthwith to court issuance noting the issuance of Trial of Right of Property with all actions of original writ to date;
7. If not delivered, state the diligence used in attempting delivery and the reasons not delivered;
8. Bear the officer's signature in the officer's official capacity; and
9. Be returned to issuing court.

**FORM 10 Return of Service of Writ of Attachment – Personal Property**  
 (Page 1) [Rule 606, T.R.C.P.]

**WRIT OF ATTACHMENT**

(The copy of the Writ of Attachment served upon the defendant must comply with Rule 568a, Rules of Civil Procedure.)

CAUSE NO. \_\_\_\_\_

_____	IN THE _____	COURT
PLAINTIFF	§	
	§	
V.	§	_____ (TYPE OF COURT)
	§	
_____	§	_____
V.	§	COUNTY, TEXAS

**CONSTABLE'S RETURN**

Received on the \_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_, at \_\_ o'clock \_\_\_\_ .m. and executed on the \_\_ day of \_\_ 20 \_\_\_\_\_, at \_\_ o'clock \_\_\_\_ .m. by levying upon and attaching the following described personal property: (Attach additional sheets(s) if necessary.)

\_\_\_\_\_

\_\_\_\_\_

belonging to defendant \_\_\_\_\_

Located at \_\_\_\_\_ City \_\_\_\_\_

\_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

The above described property was placed in storage at: \_\_\_\_\_

\_\_\_\_\_

Notice to defendant was by \_\_\_\_\_ at \_\_\_\_\_, \_\_\_\_\_,

\_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

Was property replevied? Yes \_\_\_ No \_\_\_ If yes, attach copy of bond

If yes, by whom? \_\_\_\_\_

If yes, has bond been returned to court? Yes \_\_\_\_\_ No \_\_\_\_\_

(continue)

**FORM 10 Return of Service of Writ of Attachment – Personal Property**  
 (Page 2)

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_  
 DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

**FORM 11 Return of Service of Writ of Attachment – Perishable Property**  
 (Page 1) [T.R.C.P., Rule 606]

CAUSE NO. \_\_\_\_\_

_____	IN THE	_____	COURT
PLAINTIFF	§		
	§		
V.	§	_____	(TYPE OF COURT)
	§		
_____	§	_____	
V.	§		COUNTY, TEXAS

**CONSTABLE'S RETURN**

Received on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_, at \_\_\_\_ o'clock \_\_\_\_ .m. and executed on the \_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_, at \_\_\_\_ o'clock \_\_\_\_ .m. by levying upon and attaching the following described personal property: (Attach additional sheets(s) if necessary.) \_\_\_\_\_

\_\_\_\_\_ belonging to defendant \_\_\_\_\_  
 located at \_\_\_\_\_ City \_\_\_\_\_  
 \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

The above described property was placed in storage at: \_\_\_\_\_

Notice to defendant was by \_\_\_\_\_ at \_\_\_\_\_, \_\_\_\_\_,  
 \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

Was property replevied? Yes \_\_\_\_ No \_\_\_\_ If yes, attach copy of bond

If yes, by whom? \_\_\_\_\_

If yes, has bond been returned to court? Yes \_\_\_\_\_ No \_\_\_\_\_

Was Order of Sale issued by court? Yes \_\_\_\_\_ No \_\_\_\_\_ If yes, attach copy of order.

(continued)

**FORM 11 Return of Service of Writ of Attachment – Perishable Property**  
 (Page 2)

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_ COUNTY, TEXAS

BY: \_\_\_\_\_  
 DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

**FORM 12 Return of Service of Writ of Attachment – Real Property**  
 (Page 1) [T.R.C.P., Rule 606]

CAUSE NO. \_\_\_\_\_

_____	IN THE _____	COURT
PLAINTIFF	§	
	§	
V.	§	_____ (TYPE OF COURT)
	§	
_____	§	_____ COUNTY, TEXAS
V.	§	

**CONSTABLE'S RETURN**

Received on the \_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_, at \_\_ o'clock \_\_\_\_ .m. and executed on the \_\_\_\_ day of \_\_\_\_ 20 \_\_\_\_\_, at \_\_ o'clock \_\_\_\_ .m. by levying upon and attaching the following described real property: (State complete legal description. Attach additional sheet(s) if necessary)

\_\_\_\_\_  
 \_\_\_\_\_

Notice to defendant was by \_\_\_\_\_ at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

Copy of writ and notice of attachment filed with the \_\_\_\_\_, County Clerk of \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_ Date of filing \_\_\_\_\_, 20\_\_\_\_. Time of filing \_\_\_\_\_ a.m./p.m.

Was writ quashed or vacated? Yes \_\_\_\_\_ No \_\_\_\_\_ If yes, attach copy of Order

Was property replevied? Yes \_\_\_\_\_ No \_\_\_\_\_ If yes, attach copy of bond  
 If yes, by whom? \_\_\_\_\_

If yes, has bond been returned to court? Yes \_\_\_\_\_ No \_\_\_\_\_.

If yes, is copy of bond attached? Yes \_\_\_\_\_ No \_\_\_\_\_.

Was Order of Sale issued? Yes \_\_\_\_\_ No \_\_\_\_\_ If yes, attach copy of Order of Sale:

(continued)

**FORM 12 Return of Service of Writ of Attachment – Real Property**  
 (Page 2)

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_  
 DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME



**FORM 13 Return of Service on Writ of Sequestration – Personal Property**  
 (Page 1) [T.R.C.P., Rules 704,15]

CAUSE NO. \_\_\_\_\_

\_\_\_\_\_ IN THE \_\_\_\_\_ COURT  
 PLAINTIFF §  
 §  
 V. § (TYPE OF COURT)  
 §  
 \_\_\_\_\_ §  
 V. § COUNTY, TEXAS

**CONSTABLE'S RETURN**

Came to hand on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ .m. and  
 executed on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_ .m. by taking  
 possession of the following described personal property: (Attach additional  
 sheet(s) if necessary.)

\_\_\_\_\_  
 \_\_\_\_\_  
 belonging to Defendant, \_\_\_\_\_, located at \_\_\_\_\_  
 \_\_\_\_\_ in \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_

The above described personal property was stored at: \_\_\_\_\_  
 Notice to defendant was by \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_,  
 \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

Was property replevied? Yes \_\_\_\_\_ No \_\_\_\_\_. If yes, attach copy of bond.  
 If yes, by whom? \_\_\_\_\_  
 If yes, has bond been returned to court? Yes \_\_\_\_\_ No \_\_\_\_\_.  
 If not delivered, state why \_\_\_\_\_

Additional Information and Explanation: (Return receipt attached, additional  
 explanation of alternative service authorized by court, reason returned  
 unexecuted, etc.)

(continued)

**FORM 13 Return of Service on Writ of Sequestration – Personal Property**  
 (Page 2)

MILEAGE: \_\_\_\_\_

FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

**FORM 14 Return of Service of Writ of Sequestration – Perishable Property**  
(Page 1) [T.R.C.P., Rules 704,15]

CAUSE NO. \_\_\_\_\_

_____	IN THE _____	COURT
PLAINTIFF	§	
	§	
V.	§	_____ (TYPE OF COURT)
	§	
_____	§	_____
V.	§	COUNTY, TEXAS

**CONSTABLE'S RETURN**

Received on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_m.  
and executed on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_m. by  
taking possession of the following described perishable property: (Attach  
additional \_\_\_\_\_ sheet(s) if \_\_\_\_\_ necessary)

\_\_\_\_\_ belonging to Defendant, \_\_\_\_\_, located at \_\_\_\_\_  
\_\_\_\_\_ in \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_

The above described personal property was stored at: \_\_\_\_\_  
Notice to defendant was by \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_,  
\_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

Was property replevied? Yes \_\_\_\_\_ No \_\_\_\_\_. If yes, attach copy of bond  
If yes, by whom? \_\_\_\_\_  
If yes, has bond been returned to court? Yes \_\_\_\_\_ No \_\_\_\_\_.

Was Order of Sale issued by court? Yes \_\_\_ No \_\_\_ If yes, attach copy of Order. If  
not delivered, \_\_\_\_\_ state \_\_\_\_\_ why:  
\_\_\_\_\_

Additional Information and Explanation: (Return receipt attached, additional  
explanation of alternative service authorized by court, reason returned  
unexecuted, etc.) \_\_\_\_\_

(continued)

**FORM 14 Return of Service of Writ of Sequestration- Perishable Property**  
 (Page 2)

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

## VII. WRITS – POST – JUDGMENT FOR PROPERTY

### §7.01 WRIT OF *CERTIORARI*

#### §7.01.01 Definition and Issuance

A writ of *certiorari* is an order issued by an appellate court to a lower court to produce a certified record so that the appellate court may review the case. [*Black's Law Dictionary* 241 (8<sup>th</sup> ed. 2004).] The final judgment of a small claims court may be appealed to the county court or county court at law in the same manner as appeals from the justice court to the county court. [§ 28.052, V.A.G.C.] The final judgment from a justice court may be appealed to the county court for trial *de novo* either: (1) directly [§ 51.001, V.A.C.P.R.C.]; or (2) by writ of *certiorari*. [§ 51.002a, V.A.C.P.R.C.; Rules 575-591, T.R.C.P.]

If the writ is denied, the court essentially refuses to hear the appeal, and, in effect, the judgment below stands unchanged. If the writ is granted, then it has the effect of ordering the lower court to certify the record and send it up to the higher court which has used its discretion to hear the appeal. The function of the writ is to correct errors of law on admitted or established facts or to address jurisdictional problems

The writ cannot be granted unless the applicant or some person acting for the applicant makes an affidavit establishing sufficient cause to grant the writ. [Rule 577, T.R.C.P.] In a case heard originally in justice court an application for a writ of *certiorari* must contain facts that show that either the justice of the peace did not have jurisdiction, or that injustice was done to the applicant by the final determination of the suit, and that the injustice was not caused by the applicant's own inexcusable neglect. [Rules 577 and 578, T.R.C.P.]

The writ shall not be granted after ninety days from the time the final judgment is signed. [Rule 579, T.R.C.P.] The applicant is also required to post a bond with two or more sureties that is payable to the adverse party. [Rule 580, T.R.C.P.] The writ of *certiorari* is issued by order of the county or district court judge. [Rule 575, T.R.C.P.] As soon as the affidavit, order of the judge, and bond have been filed, the clerk shall issue the writ. [Rule 582, T.R.C.P.]

#### §7.01.02 Requisites for a Writ of *Certiorari*

A writ of *certiorari* shall be in the following form:

1. Be styled "The State of Texas";

2. Be directed to any sheriff or constable;
3. Name of the court of issuance;
4. Contain the cause number;
5. Be signed by the clerk of the court;
6. Bear the seal of the court. [Rule 15, T.R.C.P.]

The writ shall command the justice to immediately make and certify a copy of the entries in the cause of the docket, and immediately send the copy with the papers in the court's possession and a copy of the bill of costs to the proper court. [Rule 576, T.R.C.P.]

#### **§7.01.03 Service**

A sheriff, constable, or their deputies, shall deliver the service copy of the writ to the judge of the court named on the writ. [See Rule 21, T.R.C.P.] Personal delivery is required and may be delivered at day of the week except Sunday. When a writ of *certiorari* has been issued, the clerk shall issue a citation for the adverse party. [Rule 584, T.R.C.P.] No other action is required of the officer.

#### **§7.01.04 Return**

The delivering officer shall complete an officer's return which shall include the following:

1. Date and time received;
2. Date and time of delivery;
3. Location of delivery;
4. Name of the judge to whom delivery was made;
5. If not executed, the diligence used to try to execute and the reason(s) not executed;
6. Executing officer's signature;
7. Department name; and,
8. Return to the issuing court. [Rules 16, 105, 107, and 536a, T.R.C.P.]

**§7.02 WRIT OF EXECUTION****§7.02.01 Definition and Issuance**

Execution provides one way for district, county, and justice courts to enforce their judgments. [Rule 621, T.R.C.P.] The successful party or the party's attorney must make application for the writ [*Id.*]. The issuance of the writ will take place if no *supersedeas* bond (a bond executed to stop the execution of the writ) or notice of appeal, as required of agencies exempt from filing bonds, has been filed [*Id.*] The writ of execution generally commands an officer to take property (real or personal) in satisfaction of a judgment against the losing party ("judgment debtor"). [*Rooth v. Dagget*, 869 S.W. 2d 634, 635 (Tex. App. –Houston (14<sup>th</sup> Dist.) 1994, n.w.h.).] Note that the winning party ("judgment creditor") in a suit has a powerful discovery tool that allows the judgment creditor to find property to execute on. [Rule 621a, T.R.C.P.]

The clerk of the court shall tax the costs in every case in which a final judgment has been rendered and shall issue execution to enforce the judgment and collect the costs. [Rule 622, T.R.C.P.] Execution issues only after a judgment becomes final: 30 days in district and county court; 10 days in justice court. [Rule 627, T.R.C.P.] The writ of execution lien does not attach until levy has occurred. Levy occurs when the constable seizes the property of the defendant pursuant to the writ of execution. [See Rule 637, T.R.C.P.; *Redlick v. Williams*, 5 S.W. 375 (Tex. 1887).] Levy upon personal property means seizure of the property, either actual or constructive. [*Voelkel-McClain Co. v. First Nat. Bank*, 296 S.W. 970, 972 (Tex. Civ. App. –Dallas 1927, no writ).]

A plaintiff may have execution issued before 30 days after final judgment is signed if the plaintiff can show by affidavit that the defendant is about to remove defendant's personal property subject to execution out of the county or to transfer or secrete the property in order to defraud creditors. [Rule 628, T.R.C.P.] If applicable, Rule 628 probably will be referenced on the face of the execution.

Several rules govern execution cases where either the plaintiff or defendant dies before execution occurs. [Rules 623-626, T.R.C.P.] When an executor, administrator, guardian or trustee of an express trust dies or resigns the person's job as head of the trust, then execution shall issue in the name of the successor after an affidavit is filed with the court. [§ 34.002, V.A.C.P.R.C.; Rule 623, T.R.C.P.] The certificate of the successor under seal of the court that made the appointment shall be included with the affidavit. [*Id.*] When a person in whose favor a judgment is rendered for the use of another (nominal plaintiff) dies after judgment, execution shall issue in the name of the party for whose use the suit

was brought, after an affidavit is filed with the court. [Rule 624, T.R.C.P.] If a sole defendant dies after a money judgment against the deceased, execution shall not issue on that judgment. The winning party may prove up the judgment and be paid in due course of administration of the deceased's estate. [Rule 625, T.R.C.P.]

In any case of judgment other than a money judgment, where the sole defendant, or one or more of several joint defendants, shall die after judgment, then proper process shall issue against the deceased's representative after filing an affidavit and certificate of appointment with the court. [Rule 626, T.R.C.P.]

The Civil Practice and Remedies Code contains other limitations on how to proceed if a party dies subsequent to judgment but before execution. If a plaintiff dies after judgment, any writ of execution must be issued in the name of the plaintiff's legal representative, if any, and in the name of any other plaintiff. [§ 34.002(a), V.A.C.P.R.C.] If a plaintiff dies after judgment and his estate is not administered, the writ of execution must be issued in the name of all plaintiffs shown in the judgment. Money collected under the execution shall be paid into the registry of the court, and the court shall order the money partitioned and paid to the parties entitled to it. [*Id.* at (b).]. Death of a plaintiff after a writ of execution has been issued does not abate the execution, and the writ shall be levied and returned as if the plaintiff were living. [*Id.* at (c).]. The death of the defendant after a writ of execution is issued stays the execution proceedings, but any lien acquired by levy of the writ must be recognized and enforced by the county court in the payment of the debts of the deceased.

Executions in probate matters are governed by the Rules of Civil Procedure; however, the Probate Code requires that the writ be directed to: (1) any sheriff or constable within the State of Texas; (2) made returnable in 60 days; and (3) be signed by the clerk officially under the seal of court. [§ 25, V.A.P.C.]

An officer has a duty to protect and secure all personal property levied on and for which no delivery bond is given. [§34.061(a), V.A.P.R.C.; Rule 644, T.R.C.P.] If an injury or loss to an interested party results from the negligence of the officer, the officer and his sureties are liable for the value of the property lost or damaged [ §34.061(b), V.A.P.R.C.] The injured party has the burden to prove:

1. That the officer took actual possession of the injured party's property;  
and



2. The actual value of any property lost or damaged. [*Id.* at (c).]

If the officer who receives a writ of execution dies or goes out of office before the writ is returned, his successor or the officer authorized to discharge the duties of the office shall proceed in the same manner as the receiving officer was required to proceed. . [§34.062, V.A.P.R.C.]

An officer also may be held liable for certain improprieties in handling a writ, such as improper endorsement of a writ of execution. If an officer receives more than one writ of execution on the same day against the same person and fails to number them as received or if an officer falsely endorses a writ of execution, the officer and the officer's sureties are liable to the plaintiff in execution only for actual damages suffered by the plaintiff because of the failure or false endorsement. [§34.063(a), V.A.C.P.R.C.; Rule 636, T.R.C.P.] (b) The plaintiff in execution has the burden to prove:

1. The officer failed to properly number or endorse the writ of execution;
2. The officer's failure precluded the levy of executable property owned by the judgment debtor;
3. The executable property owned by the judgment debtor was not exempt from execution or levy; and
4. The plaintiff in execution suffered actual damages. [*Id.* at (b).]

An officer may file an amended or corrected return after the officer has returned a writ to a court. [ § 34.064(a), V.A.C.P.R.C.; T.R.C.P. 654.] Once an officer receives actual notice of an error on a return or of the officer's failure to file a return, the officer shall amend the return or file the return not later than the 30th day after the date of the receipt of notice. [*Id.* at (b).] An officer who fails or refuses to amend or file the return may be subject to contempt under Section 7.001(b). [*Id.* at (c).]

An officer may be liable for improper return of a writ of execution [§7.003, V.A.C.P.R.C.] If an officer fails or refuses to levy on or sell property subject to execution and the levy or sale could have taken place, the officer and the officer's sureties are liable to the party entitled to receive the money collected on execution only for "actual damages" suffered. [ § 34.065(a), V.A.C.P.R.C.; Rules 637 and 639, T.R.C.P.] The judgment creditor seeking relief under this section has the burden to prove:

1. The judgment creditor has a valid judgment against the judgment debtor;
2. The writ of execution was issued to the judgment creditor;
3. The writ was delivered to the officer;
4. The judgment creditor's judgment was unpaid and unsatisfied;
5. The property to be levied on was subject to execution;
6. The officer failed or refused to levy under the writ; and
7. The amount of actual damages suffered. [ *Id.* at (b).]

Property to be levied on is subject to execution for purposes of this section if the judgment creditor proves that the judgment debtor owned the property at issue, the property was accessible to the officer under the law, the property was situated in the officer's county, and the property was not exempt from execution. [ *Id.* at (c).] Before a court may find that an officer failed or refused to levy under the writ for purposes of this section, the court must find that the judgment creditor specifically informed the officer that the property was owned by the judgment debtor and was subject to execution and that the creditor directed the officer to levy on the property. [ *Id.* at (d).] In this section, "actual damages" is the amount of money the property would have sold for at a constable or sheriff's auction minus any costs of sale, commissions, and additional expenses of execution. [ *Id.* at (e).]

A person must bring suit against a sheriff or other officer or the surety of the sheriff or officer for failure to return an execution issued in the person's favor, not later than five years after the date on which the execution was returnable. [§16.007, V.A.C.P.R.C.] [§34.065, V.A.C.P.R.C.] If an officer sells property without giving notice as required by the Texas Rules of Civil Procedure or sells property in a manner other than that prescribed by this chapter and the Texas Rules of Civil Procedure, the officer shall be liable only for actual damages sustained by the injured party. [§34.066(a), V.A.C.P.R.C.] The injured party has the burden to prove that the sale was improper and any actual damages suffered. [ *Id.* at (b).]

If an officer fails or refuses to deliver money collected under an execution when demanded by the person entitled to receive the money, the officer and the officer's sureties are liable to the person for the amount collected and for

damages at a rate of one percent per month on that amount if proven by the injured party. [§34.067, V.A.C.P.R.C.] (b) Suit shall be brought in the form of a lawsuit filed against the officer in the county in which the officer holds office. [§34.068(a), V.A.C.P.R.C.] All suits must be filed not later than the first anniversary of the date on which the injury accrues. [ *Id.* at (c).] An officer or a surety may defend the action by stating and proving any defenses provided by law, including any defense that would mitigate damages. [ *Id.* at (d).]

A writ of execution is a court order in a civil action directing the sheriff or constable to enforce a judgment, usually by seizing and selling property, in favor of the prevailing party. [*Black's Law Dictionary* 590 (8<sup>th</sup> ed. 2004).] The term *execution* signifies all appropriate means and processes to execute the judgment. [*Durham v. Scrivener*, 228 S.W. 282, 283 (Tex. Civ. App. 1920, n.w.h).] The Rules of Civil Procedure govern this process. [Rules 621 – 656, T.R.C.P.]

#### **§7.02.02 Requisites of Writ of Execution**

The writ of execution shall take the following form:

1. Be styled “The State of Texas”;
2. Be directed to any sheriff or any constable within the State of Texas;
3. Be signed by the clerk or justice officially, and bear the seal of the court, if issued out of the district or county court;
4. Require the officer to execute it according to its terms, and make the costs which have been adjudged against the defendant in execution and the further costs of executing the writ;
5. Describe the judgment, stating the court in which, and the time when rendered, and the names of the parties in whose favor and against whom the judgment was rendered;
6. Correct copy of the bill of costs taxed against the defendant in execution shall be attached; and
7. Require the officer to return it within thirty, sixty, or ninety days, as directed by the plaintiff or his or her attorney. [Rule 629, T.R.C.P.]

**§7.02.03 Interest**

Pre- and post-judgment interest calculations are controlled by statute. [§§304.001-.006, 304.101-.108, V.A.Fi.C.] Interest on judgments in cases involving contracts is governed by § 304.002, Finance Code. It provides: “A money judgment of a court of this state based upon a contract that provides for a specific rate of interest earns post judgment interest at a rate equal to the lesser of: (a) the rate specified in the contract; or (b) 18 percent a year.” Therefore, if the action is based upon a contract one must refer to the contract before calculating the interest on the judgment.

**§7.02.04 Prejudgment Interest**

Prejudgment interest applies only in cases involving wrongful death, personal injury, or property damage. Post-judgment interest may apply to any case involving a money judgment in Texas courts, and a money judgment must specify the post-judgment interest rate. [§ 304.001, V.A.Fi.C.]

Prejudgment interest is the interest calculated on the sum payable to the plaintiff from the time of loss or injury to the time of judgment, with certain exceptions. [§ 304.104, V.A.Fi.C.] Judgments in wrongful death, personal injury, and property damages cases must include prejudgment interest. [Rule 304.102, V.A.Fi.C.] The prejudgment interest rate is equal to the post-judgment interest rate applicable at the time of judgment. [§ 304.103, V.A.Fi.C.] Prejudgment interest is computed as simple interest. [Rule 304.104, VA.Fi.C.]

**§7.02.05 Post-Judgment Interest**

Post-judgment interest begins accruing on the day a money judgment is rendered and ends on the day the judgment is satisfied. [§ 304.005, V.A.Fi.C.] Post-judgment interest is compounded annually. [§ 304.006, V.A.Fi.C.]

**§7.02.06 Execution on Particular Types of Property**

When an execution is issued for money, or directing the payment of a sum of money, it must specify the following:

1. The amount to be recovered or directed to be paid;
2. The sum actually due when the writ is issued and the rate of interest on the sum due;

3. That the officer is required to satisfy the judgment and costs out of the property of the judgment debtor subject to execution by law. [Rule 630, T.R.C.P.]

When an execution is issued for the sale of particular personal property or real estate, the writ must describe the property in detail and shall require the officer to give public notice of the time and place of sale [Rule 631, T.R.C.P.] When an execution is issued for delivery of the possession of personal property or real property, the writ shall describe the property in detail and designate the party awarded judgment for possession. [Rule 632, T.R.C.P.] The writ requires the officer to deliver the property to the party entitled to it. *[Id.]* Note: if the judgment is for the recovery of personal property or its value and the officer cannot deliver the designated property, then the officer recovers the judgment out of the property subject to execution. [Rule 633, T.R.C.P.]

Execution shall be suspended by court order when the debtor files a proper *supersedeas* bond [Rule 634, T.R.C.P.]

#### **§7.02.07 Exempt Property**

Texas has a long-standing tradition of permitting certain real and personal property to be free from threat of seizure. [Tex. Const., Art. XVI, § 51.] Exemption laws are a privilege allowed by a law to a judgment debtor, whereby the debtor may hold property up to a certain amount, or certain classes of property free from all liability to levy and sale on execution or attachment.

#### **§7.02.08 Real Property**

A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for claim of creditors except for encumbrances properly fixed on the homestead property. [§ 41.001(a), V.A.Prop.C.] for:

1. Purchase money;
2. Taxes on property; or
3. Work and material used in constructing improvement on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required of the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married [§ 41.001(b) V.A.Prop.C.]

In addition, the homestead claimant's proceeds from a sale of a homestead are not subject to seizure for a creditor's claim for up to six months after the date of sale. [§ 41.001(c) V.A.Prop.C.]

### **§7.02.09 Personal Property**

Certain personal property is considered exempt and is described, in part, as follows:

1. Eligible personal property that is provided for a family and that has an aggregate fair market value of not more than \$60,000 is exempt from attachment, execution, and seizure for the satisfaction of debts, except for liens, security interests, or other encumbrances properly fixed on the property; or
2. Eligible personal property that is owned by a single adult, who is not a member of a family, and that has an aggregate fair market value of not more than \$30,000 is exempt from attachment, execution, and seizure for the satisfaction of debts, except for liens, security interests, or other encumbrances properly fixed on the property. [§ 42.001 V.A.Prop.C.]

The exemptions set out above do not apply to a debt that is secured by a lien on the property or that is due for rents or advances from a landlord to the landlord's tenant. In addition to eligible personal property listed below, certain other personal property is absolutely exempt from seizure and not subject to the above-stated aggregate limitations, including: (1) current wages for personal services, except for enforcement of court-ordered child support payments; (2) professionally-prescribed health aids of a debtor or a dependent of a debtor; and (3) alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of a debtor; (4) a religious bible or other book containing sacred writings of a religion that is seized by a creditor other than a lessor of real property who is exercising the lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property.

The following listed property is eligible personal property and qualifies for an exemption up to the aggregate maximums set out above.

1. Home furnishings, including family heirlooms;
2. Provisions for consumption;
3. Farming or ranching vehicles or implements;

4. Tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;
5. Wearing apparel;
6. Jewelry not to exceed 25 percent of aggregate limitations prescribed by Section 42.001;
7. Two firearms;
8. Athletic and sporting equipment, including bicycles;
9. A two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license by who relies on another person to operate the vehicle for the benefit of the non-licensed person;
10. The following animals and forage on hand reasonably necessary for their consumption;
11. Two horses, mules or donkeys and saddle, blanket and bridle for each;
12. 12 head of cattle;
13. 60 head of other types of livestock; and
14. 120 fowl;
15. Household pets. [§ 41.002, V.A.Prop.C.]

Additionally, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit sharing, or similar plan, including an IRA account, any annuity or similar contract, is exempt from attachment, execution, and seizure for debts. [§ 41.021, V.A.Prop.C.]

Parties have a statutory right to make a designation of personal property. If a family or a single adult who is not a member of a family owns more of a kind of personal property than is eligible for exemption, the head of the family or the single adult, if found in the county, may designate the portion of that kind of property to be levied on. [§ 42.003 (a), V.A.Prop.C.] If a defendant in execution can be found in the county, the officer holding execution shall ask the head of the family or the single adult to designate the personal property to be levied on. If, after a court's request, the debtor fails to make a designation within a reasonable time or if for any reason a creditor contests that the property is exempt, the court

shall make the designation. [*Id.*] Likewise, if the aggregate value of a debtor's personal property exceeds the amount exempt from seizure under Section 42.001(a), the debtor may designate the portion of the property to be levied on. [*Id.* at (b).] If the defendant cannot use non-exempt property to acquire exempt property or to improve exempt property with the intent to defraud, delay, or hinder a creditor from that to which the creditor is or may be entitled. [§ 42.003(a), V.A.Prop.C.]

A special exemption applies to public libraries. Libraries are exempt from attachment, execution, and forced sale, as are the state, a unit of state government, or a political subdivision of the state. [§§ 43.001-.002, V.A.Prop.C.]

#### **§7.02.10 Service**

The officer receiving the execution shall indorse (log in) the exact hour and day when the writ is received. If more than one is received on the same day against the same person, the officer shall number them as received. [Rule 636, T.R.C.P.] When an execution is delivered to an officer, the officer shall proceed without delay to levy on the property of the defendant found within the officer's county not exempt from execution, unless otherwise directed by the plaintiff, plaintiff's agent or attorney. [Rule 637, T.R.C.P.] The execution is returnable in thirty, sixty, or ninety days as requested by the plaintiff, plaintiff's agent or attorney [Rule 621, T.R.C.P.]

Except as provided by Section 34.061, Civil Practice and Remedies Code, an officer is not liable for damages resulting from the execution of a writ issued by a court of this state if the officer: (1) in good faith executes the writ as provided by law and by the Texas Rules of Civil Procedure; and (2) uses reasonable diligence in performing the officer's official duties. An officer shall execute a writ issued by a court of this state without requiring that bond be posted for the indemnification of the officer. [§7.003, V.A.C.P.R.C.; see *Richardson v. Parker*, 903 S.W. 2d 801, 804 (Tex. 1994) (applying definition of "good faith" from *City of Lancaster v. Chambers*, 883 S.W. 2d 650 (Tex. 1994): government employees are entitled to official immunity from suit arising from performance of their discretionary duties in good faith, so long as they are acting within the scope of their authority.).]

#### **§7.02.11 Levy – Writ of Execution**

A levy must be made before the expiration of the time for return of the writ. [*Harris, Norton & Co. v. Ellis*, 30 Tex. 4 (1867)]. A levy, however, may be made on the return day. [*Tobar v. Losano*, 25 S.W. 973, 974 (Tex. Civ. App. 1894).] If,



after the levy, sufficient time does not exist to sell the seized property prior to expiration of the writ, the constable must return the writ to the court and the plaintiff must secure an active writ. Remember that the constable also has to make a record of the costs associated with executing the writ, and to attach it to the writ. [Rule 629, T.R.C.P.]

The officer shall first call upon the defendant, if the defendant can be found, or, if absent, upon defendant's agent within the county, if known, to point out property to be levied upon. [rule 637, T.R.C.P.; see Chapter 42, V.A.Prop.C. (governing exempt and non-exempt property)]. The levy shall be made first on the property designated. If in the opinion of the officer the property so designated will not sell for enough to satisfy the execution and costs, then the officer shall require additional designation by the defendant [*Id.*]. If no property is designated by the defendant, the officer shall levy the execution on the property of the defendant subject to execution.

A defendant shall not point out property which has been sold, mortgaged or conveyed in trust, or property exempt from sale. [Rule638, T.R.C.P.] In order to make a levy on real estate, it is not necessary for the officer to go upon the ground but it shall be sufficient for the officer to write the levy on the writ. [Rule 639, T.R.C.P.] Levy on personal property is made by taking possession of the property when the defendant is entitled to its possession. Where the defendant has an interest in personal property, but is not entitled to possession of it, a levy is made by giving notice to the person entitled to possession or one person if there are several entitled to possession. [*Id.*]

An officer receiving a writ of execution does not have a duty to search for property belonging to the judgment debtor or determine whether property belongs to a judgment debtor. In addition the officer does not have a duty to determine whether property belonging to the judgment debtor is exempt property that is not subject to levy or determine the priority of liens asserted against property subject to execution. The officer also does not have a duty to make multiple levies for cash or multiple levies at the same location. [§ 34.071, T.C.P.R.C.]

#### **§7.02.12 Levy on Particular Types of Property**

A levy on livestock running at large in a range, and which cannot be herded and penned without great inconvenience and expense, may be made by:

1. Designating by reasonable estimate the number of animals and describing them by their marks and brands, or either;
2. The levy shall be made in the presence of two or more credible persons; and
3. Notice shall be given in writing to the owner of the stock or owner's agent or herder, if residing in the county and known to the officer. [Rule 640, T.R.C.P.]

The courts have held that a valid levy was not made where an officer merely rode among the cattle, counted them and left without segregating them from other cattle in pasture or making arrangements to put caretaker in charge. [*Western Nat. Bank of Hereford v. Steele, et. al.*, 36 S.W. 2d 271, 275 (Tex. Civ. App. 1931, writ dism'd.)]. The sheriff should have taken the cattle into his actual possession by segregating the cattle from the herd, making arrangements for pasturage, and naming someone to be in charge of them. [*Id.*]

An officer may levy on shares of stock of any corporation or joint stock company. Levy is made by seizing and taking possession of the certificate. [Rule 641, T.R.C.P.] A court may not award a personal judgment or execution against any partner or a partnership who was not served; however, execution may issue against the partnership sued. [*Self Motor Co. v. First State Bank of Crowell*, 226 S.W. 428, 431 (Tex. Civ. App. – 1920, n.w.h.)].

#### **§7.02.13 Levy on Property Conveyed to a Third Party**

Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied on and sold on execution against the person making the pledge. [Rule 643, T.R.C.P.] The purchaser of this kind of property is entitled to possession after certain conditions are met. [*Id.*] Note: a mortgagee, purchaser, or trustee has some protection from levy on the property sold or transferred to them. [§ 34.004, V.A.C.P.R.C.] The property may not be seized in execution if the person can point out other property of the debtor in the county sufficient to satisfy the execution. [*Id.*]

Sureties also receive a measure of protection under statute. If the face of the writ or the endorsement of the clerk show that one of the persons against whom the writ is issued is a surety for another, the officer must first levy on principal's property subject to execution in the county where the judgment was rendered. [§ 34.005(a), V.A.C.P.R.C.] If the officer cannot find enough of the principal's

property to levy on, the officer shall levy first on the principal's property that can be found and then on as much of the property of the surety as is necessary to satisfy the execution [*Id.* at (b).]

#### **§7.02.14 Sale – Real Property**

Real property (land and structures) taken by execution shall be sold at public auction, at the courthouse door of the county, unless the court orders that such sale be at the place where the property is located. [Rule 646a, T.R.C.P.] The sale takes place on the first Tuesday of the month, between the hours of ten o'clock a.m. and four o'clock p.m. after 20 days of publication of the notice and posting. [*Id.* and Rule 647.] If the real property taken in execution consists of several lots, tracts, or parcels in a city or town, each lot, tract, or parcel must be offered for sale separately unless not susceptible to separate sale because of the character of improvements. [§ 34.042, V.A.C.P.R.C.] A defendant who has rural property that is levied on has a statutory option to sell the property in lots. The defendant may divide the property into lots of not less than 50 acres and designate the order in which those lots shall be sold [§ 34.043(a), V.A.C.P.R.C.] The defendant must present the following documents to the executing officer in order to sell the rural property in lots;

1. A plat of the property as divided and as surveyed by the county surveyor of the count in which the property is located; and
2. Field notes of each numbered lot with a certificate of the county surveyor certifying that the notes are correct. [*Id.* at (b)(1)]

The defendant must present the plat and field notes to the executing officer before the sale at a time that will not delay the sale. [*Id.* at (c), V.A.C.P.R.C.] When a sufficient number of the lots are sold to satisfy the amount of execution the officer shall stop the sale. The defendant shall pay the expenses of the survey and the sale. [*Id.* at (d) and (e).]

#### **§7.02.15 Notice of Sale**

Notice of sale of real property has many requirements. The Rules of Civil Procedure provide:

1. The time and place of sale of real estate under execution, order of sale, or *venditioni exponas*, shall be advertised by the officer by having the notice thereof published in the English language once a week for three

consecutive weeks preceding such sale, in some newspaper published in said county. [Rule 647, T.R.C.P.]

2. The first of the publications shall appear not less than twenty days immediately preceding the day of sale. [*Id.*]
3. The notice shall contain a statement of the authority by virtue of which the sale is to be made, the time of levy, and the time and place of sale; it shall also contain a brief description of the property to be sold, and shall give the number of acres, original survey, locality in the county, and the name by which the land is most generally known, but it shall not be necessary for it to contain field notes. [*Id.*]
4. Publishers of newspapers shall charge the legal rate of two (2) cents per word for the first insertion of such publication and one (1) cent per word for such subsequent insertions, or such newspapers shall be entitled to charge for such publication at a rate equal to but not in excess of the published word or line rate of that newspaper for such class of advertising. [*Id.*]
5. If there be no newspaper published in the county, or none which will publish the notice of sale for the compensation set out above, the officer shall then post such notice in writing in three public places in the county, one of which shall be at the courthouse door of such county, for at least twenty days successively next before the day of sale. The officer making the levy shall give the defendant, or attorney, written notice of such sale, either in person or by mail, which notice shall substantially conform to the foregoing requirements. [Rule 647, T.R.C.P.]

The "courthouse door" means either of the principal entrances to the house provided by the proper authority for holding of district court. [Rule 648, T.R.C.P.] If there is no such house, the door of the house last used where the district court was last held in that county shall be deemed to be the courthouse door. [*Id.*] Where the courthouse has been destroyed, and another has not been designated by the proper authority, the place where the courthouse stood shall be deemed the courthouse door. [*Id.*] If the public sale of land is required by law to be made at a place other than the courthouse door, then sales under Chapter 34, Civil Remedies and Practice Code, will be made at the place designated by law. [§ 34.041, V.A.C.P.R.C.]

**§7.02.16 Sale of Personal Property**

*Black's Law Dictionary* defines *personal property* as everything that is the subject of ownership and not classified as *real property* (land and structures which are attached to the land). Note that crops, whether growing or standing in field ready to be harvested, are, when produced by annual cultivation, considered personal property [*Gulf Stream Realty Co. V. Monte Alto Citrus Ass'n*, 253 S.W. 2d, 933, 936 (Tex. Civ. App. 1953, writ ref'd.).]

*Personal property* levied on under execution shall be offered for sale on the premises where it is taken in execution, or at the courthouse door of the county. [Rule 649, T.R.C.P.] If this is not convenient due to the nature of the property, then the sale can take place at some other place. *Personal property* is that which is susceptible of being exhibited and subject to the view of those attending. [Rule 649, T.R.C.P.] Note that a Texas court ruled that a sale held at the courthouse door of tubing situated in an oil well some miles from the courthouse was void because the tubing had not been exhibited to the prospective purchasers. [*L.J. Tillery Oil Co. v. Snyder*, 42 S.W. 2d 282, 284 (Tex. Civ. App. 1931, n.w.h.).] Rule 649 lists two exceptions to the rule that property must be exhibited before sale: (1) sale of shares of stock; and (2) sale of property in which the defendant does not have an exclusive possessory right to the property. When a levy is made upon livestock running at large on the range, it is not necessary that such stock, or any part of the stock, be present at the place of sale, and the purchaser at such sale is authorized to gather and pen such stock and select therefrom the number purchased. [Rule 649, T.R.C.P.]

Notice of the time and place of sale of any personal property levied on shall be given by posting notice for ten days successively immediately prior to the day of sale at the courthouse door of any county and at the place where the sale is to be made [Rule 650, T.R.C.P.]

**§7.02.17 Return**

The execution is returnable in thirty, sixty, or ninety days as requested by the plaintiff or plaintiff's attorney. [Rule 629, T.R.C.P.] The levying officer shall make the return in writing and sign it officially. The return shall state concisely what the officer has done to satisfy the requirement of the writ, and shall be filed with the clerk of the court or the justice of the peace. [Rule 654, T.R.C.P.] The execution shall be returned without delay if satisfied by the collection of the money or if ordered by the plaintiff or plaintiff's attorney. [*Id.*] If not executed, the officer should list the diligence used to try to execute the writ and include the reason(s) that it was not executed.

When an execution is placed in the hands of an officer of a county other than the one in which the judgment is rendered, return may be made by mail; however, money cannot be sent through the mail except by direction of the creditor's attorney. [Rule 655, T.R.C.P.]

If, after the levy, sufficient time does not exist to sell the seized property prior to expiration of the writ, the constable must return the writ to the court and the plaintiff must secure an *alias* or *pluries* execution or *venditioni exponas*. [*Borden v. McRae*, 46 Tex. 396, 1877 WL 8543 (1877)]. Remember that the constable also has to make a record of the costs associated with executing the writ, and attach it to the writ. [Rule 629, T.R.C.P.]

An officer receiving a writ of execution may return the writ after the first levy, or attempted levy, if the judgment creditor cannot designate any more executable property currently owned by the judgment debtor at the time of the first levy or first attempted levy. [§ 34.072, T.C.P.R.C.] Notwithstanding Rule 637, Texas Rules of Civil Procedure, an attempt to levy on property may begin any time during the life of the writ, provided that the officer shall allow enough time for completing the sale of the property.

#### **§7.02.18 Defendant's Rights**

Any personal property taken in execution may be returned to the defendant by the officer if a proper bond is made by the defendant. [Rule 644, T.R.C.P.] The bond must be payable to the plaintiff, with two or more good sureties, to be approved by the officer. [*Id.*] The bond must be conditioned that the property shall be delivered to the officer at the time and place named in the bond, to be sold according to law, or for the payment to the officer of a fair value, which shall be stated in the bond. [*Id.*]

Once the defendant has replevied the property as described above, the defendant may sell or dispose of the property and pay the officer the agreed value. [Rule 645, T.R.C.P.]

If the defendant fails to deliver the property or pay the value designated, then defendant forfeits the bond. [Rule 646, T.R.C.P.] In this event the officer shall endorse the bond "Forfeited" and return it to the clerk or justice of the peace. If the judgment remains unsatisfied, the clerk or justice shall issue execution against the principal debtor and the sureties. [*Id.*]

The defendant is entitled to recover property that has been seized through execution of a writ and not yet sold. If the judgment on which execution is issued is reversed or set aside, then defendant is entitled to defendant's property. [§ 34.021, V.A.C.P.R.C.] A person is also entitled to the market value of property that has already been sold at execution if the judgment is set aside. [§ 34.022, V.A.C.P.R.C.]

### **§7.02.19 Responsibilities**

When the sale of real property has been made and its terms complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim that the defendant in execution had in the property sold. [§ 34.0445(a), V.A.C.P.R.C.] An individual may not bid on or purchase real property in the name of any other individual. [§ 34.0445(b), V.A.C.P.R.C.] An officer conducting the sale of real property may not execute or deliver a deed to the purchaser of real property unless the purchaser exhibits to the officer an unexpired written statement issued to the person in the manner prescribed by § 34.015, Tax Code, showing that the county assessor-collector of the county in which the sale was conducted has determined that there are not delinquent *ad valorem* taxes owned by the purchaser to that county, and for each school district or municipality having territory in that county. [§ 34.0445(a), V.A.C.P.R.C.] The deed executed by the officer conducting the sale must name the successful bidder as the grantee and recite that the successful bidder exhibited to that officer an unexpired, written statement issued to the purchaser in the manner prescribed by § 34.015, Tax Code. [§ 34.0445(c), V.A.C.P.R.C.]

If the purchaser complies with the terms of the sale but dies before the conveyance is executed, the officer shall execute the conveyance to the purchaser, and the conveyance has the same effect as if it had been executed in the purchaser's lifetime. [§ 34.045(b), V.A.C.P.R.C.] When the property levied upon does not sell for enough to satisfy the execution, the officer shall start over to recover the difference. [Rule 651, T.R.C.P.] If the bidder does not comply with the terms of the sale, the levying officer shall proceed to sell the same property again on the same day if there is enough time. If not, the officer shall re-advertise and sell the same property. [Rule 653, T.R.C.P.]

An officer is also required to deliver money collected on execution to the entitled party at the earliest opportunity. [§ 34.047(a), V.A.C.P.R.C.] The officer is entitled to retain from the proceeds of sale of personal property an amount equal to the reasonable expenses incurred by the officer in making the levy and keeping the property. [*Id.* at (b).] If more money is received from the sale of

personal property than is sufficient to satisfy the executions held by the officer, the officer shall immediately pay the surplus to the defendant. [*Id.* at (c).] If an officer conducting an execution sale directly or indirectly purchases the property, the sale is void. [§ 34.048, V.A.C.P.R.C.]

### **§7.02.20 Liability**

An officer has a duty to protect and secure all personal property levied on and for which no delivery bond is given. [§34.061(a), V.A.P.R.C.; Rule 644, T.R.C.P.] If an injury or loss to an interested party results from the negligence of the officer, the officer and his sureties are liable for the value of the property lost or damaged [ §34.061(b), V.A.P.R.C.] The injured party has the burden to prove:

1. That the officer took actual possession of the injured party's property;  
and
2. The actual value of any property lost or damaged. [ *Id.* at (c).]

If the officer who receives a writ of execution dies or goes out of office before the writ is returned, his successor or the officer authorized to discharge the duties of the office shall proceed in the same manner as the receiving officer was required to proceed. [§34.062, V.A.P.R.C.]

An officer also may be held liable for certain improprieties in handling a writ, such as improper endorsement of a writ of execution. If an officer receives more than one writ of execution on the same day against the same person and fails to number them as received or if an officer falsely endorses a writ of execution, the officer and the officer's sureties are liable to the plaintiff in execution only for actual damages suffered by the plaintiff because of the failure or false endorsement. [§34.063(a), V.A.C.P.R.C.; Rule 636, T.R.C.P.] (b) The plaintiff in execution has the burden to prove:

1. The officer failed to properly number or endorse the writ of execution;
2. The officer's failure precluded the levy of executable property owned by the judgment debtor;
3. The executable property owned by the judgment debtor was not exempt from execution or levy; and
4. The plaintiff in execution suffered actual damages. [ *Id.* at (b).]



An officer may file an amended or corrected return after the officer has returned a writ to a court. [ § 34.064(a), V.A.C.P.R.C.; T.R.C.P. 654.] Once an officer receives actual notice of an error on a return or of the officer's failure to file a return, the officer shall amend the return or file the return not later than the 30th day after the date of the receipt of notice. [*Id.* at (b).] An officer who fails or refuses to amend or file the return may be subject to contempt under Section 7.001(b). [*Id.* at (c).]

An officer may be liable for improper return of a writ of execution [§7.003, V.A.C.P.R.C.] If an officer fails or refuses to levy on or sell property subject to execution and the levy or sale could have taken place, the officer and the officer's sureties are liable to the party entitled to receive the money collected on execution only for "actual damages" suffered. [ § 34.065(a), V.A.C.P.R.C.; Rules 637 and 639, T.R.C.P.] The judgment creditor seeking relief under this section has the burden to prove:

1. The judgment creditor has a valid judgment against the judgment debtor;
2. The writ of execution was issued to the judgment creditor;
3. The writ was delivered to the officer;
4. The judgment creditor's judgment was unpaid and unsatisfied;
5. The property to be levied on was subject to execution;
6. The officer failed or refused to levy under the writ; and
7. The amount of actual damages suffered. [*Id.* at (b).]

Property to be levied on is subject to execution for purposes of this section if the judgment creditor proves that the judgment debtor owned the property at issue, the property was accessible to the officer under the law, the property was situated in the officer's county, and the property was not exempt from execution. [*Id.* at (c).] Before a court may find that an officer failed or refused to levy under the writ for purposes of this section, the court must find that the judgment creditor specifically informed the officer that the property was owned by the judgment debtor and was subject to execution and that the creditor directed the officer to levy on the property. [*Id.* at (d).] In this section, "actual damages" is the amount

of money the property would have sold for at a constable or sheriff's auction minus any costs of sale, commissions, and additional expenses of execution. [*Id.* at (e).]

A person must bring suit against a sheriff or other officer or the surety of the sheriff or officer for failure to return an execution issued in the person's favor, not later than five years after the date on which the execution was returnable. [§16.007, V.A.C.P.R.C.] [§34.065, V.A.C.P.R.C.] If an officer sells property without giving notice as required by the Texas Rules of Civil Procedure or sells property in a manner other than that prescribed by this chapter and the Texas Rules of Civil Procedure, the officer shall be liable only for actual damages sustained by the injured party. [§34.066(a), V.A.C.P.R.C.] The injured party has the burden to prove that the sale was improper and any actual damages suffered. [*Id.* at (b).]

If an officer fails or refuses to deliver money collected under an execution when demanded by the person entitled to receive the money, the officer and the officer's sureties are liable to the person for the amount collected and for damages at a rate of one percent per month on that amount if proven by the injured party. [§34.067, V.A.C.P.R.C.] (b) Suit shall be brought in the form of a lawsuit filed against the officer in the county in which the officer holds office. [§34.068(a), V.A.C.P.R.C.] All suits must be filed not later than the first anniversary of the date on which the injury accrues. [*Id.* at (c).] An officer or a surety may defend the action by stating and proving any defenses provided by law, including any defense that would mitigate damages. [*Id.* at (d).]

### **§7.03 WRIT OF GARNISHMENT**

#### **§7.03.01 Definition and Issuance**

Garnishment is a proceeding in which the property, money, or credits of a debtor in the possession of, or owing by, another, called a garnishee, are applied to the payment of the debt of the debtor. [§§ 63.001-.005, V.A.C.P.R.C.; Rules 657-659, T.R.C.P.] The clerk of a district or county court or a justice of the peace may issue a writ of garnishment returnable to the issuing court. [§ 63.002, V.A.C.P.R.C.] The purpose of a writ of garnishment is to: (1) determine whether the third party (party who owes the debtor something) is indebted to the defendant; (2) determine the amount of indebtedness; and (3) recover that amount. [*Bank One, Texas, N.A. v. Sunbelt Sav., F.S.B.*, 824 S.W. 2d 557 (Tex. 1992.)] In a garnishment, a third party possesses the property. [§ 63.004, V.A.C.P.R.C.]

Either at the commencement of a suit or at any time during its progress the plaintiff may file an application for a writ of garnishment. [Rule 658, T.R.C.P.] The application must be supported by affidavits of the plaintiff, plaintiff's agent or attorney, or other persons having personal knowledge of relevant facts. No writ shall issue before final judgment except upon written order of the court after a hearing, which may be *ex parte* (adverse party not present). When the court grants the application, it shall specify: the maximum value of the property to be garnished; the amount of plaintiff's bond, if required; and the amount of defendants' replevy bond. [*Id.*] The replevy bond must equal the plaintiff's claim, one year's accrual of interest (if allowed by law), and estimated costs of court. The court has the option of issuing several writs at one time and directing them to different counties. [*Id.*] The clerk of a district or county court or a justice of the peace may issue a writ of garnishment returnable to the issuing court. [§ 63.002, V.A.C.P.R.C.]

No writ of garnishment shall issue before final judgment until the party applying for it has filed a bond payable to the defendant in an amount fixed by the court, with sufficient surety(ies). [Rule 658a, T.R.C.P.] The bond is required to ensure that the defendant will be paid for the loss of the garnished property if the plaintiff does not carry through with the lawsuit. After notice to the opposite party, either before or after the issuance of a writ, the defendant or plaintiff may file a motion to increase or reduce the amount of bond. [*Id.*]

A writ of garnishment is available if:

1. An original attachment has been issued;
2. A plaintiff sues for a debt and makes an affidavit stating that--
  - A. The debt is just, due, and unpaid and
  - B. Within the plaintiff's knowledge, the defendant does not possess property in Texas subject to execution sufficient to satisfy the debt; and
  - C. The garnishment is not sought to injure the defendant or the garnishee; or
3. A plaintiff has a valid, subsisting judgment and makes an affidavit stating that, within the plaintiff's knowledge, the defendant does not possess

property in Texas subject to execution sufficient to satisfy the judgment.  
[§ 63.001, V.A.C.P.R.C.]

### **§7.03.02 Requisites of a Writ of Garnishment**

A writ of garnishment shall:

1. Be styled "The State of Texas";
2. Be directed to any sheriff or constable;
3. Identify the court and contain date of issuance;
4. Bear the cause number;
5. Be signed by the clerk or justice officially;
6. Be returnable on Monday next following expiration of (20 days in district or county court or 10 days in justice court) from date of service [Rule 669, T.R.C.P.]
7. Bear the seal of the court if from county or district court [but see § 27.059(b), V.A.G.C. (permitting the justice court to affix its seal to any process issued from the court, except a subpoena, and to use it to authenticate official acts).];
8. Specify the value of the property. [Rule 15, T.R.C.P.]

The form of the writ that may be used is set out in the Rules of Civil Procedure. The constable should refer to the Rule 661, T.R.C.P., if there is a question about the contents of a writ. When the requirements for the writ have been met, the case shall be docketed in the name of the plaintiff as plaintiff and of the garnishee as defendant. [Rule 659, T.R.C.P.] The writ shall issue commanding the garnishee to appear before the court out of which the writ issued at or before 10:00 a.m. of the Monday next following the expiration of twenty days from the date writ was served (if service is out of district or county court) or ten days from the date writ was served (if service is out of justice court). [Rule 659, T.R.C.P.]

### **§7.03.03 Service**

A sheriff, constable, or their deputies shall make immediate delivery of the garnishment to the garnishee as a defendant as stated within the writ. [Rules 659 and 663 T.R.C.P.] Personal delivery is required and may be delivered at any time or day of the week. [Rule 6, T.R.C.P.] A claim against a customer of a

financial institution is not effective as to the financial institution if the claim is served or delivered to an address other than that designated by the financial institution as the address of the financial institution's registered agent. [§ 59.008, V.A.Fi.C.]

The delivering officer shall make demand for the property and take possession of said property, completing an inventory of the same, only if directed to do so by the writ. The officer then shall proceed with disposition of the property in accordance to the command of the writ, or other writs issued from the court concerning the property disposition. In most cases, the burden is upon the garnishee to comply with the command of the writ and the officer's only responsibility is the timely delivery of the garnishment.

The judgment defendant shall be served, in accordance with Rule 21a, T.R.C.P., with a copy of the writ of garnishment, application and accompanying affidavits, and orders of the court, as soon as possible after delivery of the writ. [Rule 663a, T.R.C.P.; *Westerman v. Comerica Bank Texas*, 928 S.W. 2d 679, 682 (Tex. App. –San Antonio 1996, writ denied); *Walnut Equipment Leasing Co. V. J-V Dirt & Loam, a Div. of J-V Marble Mfg., Inc.* 907 S.W. 2d 912, 915 (Tex. App. – Austin, 1995, rehearing overruled, writ denied).]

In addition to service on the garnishee, the plaintiff must also serve the defendant in the original suit. Service can be in any manner prescribed for service of citation or that complies with Rule 21a of the Rules of Civil Procedure. [Rule 663a, T.R.C.P.] The notice must meet the standards of Rule 663a regarding size of the type and required language. [*id.*]

#### **§7.03.04 Defendant's Rights**

The defendant has the right to replevy the property at any time before judgment, by giving a bond that meets statutory requirements. [Rule 664, T.R.C.P.] Either party may request judicial review of the amount of bond. The defendant also has the right to ask the court for a substitution of property, of equal value, for that which was garnished. [*id.*] In addition, the defendant has the option of seeking dissolution or modification of the writ of garnishment. [Rule 664a, T.R.C.P.]

#### **§7.03.05 Garnishee's Rights**

The garnishee must answer the writ under oath and in writing. [Rule 665, T.R.C.P.] If garnishee's answer indicates that garnishee does not have assets of the defendant and that garnishee is not indebted to the defendant, then the court may discharge the garnishee provided that the answer to the writ filed by the

garnishee is not controverted. [Rule 666, T.R.C.P.] *Controverted* means the opposing party (the plaintiff) denies the truth of the garnishee's answer.

If the garnishee, however, fails to file an answer, then the court may render a default judgment. [Rule 667, T.R.C.P.] A default judgment can be set aside if service is improper. [*Hering v. Norbanco Austin I, Ltd.*, 735 S.W. 2d 638, 639 (Tex. App. –Austin 1987, writ denied).] If the garnishee has assets of the defendant subject to execution then the court shall order the sale of whatever items are necessary to satisfy the judgment. [Rule 669, T.R.C.P.] If the garnishee refuses to turn over assets of the defendant upon demand, the officer should immediately make return of the refusal. The garnishee will be subject to the contempt power of the court. [Rule 670, T.R.C.P.] The garnishee, if not showing is made of good and sufficient excuse, shall be fined and imprisoned until garnishee delivers the assets. [*Id.*] The sale of any property will take place according to the rules governing execution. [Rule 672, T.R.C.P.]

#### **§7.03.06 Return**

The delivering officer's return shall include:

1. The date and time received;
2. The date and time of delivery;
3. Record location of delivery;
4. The name of the garnishee;
5. To whom delivery was made;
6. How delivery was made;
7. If not executed, the diligence used to try to execute and the reason(s) not executed;
8. The executing officer's signature;
9. The elected official's name (if applicable); and
10. The department name. [Rule 16 and 107, T.R.C.P.]

Return shall be made to the issuing court or plaintiff's attorney of record, if requested. The sheriff or constable receiving the writ of garnishment must make a return like other citations. [Rule 663, T.R.C.P.] Note that the constable must be specific in filling out the return, listing the name of the garnishee and the date served, noting the location of service, and signed in an official capacity. In one Texas case where the sheriff's return did not show place of service or even recite that the writ of garnishment had been executed, service of process on garnishee was held invalid. [*Hering v. Norbanco Austin I, Ltd.*, 735 S.W. 2d at 639.] Also, never deliver the garnishment to the defendant prior to delivery to the garnishee. If in doubt as to whether service has been made on the garnishee, especially if they are in another jurisdiction, contact the plaintiff or their attorney for instructions.

Clerical errors in the affidavit, bond, or writ of garnishment or the officer's return may be amended after application is made in writing to the proper court and the opponent is given notice. The judge must determine and authorize by order entered on the court's minutes the terms of and way in which any amendment will be permitted. [Rule 679, T.R.C.P.]

#### **§7.03.07 Officer's Liability**

Neither the Rules of Civil Procedure nor the Civil Practice and Remedies Code lists liability specifically associated with garnishment. The constable must be aware, however, of liability connected with delayed delivery, delivery to the defendant prior to garnishee, improper service or return, or failure to follow proper procedures for sale of property as described herein.

### **§7.04 ORDER OF SALE**

#### **§7.04.01 Definition and Issuance**

An Order of Sale is a writ issued by a court of competent jurisdiction, ordering specific personal or real property to be sold in the same manner as in execution. An order of sale is one of the category of sales known as a *judicial sale*. A *judicial sale* is conducted under a judgment, order, or the supervision of a court such as a sale under a petition for partition of real estate or an execution. A *judicial sale* must be based upon an order or a decree of a court directing the sale. [Black's 1365 (8<sup>th</sup> ed.) 2004.] Sometimes an order of sale is utilized to sell property already in possession of an officer due to the service of another writ. Exempt property statutes do not apply to property listed with an order of sale, as judicial determination has already been made by the issuing court.

**§7.04.02 Requisites of an Order of Sale**

An order of sale shall:

1. Be styled "*The State of Texas*";
2. Be directed to any sheriff or constable;
3. Be signed by the clerk or justice officially;
4. Bear the seal of court if from county or district court;
5. Describe the judgment;
6. Require the officer to collect the judgment amount and costs of the sale;
7. Contain a correct copy of the bill of costs attached or included with the writ. [Rule 309 and 662-655, T.R.C.P.]

Orders of sale are used to enforce judgments for the foreclosure of mortgages and other liens; for example, tax liens. [Rule 309, T.R.C.P.] The plaintiff shall recover the debt, damages, and costs, with foreclosure of the plaintiff's lien on the property subject to the lien. [*Id.*; see Op. Tex. Att'y Gen. No. DM-262 (1993).]

The order of sale shall issue to any sheriff or any constable within the State of Texas. It shall direct the officer to seize and sell the property as under execution [Rule 309, T.R.C.P.; see Rule 629, T.R.C.P.], and, if the property cannot be found or the proceeds of such sale be insufficient to satisfy the balance remaining unpaid, make the judgment out of any other property of the defendant, as in the case of ordinary executions. However, an exception applies to an order of sale when the judgment is against an executor, administrator, guardian, or trustee, who is deceased, so that the execution shall issue in the name of the person's successor. [Rule 623, T.R.C.P.]

**§7.04.03 Service**

A sheriff or constable shall proceed without delay to make levy on described property belonging to the defendant. [Rule 637, T.R.C.P.] An inventory should be made of any personal property levied upon. Notification of the sale shall be in the same manner as property levied upon as in execution. [See Rule 647 and 650, T.R.C.P.] This shall occur at any time or day of the week allowing sufficient time for levy and sale. [Rule 6, T.R.C.P.] The levying officer shall keep securely



all the personal property for which no delivery bond is given. [§ 34.061(a), V.A.C.P.R.C.] In foreclosures of defaulted real estate liens, the defendant and any lien holders (if known) shall have a notice of sale via certified mail to their last known address [§ 51.002, V.A.Pr.C] The officer shall conduct an auction-type sale of the courthouse door or where personal property is stored [Rule 649, T.R.C.P.] after posting for ten days the sale notices at three public places within the county. [Rule 650, T.R.C.P.] In the case of real property, sale shall be at the courthouse door on the first Tuesday of the month between the hours of 10:00 a.m. and 4:00 p.m., following publication of the sale notice for no less than 20 days immediately preceding the sale. [Rules 646a, and 647 T.R.C.P.] The officer should: collect the proceeds of the sale and receipt them; retain, first, the costs of the sale; then disburse to all parties the calculated amount due each, or place the proceeds into the registry of the court if so directed by the writ. [§ 34.047, V.A.C.P.R.C.]

The officer then should prepare and deliver a bill of sale or deed to the purchaser. An individual may not bid or purchase real property in the name of any other individual. [§ 34.0445(b), V.A.C.P.R.C.] An officer conducting the sale of real property may not execute or deliver a deed to the purchaser of real property unless the purchaser exhibits to the officer an un-expired written statement issued to the person in the manner prescribed by § 34.015, Tax Code, showing that the county assessor-collector of the county, in which the sale was conducted, has determined that there are no delinquent *ad valorem* taxes owed by the purchaser to that county, and for each school district or municipality having territory in that county. [§ 34.0445(a), V.A.C.P.R.C.] The deed executed by the officer conducting the sale must name the successful bidder as the grantee and recite that the successful bidder exhibited to that officer an un-expired written statement issued to the purchaser in the manner prescribed by § 34.015, Tax Code. [§ 34.0445(c), V.A.C.P.R.C.]

A record of writ, documents, sale notice, receipts, and bill of sale or deed should be maintained by the officer.

#### **§7.04.04 Return**

The executing officer's return shall include:

1. The date and time received;
2. The date and time of delivery;

3. The location of delivery (complete address);
4. The date and time of levy;
5. The date and time of sale or collection;
6. How much was collected and disbursement amounts to all parties;
7. All correspondence, inventory, sale notice, certified mail, copy of bill of sale or deed;
8. If not executed, diligence used to try to execute the writ and reason(s) not executed;
9. The executing officer's signature;
10. He elected official's name (if applicable);
11. The department name; and
12. Return to the issuing court or plaintiff's attorney of record, if requested.  
[Rule 16, T.R.C.P.]

#### **§7.04.05 Additional Rules**

See the Executions section for an explanation of the rules that also apply to an Order of Sale.

The Texas Rules of Civil Procedure on executions apply to an Order of Sale. However, the exempt property protection in the Texas Property Code does not apply, as the court has made a judicial determination on the status of the property and waived the exemption if it is listed within an Order of Sale.

#### **§7.05 WRIT OF POSSESSION** (not related to Eviction)

##### **§7.05.01 Definition and Issuance**

There are several kinds of writs of possession. This section deals with the writ of possession used to seize real or personal property. [Rule 308, T.R.C.P.] A writ of possession allows the enforcement of a judgment by seizing certain property because the writ itself commands the constable to return property to the person entitled under the judgment.

A writ of possession cannot issue without a judgment. [Rule 310, T.R.C.P.] District and county courts are allowed to enforce judgments through writs of

possession by specific rules. [Rule 310, T.R.C.P.] A county or district court may issue a special writ for the possession of personal property if:

1. The judgment is for personal property; and
2. The pleadings, evidence, and verdict show that the personal property in question has a special value to the plaintiff. [Rule 308, T.R.C.P.]

Justice courts may issue writs of possession under specific rules. [Rule 561, T.R.C.P.] The general requirements are identical to those of county and district courts. [Rules 631 and 632, T.R.C.P.] A writ of possession shall describe in detail the chattels, personal property, or real property subject to the writ, and shall require the officer to deliver the possession of the property to be party entitled to it. [Rule 310, T.R.C.P.]

#### **§7.05.02 Requisites**

A writ of possession shall:

1. Be styled "The State of Texas";
2. Be directed to any sheriff; constable, or their deputies;
3. Show the court of issuance;
4. Show the cause number;
5. Be signed by the clerk of the court or justice officially;
6. Bear the seal of the court if from county or district court;
7. Contain the name of the defendant(s); and
8. Command the officer to take possession of the described property and deliver it to a specified party. [Rules 15, 308, and 621, T.R.C.P.]

#### **§7.05.03 Service**

A sheriff, constable, or their deputies shall deliver the service copy of the possession to the defendant(s) if found within their county. Personal delivery is required and may be delivered at any time or day of the week. [Rule 6 T.R.C.P.]

#### **§7.05.04 Return**

The delivering officer's return shall include:

1. The date and time received;
2. The date and time of delivery;
3. The location of delivery (complete address);
4. Record actions taken with the property described by the possession;
5. Attaché all correspondence, inventory, and property disposition;
6. The executing officer's signature;
7. The elected official's name (if applicable);
8. The department name, and
9. Return to the issuing court or plaintiff's attorney of record, if requested.  
[Rules 16 and 107, T.R.C.P.]

#### **§7.05.05 Defendant's Rights**

A defendant may suspend execution of judgment by posting a supersedeas bond. If the bond is filed and approved, the clerk or justice of the peace shall immediately issue a writ of supersedeas suspending all further proceedings. [Rules 634 and 635, T.R.C.P.]

### **§7.06 WRIT OF SCIRE FACIAS**

#### **§7.06.01 Definition and Issuance**

*Scire facias* is a judicial writ founded upon some matter of record, such as a judgment, that requires the person against whom it is brought to show cause why the party bringing it should not have advantage of such record. The name is used to designate both the writ and the whole proceeding. *Scire facias* is often a judicial writ directing a debtor to appear and show cause why a dormant judgment against the debtor should not be revived. Perhaps the most common application of this writ in Texas is as a process to revive a judgment, after the lapse of a certain time, or a change of parties or otherwise to have execution of the judgment. For example, a change of parties may occur when a plaintiff or defendant dies. [*Gracey v. West*, 422 S.W. 2d 913, 917 (Tex. 1968).] *Scire facias* not only abrogates suit, but also provides for substitution of any person or persons succeeding to the rights of the original party, whether executor,

administrator, heir, or person holding the same practical relation. [Rules 150-156, T.R.C.P.] The revived action is merely a continuation of the original action and the substituted party stands in the same shoes as the original party. [Rule 152, T.R.C.P.]

In Texas, the writ is provided for in both of the Rules of Civil Procedure [Rules 151, 152, and 154, T.R.C.P.] and in the Texas Civil Practice and Remedies Code. [§ 31.006, V.A.C.P.R.C] A *scire facias* may be used to forfeit a bail bond. [*Glenn v. State*, 236 S.W. 2d 809, 810 (Tex. Cr. App. 1951).] The *scire facias* commands the principal and sureties, if any to appear. When a forfeiture has been declared on a bond, the case is docketed on the *scire facias* or the civil docket, and proceedings are governed by the same rules as govern other civil suits. [Art. 22.10, V.A.C.C.P.] As far as jurisdiction is concerned, a district court judge has the power to hear and determine a matter pending in any other district court in the county, regardless of whether the case is transferred. Any resulting judgment, order, or action is valid and binding as if the case were pending in the court of the judge who acts in the matter. [*Id.*] Thus, a district court has authority to render a judgment *nisi*, issue a *scire facias* writ, or hear the *scire facias* bond forfeiture proceeding even if it is not the court in which the defendant was required to appear and failed to do so. [*International Fidelity Ins. Co. v. State*, 71 S.W.3d 894, 897-98 (Tex. App. – Texarkana 2002, n.w.h.).]

#### **§7.06.02 Requisites of a Writ of Scire Facias**

A writ of *scire facias* shall:

1. Be styled "*The State of Texas*";
2. Be directed to any sheriff or constable;
3. Show the court of issuance;
4. Show the cause number;
5. Show date of filing of the writ;
6. Show date of issuance of the writ;
7. Be signed by the clerk under the seal of the court;
8. Contain address of the clerk;

9. Contain time within which the defendant may file a written answer with the clerk who issued the writ; and
10. Notify the defendant that, in case of failure of defendant to file a written answer, judgment by default may be entered for the relief demanded in the petition. [Rules 15, 154, and 99, T.R.C.P.]

**§7.06.03 Service**

A sheriff, constable, or their deputies shall deliver the service copy of the *scire facias* to the defendant(s) names on the writ. Personal delivery is required and may be delivered on any day of the week except Sunday. [Rule 6, T.R.C.P.]

**§7.06.04 Return**

The delivering officer's return shall:

1. State the date and time received;
2. State the date and time of delivery;
3. Record location of delivery (complete address);
4. Record to whom process was delivered;
5. If not executed, state the diligence used to try to execute, the reason(s) not executed, and location of defendant, if known;
6. Contain the executing the officer's signature;
7. Contain the elected official's name if applicable;
8. Contain the department name;
9. Be returned to the issuing court or attorney of record, if requested. [Rule 107, 154, and 536, T.R.C.P.]

Rule 154, T.R.C.P. provides: The *scire facias* and returns thereon, provided for in this section, shall conform to the requisites of citations and the returns thereon, under the provisions of these rules.

**§7.07            TURNOVER ORDER****§7.07.01        Definition and Issuance**

The Texas “turnover statute” grants to judgment creditors a remedy for reaching property of a debtor where traditional remedies are inadequate. [§§ 31.002-.005, V.A.C.P.R.C.] Certain property is exempt from attachment, execution, or seizure for satisfaction of liabilities. [§ 31.002(a) and (f), V.A.C.P.R.C.; see *Criswell v. Ginsberg & Foreman*, 843 S.W. 2d 304, 306 (Tex. App. –Dallas 1992, no writ).]

A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

1. Cannot be readily attached or levied on by ordinary legal process; and
2. is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
3. Specifically exempt from turnover are wages paid for personal services in any form, including paycheck, cash or property. [§§ 31.002-.005, V.A.C.P.R.C.]
4. The judgment creditor may move for the court’s assistance in the same proceeding in which the judgment is rendered or in an independent proceeding. The judgment creditor is entitled to recover reasonable costs, including attorney’s fees. [§31.002 (d) and (e), V.A.C.P.R.C.] The court issuing the turnover order has several options in dealing with the debtor and the debtor’s property.

The court may:

- A. Order the judgment debtor to turn over nonexempt property that is in the debtor’s possession or is subject to the debtor’s control, together with all documents or records related to the property, to a designated sheriff or constable for execution.
- B. Apply the property to the satisfaction of the judgment; or
- C. Appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. [§§ 64.001-092, V.A.C.P.R.C.]

An individual may not bid or purchase real property in the name of any other individual. [§ 34.0445(b), V.A.C.P.R.C.] An officer conducting the sale of real

property may not execute or deliver a deed to the purchaser of real property unless the purchaser exhibits to the officer an un-expired written statement issued to the person in the manner prescribed by § 34.015, Tax Code showing that the tax assessor-collector of the county in which the sale was conducted, has determined that there are no delinquent ad valorem taxes owned by the purchaser to that county, and for each school district or municipality having territory in that county. [§ 34.0445(c), V.A.C.P.R.C.] The deed executed by the officer conducting the same must name the successful bidder as the grantee and recite that the successful bidder exhibited to that officer an unexpired written statement issued to the purchase in the manner prescribed by § 34.015, Tax Code. [*Id.* at (c), V.A.C.P.R.C.]

The Texas Supreme Court has held that a turnover order may not order the debtor to deliver the property directly to the creditor. [§ 31.002(b), V.A.C.P.R.C.; *Copher v. First State Bank of Pittsburg, Texas*, 825 S.W. 2d 738, 739 (Tex. App. – Fort Worth, 1993, n.w.h.).] The court can enforce the turnover order by contempt proceedings or by other appropriate means in the event of refusal or disobedience. [§ 31.002(c), V.A.C.P.R.C.] Therefore, a turnover order must be definite, clear, and concise in order to give the person to whom it is directed sufficient information regarding the person's duties and should not be such as would call on the debtor for interpretations, inferences, or conclusions. [*Bergman v. Bergman*, 828 S.W. 2d 555, 557 (Tex. App. – El Paso 1992, n.w.h.).]

The court may appoint a receiver to take possession of the debtor's property in order to sell it and pay the creditor the sums due. [*Cf., The Grocers Supply Co., Inc., v. Intercity Inv. Prop., Inc.*, 795 S.W. 2d 225, 226 (Tex App. El Paso, 1992, n.w.h.) (holding that the rights of a prior perfected creditor to take possession of its collateral are superior to the rights of a "mere judgment creditor", and the prior, perfected secured creditor may seize collateral from an officer who has levied on the property for a judgment creditor)].

The turnover statute allows *ex parte* entry of turnover orders without notice and hearing, notwithstanding Rule 21, Texas Rules of Civil Procedure. [§ 31.002, V.A.C.P.R.C.]

#### **§7.07.02 Requisites of a Turnover Order**

A turnover order shall:

1. Be styled "The State of Texas";



2. Be directed to a debtor/defendant;
3. Show the court of issuance;
4. Show the cause number;
5. Be signed by the clerk or justice officially;
6. Bear the seal of the court if from county or district court;
7. Name a specific sheriff or constable to receive the property; and
8. Describe the property to be turned over. [§§ 31.002-.005, V.A.C.P.R.C.; Rule 15 T.R.C.P.]

### **§7.07.03 Service**

A sheriff, constable, or their deputies shall deliver the turnover order to the defendant(s) if found, or, if absent, to their agent/attorney within the county. Personal delivery is required and may be delivered at any time or day of the week, except Sunday. [Rule 6. T.R.C.P.]

The delivering officer is to make demand for and take possession of said property, completing an inventory of the same. The officer shall proceed with execution on the property or place the proceeds into the registry of the court as directed by the order. If the defendant(s) refuses to turn over the designated property, the delivering officer should document the refusal and any circumstances surrounding the refusal.

### **§7.07.04 Return**

The delivering officer shall complete an officer's return which shall:

1. State the date and time received;
2. State the date and time of delivery;
3. Record actions taken with the property described by the turnover;
4. Attach all correspondence, inventory, and property disposition;
5. If not executed, the diligence used to try to execute and the reason(s) not executed;
6. Contain the executing officer's signature;

7. Contain the elected official's name (if applicable);
8. Contain the department name; and
9. Be returned to the issuing court or plaintiff's attorney of record, if requested. [Rules 16 and 107, T.R.C.P.]

**§7.07.05 Defendant's Rights**

The debtor may challenge a turnover order by motion to modify. [*Ex parte Johnson*, 654 S.W. 2d 415, 418 (Tex. 1983).] A turnover may be granted *ex parte*. [*Id.*] Failure to provide prior notice and hearing before the issuance of a turnover order under Section 31.002 does not compromise constitutional principles. [§ 31.002, V.A.C.P.R.C.; *Ex parte Johnson*, 654 at 418.].

**FORM 14 Officer's Return—Execution**  
(Part 1) Rule 654, T.R.C.P.

**OFFICER'S RETURN**

Came to hand this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, at \_\_\_\_: \_\_\_\_, o'clock a.m./p.m. and made demand on Defendant, \_\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, in \_\_\_\_\_ County, Texas Zip \_\_\_\_\_ on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_:\_\_\_\_,

\*\*\*\*\*

Collected \_\_\_\_\_ Dollars (\$\_\_\_\_.\_\_\_\_) from said defendant on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, applied to the judgment, per attached work sheet.

\*\*\*\*\*

After demand and refusal of payment by defendant, Officer did not find any non-exempt property belonging to the defendant at the following address(es):

\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Texas,  
Zip \_\_\_\_\_  
\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Texas,  
Zip \_\_\_\_\_  
\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Texas,  
Zip \_\_\_\_\_

That could be levied upon, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_ .

\*\*\*\*\*

Did not collect monies from said defendant and levied on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, on the following property:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\*\*\*\*\*

A Constable's Sale, on the above listed property, was held on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, at \_\_\_\_:\_\_\_\_ o'clock a.m./p.m. at hours of ten o'clock and four o'clock p.m. (Sale Notice Attached)

\*\*\*\*\*

Collected \_\_\_\_\_ Dollars \$ \_\_\_\_\_ from purchaser at sale and applied to the judgment of this writ, per the attached work sheet. Constable's (deed/bill of sale) \_\_\_\_\_ was issued to the purchaser.

(continued)

**FORM 14**

(Part 2)

Fee \$\_\_\_\_\_.

\_\_\_\_\_  
Constable Precinct No \_\_\_\_\_

\_\_\_\_\_ County, Texas

By: \_\_\_\_\_

(Deputy Signature)

\_\_\_\_\_  
(Printed Name)

**FORM 15 Officer's Return—Execution and Order of Sale**  
 (Page 1) [Rule 654, T.R.C.P.]

**OFFICER'S RETURN**

Came to hand this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_ : \_\_\_\_ o'clock a.m./p.m. and made demand on Defendant, \_\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_ County, Texas on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m.

Did no collect monies from said Defendant, and levied on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, on the following property, per the attached Order of Sale:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

A Constable's Sale, on the above listed property, was held on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m. at \_\_\_\_\_ County, Texas, between the hours of ten o'clock a.m. and four o'clock p.m. (Sale Notice attached)

Collected \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) from purchaser at sale and applied to the judgment on this writ, per the attached work sheet. Constable's (deed/bill of sale) \_\_\_\_\_ was issued to the purchaser.

After demand and refusal of payment by defendant, Officer did not find any additional

\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Texas  
 Zip \_\_\_\_\_  
 \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Texas  
 Zip \_\_\_\_\_  
 \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ County, Texas  
 Zip \_\_\_\_\_

that could be levied upon, this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

After demand, collected \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) from said defendant on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_ and applied to the judgment, per attached work sheet.

(continued)

**FORM 15**

(Page 2)

Fee \$ \_\_\_\_\_.

\_\_\_\_\_  
Constable Precinct No \_\_\_\_\_

\_\_\_\_\_ County, Texas

By: \_\_\_\_\_

(Deputy Signature)

\_\_\_\_\_  
(Printed Name)

**FORM 16 Constable's Bill of Sale—Sale Property**  
(Page 1) [Tex. Civ. Prac. & Rem. Code § 34.0445]

**CONSTABLE'S BILL OF SALE**

(Personal Property)

THE STATE OF TEXAS }  
COUNTY OF \_\_\_\_\_ }

KNOW ALL MEN BY THESE REPRESENTS:

THAT, WHEREAS, by virtue of a certain Execution and Order of Sale issued out of the \_\_\_\_\_ Court of the County of \_\_\_\_\_, Texas, in favor of \_\_\_\_\_ on a certain judgment rendered on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, and directed and delivered to me as and chattels, lands and tenements of the said \_\_\_\_\_ to make certain moneys in said writ specified.

WHEREBY I, \_\_\_\_\_, Constable, as hereinabove stated, did on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, in said writ levy upon and take into my possession the property hereinafter described, and, after advertising the same as prescribed by law, at \_\_\_\_\_, Texas, sell the described property at public venue. The same was sold to \_\_\_\_\_, GRANTEE, for the sum of \_\_\_\_\_ (Dollars) \$ \_\_\_\_\_, being the highest bidder therefore.

NOW THEREFORE, in consideration of the premises, and the payment of said sum of \_\_\_\_\_ (Dollars) \$ \_\_\_\_\_, the receipt of which is hereby acknowledged. I, \_\_\_\_\_, Constable, Precinct \_\_\_\_, as hereinabove stated, have sold and by these presents do bargain, sell, and deliver unto \_\_\_\_\_ all the right, title, and interest which the said \_\_\_\_\_ had on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, or at any time afterwards, in and to the following described property, to-wit:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(continued)

**FORM 16**

(Page 2)

TO HAVE AND TO HOLD the same unto the said \_\_\_\_\_  
GRANTEE, theirs heirs and assigns forever, as fully as I, as Constable, as  
hereinabove stated, can sell, transfer, and dispose of the same by virtue of said  
(Execution, Order of Sale, Tax Warrant, etc.)  
\_\_\_\_\_.

IN TESTIMONY WHEREOF, I have hereunto set my hand this \_\_\_\_ day of  
\_\_\_\_\_,  
20\_\_\_\_.

\_\_\_\_\_  
Constable Precinct No \_\_\_\_  
\_\_\_\_\_ County, Texas

By: \_\_\_\_\_  
(Deputy Signature)

\_\_\_\_\_  
(Printed Name)



**FORM 17 Officer's Return—Order of Sale**

(Page 1) [Rules 309, T.R.C.P., and applicable Execution Rules]

**OFFICER'S RETURN**

Came to hand this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m. and levied on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, on the following property, at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, County, Texas on the \_\_\_\_ day of 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m.:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Order of Sale attached)

\*\*\*\*\*

A Constable's Sale, on the above listed property, was held on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m. at \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, County, Texas, between the hours of ten o'clock a.m. and four o'clock p.m. on this writ, per the attached work sheet. (Sale Notice attached)

\*\*\*\*\*

Constable's (deed/bill of sale) \_\_\_\_\_ was issued to the purchaser.

\*\*\*\*\*

Did not find any property listed within the Order of Sale that could be levied upon, this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, belonging to the Defendant at the following address(es):

\_\_\_\_\_ County, Texas  
Zip,  
\_\_\_\_\_ County, Texas  
Zip,  
\_\_\_\_\_ County, Texas  
Zip,

\*\*\*\*\*

(continue)

**FORM 17**

(Page 2)

Fee \$ \_\_\_\_\_.

\_\_\_\_\_  
Constable Precinct No \_\_\_\_\_  
\_\_\_\_\_ County, Texas

By: \_\_\_\_\_  
(Deputy Signature)

\_\_\_\_\_  
(Printed Name)

**FORM 18 Officer's Return—Garnishment**  
 [Rules 16, 107, and 663, T.R.C.P.]

**OFFICER'S RETURN**

Came to the hand on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_:  
 \_\_\_\_ o'clock a.m./p.m. in Precinct \_\_\_\_, \_\_\_\_\_ County, Texas, and  
 executed by delivery to \_\_\_\_\_, Garnishee, in  
 person at \_\_\_\_ : \_\_\_\_ o'clock a.m./p.m. at \_\_\_\_\_,  
 \_\_\_\_\_, in \_\_\_\_\_ County, Texas Zip  
 \_\_\_\_\_.

ATTEMPTED SERVICE

DATE	TIME	ADDRESS & REMARKS

\*\*\*\*\*  
 Returned to the issuing court this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at  
 \_\_\_\_: \_\_\_\_ o'clock a.m./p.m. not as to \_\_\_\_\_,  
 Garnishee/Defendant.  
 Information as to the whereabouts of the said Garnishee/Defendant being  
 \_\_\_\_\_,  
 \_\_\_\_\_,

\*\*\*\*\*  
 Fee \$\_\_\_\_.\_\_\_\_

\_\_\_\_\_  
 Constable Precinct No \_\_\_\_  
 \_\_\_\_\_ County, Texas  
 By: \_\_\_\_\_  
 (Deputy Signature)  
 \_\_\_\_\_  
 (Printed Name)

**FORM 19 Officer's Return—Possession (not eviction)**  
[Rules 308 and 632, T.R.C.P.]

**OFFICER'S RETURN**

Came to the hand on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_:  
\_\_\_\_ o'clock a.m./p.m. and executed in Precinct \_\_\_\_, \_\_\_\_\_  
County, Texas by personal delivery to  
\_\_\_\_\_ at \_\_\_\_ : \_\_\_\_ a.m./p.m. at,  
\_\_\_\_\_, \_\_\_\_\_, in  
\_\_\_\_\_ County, Texas Zip \_\_\_\_\_.

\*\*\*\*\*

The following listed property:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ was taken into possession at  
\_\_\_\_\_ County, Texas and delivered to the  
Plaintiff on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_ : \_\_\_\_ o'clock  
a.m./p.m.

\*\*\*\*\*

Returned to the issuing court this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at  
\_\_\_\_: \_\_\_\_ o'clock a.m./p.m.

\*\*\*\*\*

Not executed as to the Defendant property

\_\_\_\_\_

Information as to the whereabouts of the Defendant/Property being

\_\_\_\_\_.

\*\*\*\*\*

Fee \$ \_\_\_\_\_.

\_\_\_\_\_  
Constable Precinct No \_\_\_\_

\_\_\_\_\_ County, Texas

By: \_\_\_\_\_

(Deputy Signature)

\_\_\_\_\_  
(Printed Name)

**FORM 20 Officers Return—Scire Facias**

[Rules 107, 154, and 563, T.R.C.T.P.]

**OFFICER'S RETURN**

Came to hand on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m. and executed in the Precinct \_\_\_\_\_, \_\_\_\_\_ County, Texas, by \_\_\_\_\_ personal delivery to \_\_\_\_\_ at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m. \_\_\_\_\_, \_\_\_\_\_, in \_\_\_\_\_ County, Texas Zip \_\_\_\_\_.

**ATTEMPTED SERVICE**

DATE	TIME	ADDRESS & REMARKS

\*\*\*\*\*

Retuned to the issuing court this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m.

\*\*\*\*\*

Not executed as to the Defendant property \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Information as to the whereabouts of the Defendant/property being

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\*\*\*\*\*

Fee \$ \_\_\_\_\_.

\_\_\_\_\_  
Constable Precinct No \_\_\_\_\_

\_\_\_\_\_ County, Texas

By: \_\_\_\_\_  
(Deputy Signature)

\_\_\_\_\_  
(Printed Name)

**FORM 21 Officer's Return—Turnover Order**  
[Tex. Civ. Prac. Rem Code §§ 31.002-0025]

**OFFICER'S RETURN**

Came to hand on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_: \_\_\_\_  
o'clock a.m./p.m. and executed in the Precinct \_\_\_\_\_,  
County, Texas, by personal delivery to  
\_\_\_\_\_ at \_\_\_\_: \_\_\_\_  
o'clock a.m./p.m. \_\_\_\_\_, \_\_\_\_\_, in  
\_\_\_\_\_ County, Texas Zip \_\_\_\_\_.

\*\*\*\*\*

The following listed property was turned over by the Defendant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_ and was taken into possession at \_\_\_\_\_,  
\_\_\_\_\_ County, Texas on the \_\_\_\_ day of \_\_\_\_\_, 20  
\_\_\_\_, at \_\_\_\_: \_\_\_\_ o'clock a.m./p.m.

\*\*\*\*\*

Returned to the issuing court this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at  
\_\_\_\_: \_\_\_\_ o'clock a.m./p.m. not executed as to the  
Defendant/Property \_\_\_\_\_

Information as to the whereabouts of the Defendant/Property being

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

\*\*\*\*\*

Fee \$ \_\_\_\_\_.

\_\_\_\_\_  
Constable Precinct No \_\_\_\_

\_\_\_\_\_ County, Texas

By: \_\_\_\_\_

(Deputy Signature)

\_\_\_\_\_  
(Printed Name)

## VIII. WRITS FOR PERSONS

### §8.01 WRIT OF ATTACHMENT

#### §8.01.01 Definition and Issuance

A writ of attachment is an order for the “arrest” of a person who either is in contempt of court or is to be held as security for the payment of judgment; or it is a writ ordering legal seizure of property [*Black’s Law Dictionary* 136 (8<sup>th</sup> ed. 2004).] The writ may be issued by a judge or clerk of a district or county court or a justice of the peace, returnable to the issuing court. [§ 61.021, V.A.C.P.R.C.]

#### §8.01.02 Emergency Order Authorizing Possession of a Child

Before a court may, without prior notice and a hearing, issue a temporary restraining order or attachment of a child in a suit brought by a governmental entity, the court must find that: there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child’s welfare; that there is no time, consistent with the physical health or safety of the child and the nature of the emergency, for a full adversary hearing under Subchapter C; and, reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child. [§ 262.102(a), V.A.Fam.C.]

In determining whether there is an immediate danger to the physical health or safety of a child, the court may consider whether the child’s household includes a person who has abused or neglected another child in a manner that caused serious injury to or the death of the other child, or sexually abused another child. [*Id.* at (b).]

If, based on the recommendations of or a request by the department, the court finds that child abuse or neglect has occurred and that the child requires protection from family violence by a member of that child’s family or household, the court shall render a temporary order under Chapter 71 for the protection of the child. [*Id.* at (c).]

A temporary restraining order or attachment of the child issued under Chapter 262, Family Code, expires no later than 14 days after the date it is issued unless it is extended as provided by the Texas Rules of Civil Procedure. [§ 262.103, V.A.Fam.C.]

If there is no time to obtain a temporary restraining order or attachment before taking possession of a child consistent with the health and safety of that child, an authorized representative of the Department of Protective and Regulatory Services, a law enforcement officer, or a juvenile probation officer may take possession of a child without a court order, only on:

1. Personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health or safety of the child;
2. Information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that there is an immediate danger to the physical health and safety of the child;
3. A personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse;
4. Information furnished by another that has been corroborated by personal knowledge of facts and all which taken together would lead a person or ordinary prudence and caution to believe that the child has been the victim of sexual abuse; or
5. Information furnished by another that has been corroborated by personal knowledge of facts and all which taken together would lead a person of ordinary prudence and caution to believe that the parent or person who has possession of the child is currently using a controlled substance as defined by Chapter 481, Health and Safety Code, and the use constitutes an immediate danger to the physical health or safety of the child. [§ 262.104, V.A.Fam.C.]
6. Personal knowledge or information furnished by another, that has been corroborated by personal knowledge, that would lead a person of ordinary prudence and caution to believe that the parent or person who has possession of the child has permitted the child to remain on premises used for the manufacture of methamphetamine.

### **§8.01.03 Attachment of Garnishee**

If a garnishee has effects in the garnishee's possession and fails or refuses to deliver those effects to the sheriff or constable when demand is made, the officer shall make immediate return of the failure or refusal. Upon motion of the plaintiff, the garnishee shall be cited to show cause why garnishee should not be attached for contempt of court for the failure or refusal. [Rule 670, T.R.C.P.]



**§8.01.04 Attachment For Disobeying Injunction**

Disobedience of an injunction may be punished by the court or judge as contempt. In case of such disobedience, the complainant, the complainant's agent or attorney, may file in the court in which such injunction is pending an affidavit stating what person is guilty of such disobedience and describing the acts constituting disobedience, The court or judge shall cause to be issued an attachment for such person, requiring that the sheriff or constable arrest the person if found in the county and bring the person, requiring that the sheriff or constable arrest the person if found in the county and bring the person before the court. However, the court may issue instead a show cause order directing and requiring the person to appear on a date certain to show cause why the person should not be judged in contempt. [Rule 692, T.R.C.P.]

When a subpoena for a child witness is issued, if a person, without legal cause, fails to produce the child in court as directed by the subpoena, the court may impose on the person penalties for contempt. The court may also issue a writ of attachment for the person and child, in the same manner as other writs of attachment. [Art. 24.011(b), V.A.C.C.P.]

Attachment may also be issued in criminal proceedings. [Art. 24.11, V.A.C.C.P.] When a witness, who resides in the county of the prosecution has been duly served with a subpoena to appear and testify in any criminal action or proceeding, fails to appear the State or the defendant shall be entitled to have an attachment issued forthwith for such witness. [Art. 24.12, V.A.C.C.P.]

When a witness resides in the county of the prosecution, whether the witness has disobeyed a subpoena or not, either in term-time or vacation, upon the filing of an affidavit with the clerk by the defendant or State's counsel that the affiant has good reason to believe and does believe that such witness is a material witness and is about to move out of the county, the clerk shall forthwith issue an attachment for the witness; provided that, in misdemeanor cases, when the witness makes oath that the witness cannot give surety, the officer executing the attachment shall take the witness's personal bond. [Art. 24.14, V.A.C.C.P.]

A magistrate has the power in all cases, where a witness resides or is in the county where the prosecution is pending, to issue an attachment for the purpose of enforcing the attendance of such witness; this the magistrate may do without having previously issued a subpoena for that purpose. [Art. 16.10, V.A.C.C.P.]

If a witness summoned from without the county refuses to obey a subpoena, the witness shall be fined by the court or magistrate not exceeding five hundred

dollars, which fine and judgment shall be final, unless set aside after due notice to show cause why it should not be final. Notice may immediately issue, requiring the default witness to appear at once or at the next term of the court, in the discretion of the judge, to answer for the witness' default. The court may cause to be issued at the same time an attachment for the witness, directed to the proper county. [Art. 24.22, V.A.C.C.P.]

The attachment shall command the officer to whom the writ is directed to take the witness into custody and have the witness before the court at the time named in the writ. In such a case, the witness shall receive no fees, unless it appears to the court that witness' disobedience is excusable. In that case, the witness may receive the same pay as if the witness had not been attached. When the fine is made final, all costs thereon shall be collected as in other criminal cases. The fine and judgment may be set aside in vacation or at the time or any subsequent term of the court for good cause shown, after the witness testifies or has been discharged. The following words shall be written or printed on the face of the subpoena for out-of-county witnesses: *"A disobedience of this subpoena is punishable by fine not exceeding five hundred dollars, to be collected as fines and costs in other criminal cases."* [Id.]

A magistrate may issue an attachment for a witness to any county in the State, when affidavit is made by the party applying for the attachment that the testimony of the witness is material to the prosecution or the defense, as the case may be; and the affidavit shall further state the facts which it is expected will be proved by the witness. If the facts set forth are not considered material by the magistrate, or if they are admitted to be true by the adverse party, the attachment shall not issue. [Art. 16.11, V.A.C.C.P.]

#### **§8.01.05 Requisites of an Attachment**

A writ of attachment shall:

1. Be styled "The State of Texas";
2. Be directed to any sheriff or constable of any county of the State of Texas;
3. Show the court of issuance;
4. Show the cause number;

5. Be signed by the clerk of the court, or the justice of the peace or magistrate;
6. Bear the seal of the court;
7. Identify the person to be attached; and
8. Order the officer executing the writ of attachment to attach the defendant and produce that person in court on a specific date and time, or place defendant in jail. [Art. 24.11, V.A.C.C.P.]

**§8.01.06 Service**

The officer receiving a writ of attachment shall execute the same, without delay, by taking the person into custody and producing the person in the court on the date and at the time ordered in the writ of attachment, or by placing the person in the county jail if the order so states. [Art. 16.13, V.A.C.C.P.]

**§8.01.07 Service of Writ for Juvenile Hearing**

A juvenile court may issue a writ of attachment for a person who violates a summons to appear for a hearing entered under Section 53.069 (c) Family Code. [§ 53.08 (a), V.A.FAM.C.] A writ of attachment so issued is executed in the same manner as in a criminal proceeding as provided by Chapter 24, Code of Criminal Procedure. [*Id.* at (b).] The officer receiving the attachment shall execute it forthwith by bringing before the magistrate the witness names in the writ, unless the witness shall give bond for witness' appearance before the magistrate at the time and place required by writ. [Art. 16.13, V.A.C.C.P.]

**§8.01.08 Return**

The executing officer shall show in the return;

1. The date and time received;
2. The date and time it was executed;
3. The location of where it was executed;
4. To whom the writ was delivered;
5. If unexecuted, the reason for the failure to execute;
6. Actions that were taken by the officer to serve it;
7. The executing officer's signature;

8. The elected official's name (if applicable)'
9. The department name; and,
10. Shall return it to the issuing court.

### **§8.01.09 Officer's Liability**

Except as provided in Section 34.061, Civil Practice and Remedies Code, an officer is not liable for damages resulting from the execution of a writ issued by a court of this state if the officer:

1. In good faith, executes the writ as provided by law and by Texas Rules; and
2. An officer shows that the officer acted in good faith when the officer shows that a reasonably prudent officer, under the same or similar circumstances, could have believed that the officer's conduct was justified based on the information the officer possessed when the conduct occurred. [§ 7.003, V.A.C.P.R.C.]

An officer shall execute a writ issued by a court of this state without requiring that bond be posted for the indemnification of the officer. [*Id.* at (b).]

## **§8.02 HABEAS CORPUS**

### **§8.02.01 Definition and Issuance**

The writ of *habeas corpus* is the remedy to be use used when any person is restrained in the person's liberty. It is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in custody, or under restraint, commanding them to produce such person, at a time and place named in the writ, and show why the person is held in custody or under restraint. [Art. 11.01, V.A.C.C.P.]

*Habeas corpus* translates from Latin as "you have the body of". [*Black's Law Dictionary* 728 (8<sup>th</sup> ed. 2004).] The object of a writ of *habeas corpus* is that a party be brought before the court or judge. [*Id.*] Writs of *habeas corpus* apply to civil and criminal matters. The Code of Criminal Procedure governs the criminal writ and the Texas Rules of Appellate Procedure govern the civil writ. [See Arts. 11.01-.64, V.A.C.C.P. and Rules 52.1-52.11, T.R.A.P.] The general definition above applies to both civil and criminal writs of *habeas corpus*. In a typical context, such as contempt for which a person is placed in jail, a writ of *habeas corpus* is used to seek the person's release. [Rules 52 and 120, T.R.A.P.]

However, the Family Code contains specific provisions concerning writs of *habeas corpus*.

In the family law context, the writ of *habeas corpus* is used to regain possession of a child based on a prior valid order of the court. A court's order in a *habeas corpus* proceeding compelling the return of a child to the relator is the proper remedy upon finding that the relator was the parent of the child who has superior rights to possession over persons seeking to become managing conservators. A writ of attachment may be issued in a *habeas corpus* proceeding. [§§ 157.371-376, V.A.Fam.C.]

One of the most common instances in which a constable sees a civil writ of *habeas corpus* is when a party challenges a contempt judgment. The validity of a contempt judgment can only be attacked by a writ of *habeas corpus*. [*Deramus v. Thornton*, 333 S.W. 2d 824, 827 (Tex. 1960).] However, mere judgment of contempt will not justify granting of a writ of *habeas corpus*, the applicant must suffer some restraint to justify the issuance of the writ. [*Ex Parte Sealy*, 870 S.W. 2d 663, 666 (Tex. App. – Houston, [1<sup>st</sup> dist.] 1994, no writ) citing *Deramus*.]

Subject to Chapter 152, Family Code, and the “Parental Kidnapping Act” (38 U.S.C. § 1738A), if the right to possession of a child is governed by a court order, the court, in a *habeas corpus* proceeding involving the right to possession of the child, shall compel return of the child to the relator only if the court finds that the relator is entitled to possession under the order. If the court finds that the previous order was granted by a court that did not give the contestants reasonable notice of the proceeding and an opportunity to be heard, the court may not render an order in the *habeas corpus* proceeding compelling return of the child on the basis of that order. [§ 157.372, V.A.Fam.C.]

#### **§8.02.02 Requisites of Habeas Corpus**

The form and contents of the petition are set out in the Texas Rules of Appellate Procedure. A petition seeking extraordinary relief, such as issuance of a writ of *habeas corpus*, must be presented to the clerk of the appropriate appellate court captioned “*In re* [name of relator].” [Rule 52.1, T.R.A.P.] Any party may file a response to the petition, although it is not mandatory. [Rule 52.4, T.R.C.P.]

A writ of *habeas corpus* shall:

1. Be styled “The State of Texas;”

2. Be addressed to a person having another under restraint, or in custody;
3. Describe, as near as may be, the name of the office, if any, of the person to whom it is directed;
4. State the name of the person said to be detained;
5. Fix the time and date of return;
6. Be signed by the judge or by the clerk with the judge's seal, when issued by a court;
7. Show the date of issuance;
8. Show the issuing court;
9. Show the cause number;
10. Bear the seal of the court if issued by the county or district court;
11. Identify all parties whose interests would be affected;
12. Show the hearing date;
13. Contain a concise summary of facts; and
14. If a criminal case, contain a copy of writ, order, or process by which defendant is detained, if any. [Art. 11.02, V.A.C.C.P.; Rule 15, T.R.C.P.]

### **§8.02.03 Service**

The service of the writ may be made by any person competent to testify. [Art. 11.26, V.A.C.C.P.] The writ may be served by delivering a copy of the original to the person who is charged with having the party under restraint or in custody, and exhibiting the original, if demanded; if the person being served refuses to receive it, the person shall be informed verbally of the purport of the writ in criminal action. If the person being served refuses admittance to the person wishing to make service, or conceals self, a copy of the writ may be fixed upon some conspicuous part of the house where such person resides or conceals self, or of the place where the prisoner is confined; and the person serving the writ of *habeas corpus* shall, in all cases, state fully in the return the manner and the time of the service of the writ. [Art. 11.27, V.A.C.C.P.]

The writ of *habeas corpus* may be delivered at any time or day of the week, except Sunday, and it expires upon the hearing date. [Rule 6, T.R.C.P.]

The receiving officer shall:

1. Stamp the date and time and writ was received;
2. Collect delivery fee and make receipt;
3. Enter into record keeping system; and
4. Deliver the writ to the defendant.

The writ of *habeas corpus* is a time sensitive document. It is to be delivered to the named person by executing officer. No further action is required.

#### **§8.02.04 Return**

Before indictment found, the writ may be made returnable to any county in the State. [Art. 11.06, V.A.C.C.P.] The delivering officer shall complete an officer's return which shall include:

1. Complete date and time received;
2. Date and time of delivery;
3. Location of delivery (complete address);
4. Name of defendant;
5. Person to whom the document was delivered;
6. How delivery was made;
7. Executing officer's signature;
8. The elected officials' name (if applicable);
9. Department name; and
10. If not executed, diligence used to try to execute and reason(s) not executed.

**§8.02.05 Liability**

Any officer to whom a writ of *habeas corpus*, other writ, warrant or process authorized by Chapter 11, Code of Criminal Procedure, shall be directed, delivered or tendered, who refuses to execute the same according to the directions, or who wantonly delays the service or execution of the same, shall be liable to fine as for contempt of court. [Art. 11.60, V.A.C.C.P.]

**§8.03 COMMITMENTS****§8.03.01 Definition and Issuance**

A writ of commitment is a warrant, order, or process by which a court or magistrate directs an officer to take a person for confinement to a prison, mental hospital, or other institution. [*Black's Law Dictionary* 288 (8<sup>th</sup> edition 2004).]

A writ of commitment in a criminal matter (also known as mittinus) may be issued by any magistrate; in a civil matter, if on hearing for mental health, the county court that handles probate and mental health matters will normally issue upon application, or a designated magistrate in the probate judge's absence. [§ 573.012, V.A.H.&S.C.] The Code of Criminal Procedure contains a writ of commitment directing a sheriff to receive and place a party in jail. [Art. 2.18, V.A.C.C.P.; Op. Tex. Att'y Gen. No. JC-0312(2000).] The Mental Health Code provides for a warrant for apprehension and detention to be issued by a court that is similar to a commitment writ. [§ 573.012(d)-(f), V.A.H.&S.C.]

Only civil writs of commitment in mental health cases are addressed in this volume. See *Topic XI. "Mental Health"*.

**§8.04 CAPIAS****§8.04.01 Definition and Issuance**

In the criminal context, a *capias* is a writ issued by the court having jurisdiction of a case after commitment or bail and before a trial, or by a clerk, and directed "To any peace officer of the State of Texas", commanding the officer to arrest a person accused of an offense and bring the person before that court immediately, or on a day or at term stated in the writ. [Art. 23.01, V.A.C.C.P.] *Capias* is the name for several kinds of writs that command an officer to take a named defendant into custody. A *capias* can be issued under the Code of Criminal Procedure or under the Family Code. A Family Code *capias* is not the same thing as a Code of Criminal Procedure *capias*. This volume addresses only Family Code *capiases*:



1. If the respondent who has been personally served with notice to appear at a hearing does not appear at the designated time, place, and date to respond to a motion for enforcement of an existing order, regardless of whether the motion is joined with other claims or remedies, the court may hold the respondent in contempt but may, on proper proof, grant a default judgment for the relief sought and issue a *capias* for the arrest of the respondent. [§ 157.066, V.A.Fam.C.]
2. The court may order a *capias* to be issued for the arrest of respondent if the motion for enforcement requests contempt, the respondent was personally served, and the respondent fails to appear. [§ 157.114, V.A.Fam.C.]
3. The law enforcement officials shall treat the *capias* in the same manner as an arrest warrant for a criminal offense and shall enter the *capias* in the computer records for outstanding warrants maintained by the local police, sheriff and the Department of Public Safety. The *capias* shall be forwarded to and disseminated by the Texas Crime Information Center and the National Crime Information Center. [§ 157.102, V.A.Fam.C.]

A *capias* shall be executed in the same manner as a misdemeanor arrest warrant. [§ 157.102, V.A.Fam.C.] Bail should be taken by the sheriff of the country where the defendant was jailed as the same procedure for other warrants. The arresting officer should contact the issuing court, if within the same county during normal court hours, to see if the magistrate wants the defendant brought before them or placed directly in jail. The officer should check with the issuing court for validity of the *capias* from time to time, If a period of time has elapsed since the issuance of the *capias*.

Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is imminently likely to suffer serious physical harm or to be removed from this state. If the court, upon testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by Section 152.308(b), Family Code. [§ 152.311(a) and (b), V.A.Fam.C.]

A warrant to take physical custody of a child must: recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based; direct law enforcement officers to take physical custody of the child; provide for the placement of the child pending final relief. [*Id.* at (e).]

The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian. [*Id.* at (f).]

#### **§8.04.02 Requisites of a *Capias***

A *capias* shall be held sufficient if it:

1. Runs in the name of "The State of Texas;'
2. Is directed to any peace officer;
3. Names the person whose arrest is ordered, or if unknown, describe the person;
4. Specifies the offense of which the defendant is accused, and it appears thereby that the defendant is accused of some offense against the penal laws of the State;
5. Show the cause number;
6. Commands arrest;
7. Names the court to which and the time when it is returnable;
8. Is dated and attest officially by the authority issuing it;
9. Bears the district or deputy clerk signature;
10. Bears the district clerk seal;
11. Contains a bail amount; and
12. Contains notice on its face to treat the same as an arrest warrant and enter into warrant computer. [See Arts. 23.02 V.A.C.C.P.; § 157.102 V.A.Fam.C.]

#### **§8.04.03 Service**

When an officer receives a *capias*, the officer should:

1. Stamp date and time received;
2. Collect delivery fee;
3. Enter into warrant computer system (unless issued by another county, which should enter it into computer system, and forward certified copy of county of arrest);
4. Obtain confirmation and extradition of prisoner from the originating county sheriff or constable;
5. If it is an out-of-county *capias*; arrest defendant and have magistrates;
6. Place defendant into county jail;
7. Execute the return completely on the *capias*, giving original, or copy, to the jail of the county of arrest
8. Retain copy of executed *capias* and place with arrest record;
9. Remove from warrant computer system, if entered;
10. Notify out of county sheriff or constable if entered by them; and
11. Complete state fee voucher, if issued by Attorney General.

A *capias* can be executed by any peace officer at any time of the day, on any day of the week. It is executed by arresting the defendant and placing the defendant in the county jail. The *capias* accompanies the defendant to the county jail and does not expire until recalled by the issuing court.

A *capias* may be executed by any peace officer. In felony cases, the defendant must be delivered immediately to the sheriff of the county where the arrest is made, together with the writ under which he was taken. [Art. 23.13, V.A.C.C.P.]

A *capias* shall not lose its force if not executed and returned at the time fixed in the writ, but may be executed at any time afterward, and return made. All proceedings under such *capias* shall be valid as if the same had been executed and returned within the time specified in the writ. [Art. 23.07, V.A.C.C.P.]

**§8.04.04 Return**

The officer's return on a *capias* shall contain:

1. Complete date and time received;
2. Record of date and time executed;
3. Record of location of arrest (complete address);
4. Name of the defendant and depict in which county jail the defendant is incarcerated;
5. If not executed, diligence used to try to execute and reasons not executed;
6. Executing officer's signature;
7. Elected official's name, if applicable; and
8. Department name.

When an arrest has been made and bail taken, the bond, together with the *capias*, shall be returned forthwith to the proper court. [Art. 23.17, V.A.C.C.P.]

The return of the *capias* shall be made to the court from which it was issued. If it has been executed, the return shall state what disposition has been made of the defendant. If it has not been executed, the cause of the failure to execute shall be fully stated. If the defendant, has not been found, the return shall further show what efforts have been made by the officer to find the defendant, and what information the officer has as to the defendant's whereabouts. [Art. 23.18, V.A.C.C.P.]

When the *capias* is not returned at the time fixed in the writ, the officer holding it shall notify the court from whence it was issued, in writing, of the officers' reason for returning it. [Art, 23.08, V.A.C.C.P.]

**FORM 22 Return of Service of Writ of Attachment of Persons**  
 [Tex. C. Crim. Proc. Arts. 24.12 and 24.22]

**CONSTABLE'S RETURN**

Come to hand on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_:\_\_\_\_ o'clock a.m./p.m. and executed (not executed) on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_:\_\_\_\_ o'clock a.m./p.m., at \_\_\_\_\_, \_\_\_\_\_ in \_\_\_\_\_, County, Texas, Zip \_\_\_\_\_.

By attaching the person name in the writ and delivering them to the custody of: \_\_\_\_\_ as directed in the writ.

Returned to the issuing court this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_ at \_\_\_\_:\_\_\_\_ a.m./p.m. As the defendant \_\_\_\_\_, and the information as to the whereabouts of the person to be attached being: \_\_\_\_\_

\*\*\*\*\*

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

**FORM 23 Subpoena for Out of County Witness in Criminal Case**

Art. 24.22, V.A.C.C.P.

THE STATE OF TEXAS  
TO THE SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS,  
GREETINGS:

YOU ARE HEREBY COMMANDED that you serve by delivering a copy of this subpoena to \_\_\_\_\_, Witness, and summon \_\_\_\_\_, who resides at \_\_\_\_\_, \_\_\_\_\_ County, Texas, who shall thereby know that he is summoned, Witness is to be and appear before the Justice Court of Precinct \_\_\_\_\_, Place \_\_\_\_\_, to be held in and for the County of \_\_\_\_\_, at the Courthouse thereof, in the City of \_\_\_\_\_, on the \_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_ .m.

Witness is being summoned at the instance of Plaintiff/Defendant (and by request of \_\_\_\_\_, Plaintiff's/Defendant's attorney) in a certain suit now pending in said court, styled \_\_\_\_\_, Plaintiff, vs. \_\_\_\_\_, Defendant, Cause no. \_\_\_\_\_; and that Witness continue in attendance from day to day until discharged by the court or by the said \_\_\_\_\_, Plaintiff/Defendant. Witness is directed to:

- Attend and give testimony at a deposition, hearing, or trial; or
- Produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

**A disobedience of this subpoena is punishable by a fine not exceeding five hundred dollars, to be collected as fines and costs in other criminal cases.**

BE ADVISED that failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punishable by fine or confinement, or both.

HEREIN fail not, but have you then and there before said court this writ, with your return thereon, showing how you have executed the same.

WITNESS, \_\_\_\_\_, Justin of the Peace, Precinct \_\_\_\_\_, Place \_\_\_\_\_ County, Texas.

GIVEN UNDER MY HAND, at office in the City of \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Justice of the Peace  
PCT. \_\_\_\_\_, PL. \_\_\_\_\_,  
\_\_\_\_\_ COUNTY, TEXAS

ISSUED this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

**FORM 24 Return of *Habeas Corpus***  
 [Code Crim. Pro. Art 23.18]

**CONSTABLE'S RETURN**

Came to hand on the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, at \_\_\_\_:\_\_\_\_ o'clock  
 a.m./p.m. and executed on the \_\_\_\_ day of \_\_\_\_, 20\_\_\_\_, at \_\_\_\_:\_\_\_\_ o'clock  
 delivering to: \_\_\_\_\_ at  
 \_\_\_\_\_, \_\_\_\_\_, in \_\_\_\_\_ County, Texas Zip  
 \_\_\_\_\_

Returned to the issuing court this \_\_\_\_ day of \_\_\_\_, 20 \_\_\_\_, NOT EXECUTED  
 for the following reason: \_\_\_\_\_ and the information as to the whereabouts of the  
 Defendant being: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence Used)

DATE	TIME	LOCATION	COMMENTS	DEPUTY

\_\_\_\_\_  
 CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
 COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
 PRINTED NAME

**FORM 25 Return of Service on Capias**  
[Code Crim. Proc. Art. 11.10]

**CITATION – RETURN OF SERVICE**

Received the \_\_\_\_ day of \_\_\_\_, 20 \_\_\_\_, at \_\_\_\_ o'clock a.m./p.m. and executed (not executed) on the \_\_\_\_ day of \_\_\_\_, 20 \_\_\_\_, at \_\_\_\_ o'clock a.m./p.m. by delivering in person a true copy of this notice to: \_\_\_\_\_

at \_\_\_\_\_, \_\_\_\_\_, in \_\_\_\_\_ County, Texas, Zip \_\_\_\_\_.

By taking the Defendant, \_\_\_\_\_, into custody and placing him/her in the \_\_\_\_\_ County Jail.

Returned to the issuing court on this \_\_\_\_ day of \_\_\_\_, 20\_\_ .

NOT EXECUTED as the Defendant, \_\_\_\_\_  
And the information as to the whereabouts of the Defendant being: \_\_\_\_\_

\*\*\*\*\*

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

\_\_\_\_\_  
CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
PRINTED NAME



## IX. EVICTIONS and Landlord/Tenant Law

### §9.01 EVICTIONS AND LANDLORD/TENANT LAW

#### §9.01.01 DEFINITION AND ISSUANCE

An eviction\* is dispossession by process of law; the act of depriving a person of the possession of land or rental property which the person has held or leased. It is the act of turning a tenant out of possession, either by re-entry or legal proceedings, such as an action of ejectment. [*Black's Law Dictionary* 594 (8<sup>th</sup> Edition 2004).]

\*Be aware that eviction suits were formerly known by the common law term "forcible entry and detainer" suits. Although the language has been changed in some sections of the Property Code, these changes have not been made uniformly, and the term "forcible entry and detainer" is still used in some parts of the Property Code as well as in the Rules of Civil Procedure.

After proper notice has been given to the tenant, the process of eviction is the same for residential, commercial, manufactured housing, and homeowner's associations. The Texas Property Code, the Texas Civil Practice and Remedies Code, and The Rules of Civil Procedure govern the process, which does not try title or ownership issues of rental property. The only issue in an eviction is the right of actual possession, not the merits of the title. [Rule 746, T.R.C.P.] The eviction suit should be filed in the justice court in the county (venue) and precinct (jurisdiction) where the real property is located. [§ 15.0115(a), T.C.P.R.C.; § 24.004, V.A.Prop.C.] Property located in one or more precincts or one or more counties may be filed in any justice court where any part of the property is located. The court's jurisdiction will encompass the real property located in another precinct or county when any part of the real property is within the court's jurisdiction.

The landlord must give a written notice to the tenant before filing suit. The landlord's notice to vacate must give the tenant at least three days or any other period of time specified in the lease before the landlord files the eviction suit. [§ 24.005(a), V.A.Prop.C.] If the tenant is being evicted as the result of a foreclosure and the purchaser chooses not to continue the lease, the notice must be 30 days. [*Id.* at (b).] If the occupant is a tenant of a person who acquired possession by forcible entry, the landlord must give the person at least three days' written notice to vacate before filing an eviction suit. [*Id.* at (c).] If the tenant occupies the premises by forcible entry the notice may be oral or written

and notice may be to vacate immediately or by a specified deadline. [*Id.* at (d).] This notice may be in person, or by mail at the premises in question. It may be delivered to the tenant or any person residing at the address who is 16 years of age or over, or be placed inside the main entry door. [*Id.* at (f).] A written request must be made before the vacate notice is given if the landlord wishes to request payment of back rent when the eviction suit is filed. [*Id.* at (i).] To be eligible to recover attorney's fees, the landlord must give a tenant a written demand to vacate the premises. The demand must state that if the tenant does not vacate the premises before the 11<sup>th</sup> day after the date of receipt of the notice and the landlord files suit, the landlord may recover attorney's fees. The demand must be sent by registered mail or certified mail, return receipt requested, at least 10 days before the date the suit is filed. [§ 24.006(a), V.A.Prop.C..]

Chapter 24 of the Texas Property Code governs residential evictions based on manufactured home leases entered into before April 1, 2002 and Chapter 94 governs evictions for "manufactured home communities" (four or more lots offered for lease).

A constable or a constable deputy may act as a private process server to deliver the landlord's notice to vacate before the suit is filed. The officer may not use a county vehicle or county equipment or wear a uniform; gun, badge or in any way imply by deed or action that the officer is anything other than a private process server. The officer may not deliver the notices while on duty. The officer may charge a fee for providing this service. This is not a constable/sheriff fee and it is not set by the commissioner's court. [§ 154.005(d), V.A.L.G.C.]

**§9.01.02 Requisites of Citation In an Eviction** (Regular eviction filed under rule 739 T.R.C.P.)

An eviction citation must:

1. Be styled "The State of Texas;"
2. Be signed by the clerk under seal of the court or by the justice of the peace;
3. Contain the name and location of the court;
4. Show the date of the filing of the petition;
5. Show the date the citation is issued;

6. Show the file number;
7. Show the name of the parties;
8. State the nature of plaintiff's demand;
9. Be directed to the defendant;
10. Show the name and address of the plaintiff's attorney (if applicable) or the name and address of the plaintiff;
11. Contain the time within which the rules require the defendant to file a written answer with the clerk who issued the citation;
12. Contain the address of the clerk;
13. Notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded by the petition;
14. Command the defendant to appear before the court not more than 10 days nor less than 6 days from the date of service; and
15. Inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with the citation, the case shall be heard by a jury. [Rule 99 and 739, T.R.C.P.]
16. Must include the following notice to the defendant:  
**FAILURE TO APPEAR FOR TRIAL MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST YOU.** [§ 24.0051(c), V.A.Prop.C.; Rules 534 and 739, T.R.C.P.]
17. Must include the following notice to the defendant on the first page of the citation in English and Spanish and in conspicuous bold print:  
**SUIT TO EVICT – THIS SUIT TO EVICT INVOLVES IMMEDIATE DEADLINES. CALL THE STATE BAR OF TEXAS TOLL-FREE AT 1-877-9TEXBAR IF YOU NEED HELP LOCATING AN ATTORNEY. IF YOU CANNOT AFFORD TO HIRE AN ATTORNEY, YOU MAY BE ELIGIBLE FOR FREE OR LOW-COST LEGAL ASSISTANCE.** [§ 24.0051(d), V.A.Prop.C.; Rules 534 and 739, T.R.C.P.]

**§9.01.03 Requisites of Citation in an Immediate Possession Eviction**

The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice shall be served in the same manner as a service of citation and shall inform the defendant of the following:

1. The defendant may remain in possession if the defendant executes and files a counterbond prior to the expiration of six days from the date the defendant is served. The bond is subject to approval of the judge. [Rule 740(a), T.R.C.P.]
2. The defendant may demand and be granted a trial to be held prior to the expiration of six days from the date the defendant is served. [*Id.* at (b).]
3. If the defendant fails to file a counterbond and if the defendant does not demand trial be held prior to the expiration of six days from the date of service, the constable of the precinct or sheriff of the county where the property is situated shall place the plaintiff in possession of the property promptly after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond. [*Id.* at (c).]
4. If, in lieu of a counterbond, defendant demands trial within the six-day period and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace. [*Id.* at (d).]

The language on the eviction citation will be different when a possession bond is filed. The writ of possession may not issue until a judgment has been rendered. Judicial process requires a citation must be served and returned to the court before a judgment may be entered and there must be a judgment before a writ may be issued. In Rule 740(c), T.R.C.P., the language indicates that possession will occur after expiration of six days. Issuance of the writ is not automatic and the officer must follow the commands within the writ of possession.

**§9.01.04 Service**

The constable or sheriff may deliver eviction citations. [Rule 742, T.R.C.P.] The citation should be served no less than 6 days from the return day and may be served on any day of the week except Sunday. [Rule 6 and 742, T.R.C.P.] The defendant may be personally served anywhere the defendant may be found in the officer's jurisdiction. When the officer attempts service at the defendant's

usual place of abode (residence), the officer may serve the defendant or any person over 16 years of age at the place of abode. [Rule 742, T.R.C.P.] The justice court citation may set the date and time the defendant should appear in court. Some courts allow the officer delivering the citation to set the court date. The delivering officer should, in either case, make sure the court date is no less than 6 days and no more than 10 days from the service date [See Rule 739, T.R.C.P.] The date of service is not counted in the computation of time. [Rule 4, T.R.C.P.] There are times when the court may set a court date and the officer has only one day to complete delivery of citation. If the officer is unable to deliver the citation, it will be necessary to return the citation to the court for the assignment of a new court date. There are some courts that will give the officer a new court date without the return of the citation. It is recommended the officer check with the court and find what the court's policy is before returning the citation.

[50 U.S.C. App. §501, *et. Seq.*] provides a stay of eviction. The servicemember or dependent must request the stay. The court may stay the case on its own motion when the court becomes aware the act applies to the defendant. [50 U.S.C. App. §501, *et. Seq.*]

#### **§9.01.05 Alternate Service Application**

If the officer receiving the eviction citation is unsuccessful in making personal service, the officer shall make application for alternate service. [Rule 742a, T.R.C.P. The officer must:

1. Within 5 days after receiving citation, execute a sworn statement that the officer has made diligent efforts to serve the citation;
2. Document officer's diligence in attempting to serve the citation;
3. Make a minimum of two service attempts at all addresses in the county shown on the complaint;
4. Sign the affidavit; and
5. Have the affidavit notarized; and
6. File the sworn statement with the justice who shall promptly consider the statement. [Rule 742a, T.R.C.P.]

The rule states that judge “may sign” not “must” sign. The officer should consult with the justice of the peace to determine the judge’s requirements for approval of alternative service. [*Id.*]

#### **§9.01.06 Alternate Service**

Once the judge has approved the alternate service, the citation will be served in the following manner:

1. The officer shall place the citation inside the rental until by placing it through a mail chute or by slipping it under the front door; and, if neither method is possible or practical, the officer may securely affix the citation to the front door or main entry to the premises.
2. The officer must, that same day or the next day, mail a copy of the citation and complaint by first class mail to the premises in question.
3. The officer shall note on the return the date of delivery and the date of mailing.
4. Such delivery and mailing to the premises should be at least six days before the date of the hearing shown on the citation.
5. On or before the day assigned for trial, the officer shall return the citation with the officer’s action written thereon to the judge who issued the citation. [Rule 742a, T.R.C.P.]

#### **§9.01.07 Return**

The delivering officer shall complete an officer’s return which shall include:

1. The date and time received;
2. The date and time of delivery;
3. Name the person served;
4. Method of service (in person or alternate service);
5. The address;
6. The date mailed, if alternate service;

7. The service fee;
8. The elected official name and title (if applicable); and
9. Bear the officer's signature (recommended, also print name). [Rules 16, 107, and 742a, T.R.C.P.]

The citation should be returned to the court promptly. The citation must be returned to the court before the judgment may be issued. [*American Spiritualist Ass'n v. Ravkin*, 313 S.W. 2d 121, 124 (Tex. App. – Dallas 1958) holding the justice court judgment was fatally defective because of a lack of service on all defendants.)]

## **§9.02 WRIT OF POSSESSION**

### **§9.02.01 Definition and Issuance**

A writ of possession is a writ of execution employed to enforce a judgment to recover the possession of land. [*Black's Law Dictionary* 1642 (8<sup>th</sup> ed. 2004).] Justices of the peace, county courts, and district courts may issue writs of possession. A writ of possession may not issue before the sixth day after the judgment is rendered unless a possession bond has been filed and approved and judgment for possession is granted by default. [§ 24.0061, V.A.Prop.C.] If the eviction was filed under Rule 740 (immediate possession) the writ of possession may issue when the judgment is rendered. [Rules 740 and 748, T.R.C.P.] The plaintiff must request issuance of the writ of possession.

A permit is required to move a manufactured house. The manufactured housing movers must get a permit from the Texas Department of Transportation to move the house on the public roads. [§ 623.092, V.A. Transp.C.] If an application for a permit to move a manufactured house is accompanied by a copy of a writ of possession issued by a court of competent jurisdiction, the applicant is not required to submit the written statement from the chief appraiser. The mover can obtain a permit with a copy of the writ of possession. [§ 623.093(f), V.A. Transp.C.]

### **§9.02.02 Requisites of Writ of Possession**

The writ of possession shall:

1. Order the officer executing the writ to post a written warning of at least 8½ by 11 inches on the exterior of the front door of the rental unit

- notifying the tenant that the writ has been issued and that the writ will be executed on or after the specific date and time stated in the warning, but not sooner than 24 hours after the warning is posted. [§ 24.0061(d)(1), V.A.Prop.C.]
2. When the writ is executed, order the officer executing the writ to:
    - A. Deliver possession of premises to landlord;
    - B. Instruct the tenant and all persons claiming under the tenant to leave the premises immediately, and, if the persons fail to comply, physically remove them;
    - C. Instruct the tenant to remove or to allow the landlord, the landlord's representatives, or other persons acting under the officer's supervision to remove all personal property from the rental until other than personal property claimed to be owned by the landlord;
    - D. Place, or have an authorized person place, the removed personal property outside the rental unit at a nearby location, but not blocking a public sidewalk, passageway, or street and not while it is raining, sleeting, or snowing. [*Id.* at (d).]
  3. Authorize the officer, at the officer's discretion, to engage the services of a bonded or insured warehouseman to remove and store, subject to applicable law, part or all of the property at no cost to the landlord or the officer executing the writ. [*Id.* at (e).] The officer may not require the landlord to store the property. [*Id.* at (f).]
  4. Contain notice to the officer that under Section 7.003, Civil Practice and Remedies Code, the officer is not liable for damages resulting from the execution of the writ if the officer executes the writ in good faith and with reasonable diligence. [*Id.* at (g).] A sheriff or constable may use reasonable force in executing the writ. [*Id.* at (h).]

The writ of possession contains clear language on how to execute the writ. It addresses issues of personal property claimed to be owned by tenant or the landlord and gives the officer authority to supervise all personnel and activities when executing the writ. If the landlord or the officer chooses to store all or any



part of the property, the officer must give the tenant a written notice stating the complete name, address, and telephone number where the property is stored. If the tenant is not present, the notice must be mailed by first class mail to the tenant's last known address. The notice must state that the tenant may redeem property on an item-by-item basis after paying the moving and storage charges reasonably attributable to the items being redeemed during the first 30 days after storage. After the 30 days, all remaining charges must be paid to redeem the property. [§ 24.0062(b), V.A.Prop.C.]

### **§9.02.03 Service**

The writ is directed to the sheriff or constable for execution. The copy of the writ may be attached to the written warning the defendant receives before the writ is executed. The writ clearly states it is executed when the officer returns control of the premises to the landlord/plaintiff. [§ 24.0061, V.A.Prop.C..] The writ may be executed on any day of the week, but it is generally not executed on Sunday. [Rule 6, T.R.C.P.]

### **§9.02.04 Return**

The executing officer shall complete an officer's return; which shall:

1. State the date and time received;
2. State the date and time warning is posted;
3. State the date and time show on the warning for execution of the writ;
4. State date and time that writ was executed;
5. Explain how the writ was executed; (was the defendant present? Was property stored? How was storage notice delivered? Was property placed at a nearby location? Was an inventory made?)
6. Contain the service fee;
7. Show the elected official's name and title (if applicable); and
8. Contain the officer's signature (print name, as well). [Rule 16, T.R.C.P.]

The officer's return should be brief, clear, and concise. It should be a chronological statement of all actions relating to the execution of the writ.

**§9.03 WRIT OF REENTRY****§9.03.01 Definition and Issuance**

A writ of reentry is a judicial order issued by a justice of the peace to place a tenant back into a rental unit when the landlord has illegally locked the tenant out. [§ 92.009(a), V.A.Prop.C..] The writ of reentry suit must be filed in the justice court in the precinct where the property is located. It may be issued after the tenant has sworn the facts of the illegal act at an *ex parte* hearing and the justice reasonably believes that the unlawful act has occurred. [*Id.* at (b).]

If the lockout has occurred because of nonpayment of rent, the residential tenant does not have to pay the alleged back rent to regain entry. [§ 92.0081(f), V.A.Prop.C..] A commercial tenant must pay the back rent in order to regain entry. [§ 93.002(f), V.A.Prop.C..]

**§9.03.02 Requisites of Writ of Reentry**

The writ shall:

1. Be styled "The State of Texas";
2. Be directed to landlord or landlord's representative;
3. Be signed by justice of the peace;
4. Show name and location of the court;
5. Show date of issuance;
6. Show file number;
7. Show name of parties;
8. Describe the premises; and
9. Notify the landlord of the right to a hearing.

**§9.03.03 Service**

The sheriff, constable or their deputy may serve the writ. [§ 92.009(d), V.A.Prop.C..] The writ may be served on the landlord, the landlord's management company, and on premises manager or a person who collects the

rent. The hearing awarded immediate possession of the premises to the tenant, and the writ should be executed in the same manner as a writ of possession. This means the officer is authorized to place the tenant in possession of the premises, if the landlord fails to comply with the writ. Should the landlord fail to comply with the writ, the officer may use reasonable force in executing it. [*Id.*]

The officer needs to use caution. Usually when this writ is issued, emotions are strained among all parties. Officer needs to explain the writ clearly to landlord, emphasizing that the tenant has been placed back into the premises. The landlord should be informed that failure to comply with the writ could result in finding a contempt, including a possible fine, jail term, or both [§ 92.009(i), V.A.Prop.C.] A writ of possession supersedes a writ of reentry. [§ 92.009(h), V.A.Prop.C..]

#### **§9.03.04 Return**

The officer's return shall:

1. Show date and time received;
2. Record date and time of delivery;
3. State name of the person served;
4. Record location of delivery (complete address);
5. Give detailed description of how tenant was placed in possession of property;
6. Contain the name and title of elected official, if applicable; and
7. Be signed in official capacity. [Rule 16, T.R.C.P.]

### **§9.04 DISTRESS WARRANT**

#### **§9.04.01 Definition and Issuance**

A distress warrant is a writ authorizing an officer to distrain property. [*Black's Law Dictionary* 1616 (8<sup>th</sup> ed. 2004).] In the context of an eviction it refers to seizing tenant's goods for failing to pay rent due to the landlord. The distress warrant can only be issued on commercial or agricultural property. [§§54.002 and 54.022, V.A.Prop.C..] Distress warrants may not be issued for residential

property. Distress warrants may be issued at the commencement of the suit or at any time during the progress of suit. [Rule 610, T.R.C.P.]

When a tenant leases commercial or agricultural property, a statutory lien is established on the contents of the commercial building or on the equipment and crops grown or agricultural property. [§§ 54.001 and 54.021, V.A.Prop.C..] A suit for back rent must be filed in the court of competent jurisdiction prior to filing of an application for a distress warrant. The application for a distress warrant and bond must be filed with the justice of the peace in the precinct where the leasehold is located or where the property subject to the landlord's lien is located. [§§ 54.006(b)(1)(2) and 54.025, V.A.Prop.C..] The justice court shall issue a citation and a distress warrant to be served upon the defendant and it shall be returnable to the court state on the citation. NOTE: This justice court citation requires the defendant to respond by 10:00 a.m. on the first Monday following twenty days from the date of service if the justice court does not have jurisdiction. [Rule 619, T.R.C.P.] The citation and warrant shall be returned to a higher court if the dollar amount of back rent exceeds the justice of the peace jurisdiction. [§ 28.003, V.A.G.C.; Rule 620, T.R.C.P.]

#### **§9.04.02 Requisites of a Distress Warrant**

A distress warrant shall:

1. Be styled The State of Texas;
2. Be directed to any sheriff or constable;
3. Be signed by the judge officially;
4. Command the officer to attach and hold, unless replevied, subject to further order of the court, so much of the property not exempt by statute of reasonable value in approximately the amount fixed by the court;
5. Contain the names and location of the court;
6. Contain the date of issuance;
7. Contain the names of parties
8. Specify the court to which the warrant is returnable (may be different than court of issuance); and

9. Contain an advisory in 10-point type, "YOU HAVE A RIGHT TO REGAIN POSSESSION OF PROPERTY BY FILING A REPLEVY BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH COURT A MOTION TO DISSOLVE THIS WARRANT." [Rules 612 and 613, T.R.C.P.]

#### **§9.04.03 Service**

The constable or sheriff shall execute the distress warrant by attaching and holding the defendant's property, not exempt by statute, of reasonable value in approximately the amount set by the court that shall be found within the officer's county. [Rule 612, T.R.C.P.] The officer shall keep the property safe and under the officer's control until it is replevied or the court issues further orders instructing the officer to release or sell the property.

The defendant shall be served the distress warrant by delivering a copy in person or delivering a copy to the party's duly authorized agent or attorney, or delivering by certified or registered mail, restricted delivery to recipient, or by telephonic document transfer to the recipient's current telecopier number or by any other manner the court may direct following the levy of the warrant. [Rule 21a and 613, T.R.C.P.] When service is by mail, service is complete when it is deposited in the post office or a USPS depository. Service by telecopier, if it is faxed after 5:00 p.m., shall be deemed served on the following day. [Rule 21a, T.R.C.P.] The distress warrant may be served on any day of the week and at anytime. [Rule 6, T.R.C.P.]

#### **§9.04.04 Return**

The executing officer's return shall:

1. Contain the date and time received;
2. Show date and time of seizure;
3. Contain location of delivery (complete address);
4. Contain description of actions taken (mandatory);
5. Describe seized property with such certainty as to identify it (mandatory). Perishable property should be called to the court's attention to avoid serious or immediate waste or decay;

6. Contain the executing officer's signature;
7. Contain the elected official's name (if applicable);
8. Show the department name; and
9. Be sent to appropriate court where the original suit is pending. [See, Rule 620 T.R.C.P.]

Once the citation and distress warrant have been returned to the court, the officer will keep the property in the officer's care and control until one of the following occurs;

1. The court orders the property sold;
2. The property is replevied; or
3. The court orders the release of the property.

If the court orders the property to be sold, the court shall issue an order of sale. The officer will follow the rules governing an order of sale. (See "Writs – Post-Judgment for Property; Order of Sale, § 7.04)

## **9.05 Residential Tenant's Right of Restoration after Unlawful Utility Disconnection [92.0091 V.A.Prop.C.]**

### **9.05.01 Definition and Issuance**

A judicial order issued by a justice of the peace allowing a residential tenant an immediate temporary restoration of disconnected utility service, pending a final hearing on the tenant's sworn complaint, if service was unlawfully disconnected by the landlord or the landlord's representative in violation of V.A.Prop.C. 92.008(b).

The tenant must file with the justice court in the precinct in which the rental premises are located a sworn complaint specifying the facts of the alleged unlawful utility disconnection by the landlord or the landlord's agent. The tenant must also state orally under oath to the justice the facts of the alleged unlawful utility disconnection [92.0091(b) V.A.Prop.C.] If the justice reasonably believes that the unlawful act has occurred, may issue the Writ [92.0091(c)].

**i. Requisites:**

The Writ shall:

1. Be styled " The State of Texas"
2. Be directed to the Landlord or Landlord's representative
3. Be signed by the justice of the peace
4. Show name and location of the court
5. Show date of issuance
6. Show file number
7. Show name of parties
8. Describe premises and service to be restored
9. Notify landlord of the right to a hearing

**9.05.02 Service**

The Sheriff, Constable or their deputy may serve the Writ [ 92.0091(d)].The writ of restoration of utility service must be served on either the landlord or the landlord's management company, on-premises manager or rent collector in the same manner as a writ of possession in a forcible detainer suit.

**ii. Return:**

The officer's return shall:

1. Show date and time received
2. Record date and time delivered
3. Record location of delivery ( complete address )
4. State name and title of person served
5. Contains the name and title of elected official, (if applicable)

6. Be signed in official capacity. [ Rule 16, T.R.C.P.]



**FORM 26 Officer's Request for Authorization of Alternate Service – Eviction**  
 (Page 1) [Rule 742a, T.R.C.P.]

STATE OF TEXAS

COUNTY OF \_\_\_\_\_

Before me, the undersigned authority, this day personally appeared \_\_\_\_\_, to me well known, and who, after being duly sworn by me, did depose and say:

I am a Deputy Constable/Constable employed by \_\_\_\_\_ Constable of Precinct Number \_\_\_\_\_ of \_\_\_\_\_ County, Texas.

On the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, I was assigned an eviction citation, cause number \_\_\_\_\_ issued out of \_\_\_\_\_ Court of \_\_\_\_\_ County, Texas, styled as \_\_\_\_\_ versus \_\_\_\_\_ and was instructed to attempt service on \_\_\_\_\_ at \_\_\_\_\_, in \_\_\_\_\_ County, Texas Zip \_\_\_\_\_. The citation has been in my possession for five days or less and, despite diligent efforts at all addresses listed, I have been unable to personally deliver the citation. I have made the following efforts to personally serve the defendant:

DATE	TIME	LOCATION/COMMENT

I therefore request authorization to serve the citation by (a) placing the citation inside the premises or by placing it through the door mail chute or by slipping it under the front door or by securely affixing the citation to the main entrance to the premises; (b) by mailing a copy of the citation with the petition attached to the premises on the same or next day.

\_\_\_\_\_  
 Constable Precinct No \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_ County, Texas

By: \_\_\_\_\_

(Deputy Signature)

\_\_\_\_\_  
 (Printed Name)

(continue)

**FORM 26**

(Page 2)

Subscribed and sworn to before me on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
Notary Public in and for the  
State of Texas

\_\_\_\_\_  
Notary's Name (printed):

\_\_\_\_\_  
My Commission expires:

**ORDER OF THE COURT**

The hereinabove motion came on for hearing this day and after due consideration this motion is herewith GRANTED.

ENTERED this, the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Justice of the Peace, Precinct No. \_\_\_\_

\_\_\_\_\_, County, Texas

**FORM 27A Officer's Return – Writ of Possession**

[Tex. Property Code, § 24.0061]

**OFFICER'S RETURN**

Came to hand on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock a.m./p.m.  
The warning notice was posted on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_  
o'clock a.m./p.m., to be executed on or after the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at  
\_\_\_\_\_ o'clock a.m./p.m.

The defendant was/was not present. Defendant's property was:

- placed at a nearby location, being \_\_\_\_\_.
- placed in storage and storage notice was given to Defendant in person.
- placed on the door and mailed.

COMMENTS:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

\*\*\*\*\*

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

\_\_\_\_\_  
CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
PRINTED NAME

**FORM 27B Storage Notice to Tenant – Writ of Possession**  
 (Page 1) [Tex. Property Code §§ 24.0061(e) and 24.0062]

**STORAGE NOTICE**

Notice is hereby given to \_\_\_\_\_, tenant of \_\_\_\_\_, that all or part of the personal property removed from the rental premise under a Writ of Possession (Case number \_\_\_\_\_) has been stored by a public warehouseman pursuant to Texas Property Code §§ 24.0061(e) and 24.0062. The warehouseman is:

Warehouseman \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_, Texas Zip \_\_\_\_\_

Phone No. \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Contact the warehouseman for release of the personal property placed in storage

Pursuant to The Texas Property Code §24.0062, notice is given to you as tenant, of the following:

- Within 30 days from the date of storage, tenant may redeem on demand and on payment of the moving and storage charges reasonably attributable to the items being redeemed any of the property described by Section 24.0062(e) of the Texas Property Code, including:

1. Wearing apparel;
2. Tools, apparatus, and books of a trade or profession;
3. School books;
4. A family library;
5. Family portraits and pictures;
6. One couch, two living room chairs, and a dining table and chairs;
7. Beds and bedding;
8. Kitchen furniture and utensils;
9. Food and foodstuffs;
10. Medicine and medical supplies;

(continue)

**FORM 27B**

(Page 2)

11. One automobile and one truck;
12. Agricultural implements;
13. Children's toys not commonly used by adults;
14. Foods that the warehouseman or the warehouseman's agent knows are owned by a person other than the tenant or an occupant of the residence;
15. Foods that the warehouseman or the warehouseman's agent knows are subject to a recorded chattel mortgage or financing agreement; and
16. Cash

After 30 days from the date of storage and before sale of the stored property, the tenant may redeem the property on demand and upon payment of all remaining moving and storage charges.

- Subject to the previously stated conditions, the warehouseman has a lien on the property to secure payment of moving and storage charges and may sell all of the property to satisfy reasonable moving and storage charges after 30 days, subject to the requirements of Section 24.0062(j), Texas Property Code.

Date \_\_\_\_\_ Notice given by:

\_\_\_\_\_  
Deputy Constable

Notice was given to tenant:

in person.

by mail.

**FORM 28    Officer's Return - Writ of Reentry**  
[Tex. Property Code § 92.009(d)]

**OFFICER'S RETURN**

Came to hand on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_  
o'clock a.m./p.m., and was executed on the \_\_\_\_\_ day of \_\_\_\_\_,  
20\_\_\_\_ at \_\_\_\_\_ o'clock a.m./p.m. by delivering the writ to  
\_\_\_\_\_ landlord/landlord agent/rent collector. Following said  
delivery, the:

- landlord placed the tenant back into the rental unit.
- executing officer placed the tenant back into the rental unit.

COMMENTS:

\*\*\*\*\*

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

\_\_\_\_\_  
CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_ COUNTY, TEXAS

BY: \_\_\_\_\_  
DEPUTY NAME

\_\_\_\_\_  
PRINTED NAME

## X. FAMILY LAW

### §10.01 FAMILY LAW

#### §10.01 *Protective Orders and Magistrate's Order for Emergency Protection*

##### §10.01.02 Definition and Issuance – Magistrate's Order

A magistrate's order for emergency protection differs from a protective order issued pursuant to Chapter 85, Family Code or a temporary *ex parte* order under Chapter 83, Family Code. An emergency protective order (issued by a magistrate) may protect the applicant as follows:

At a defendant's appearance before a magistrate after arrest for an offense involving "family violence" as defined by Section 71.004, Family Code, or an offense under Section 42.072, Penal Code ("stalking"), a magistrate may issue an order for emergency protection on the magistrate's own motion or on the request of:

1. The victim of the offense;
2. The guardian of the victim;
3. A peace officer; or
4. An attorney representing the state. [§17.292, V.A.C.C.P.]

The Family Code defines *family violence* as:

1. An act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably placed the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;
2. Abuse, as that term is defined by sections 261.001 (abuse) (1)(C) (E), and (G), by a member of a family or household toward a child of the family or household; or (3) dating violence, as that term is defined by Section 71.0021." [§ 71.004, V.A.Fam.C.]

**§10.01.03 Requisites of a Magistrate's Order**

The magistrate may, among other things, prohibit the arrested party from: (1) committing family violence or an assault on the person protected under the order or an act in furtherance of an offense under Section 42.072, Penal Code ("stalking"); (2) communicating directly with a member of the family or household or with the person protected under the order in a threatening or harassing manner; or by a threat through any person to a member of the family or household or to the person protected under the order; (3) going to or near the residence, place of employment, or business of a member of the family or household or of the person protected under the order, or the residence, child care facility, or school where a child protected under the order resides or attends; or (4) possessing a firearm, unless the person is a peace officer, a defined by Section 1.07, Penal Code, actively engaged in employment as a sworn, full-time paid employee of a state agency or political subdivision. [Art. 17.292(c), V.A.C.C.P.] The victim of the offense need not be present in court when an order for emergency protection is issued. [*Id.* at (d).] Issuance of a protective order by a magistrate is either mandatory or permissive.

**Mandatory:** at a defendant's appearance before a magistrate after arrest for an offense involving family violence or stalking, the magistrate **shall** issue an order for emergency protection if the arrest is for an offense that also involves serious bodily injury to the victim; or the use or exhibition of a deadly weapon during the commission of an assault. [*Id.* at (b).]

**Permissive:** at a defendant's appearance before a magistrate after arrest for an offense involving family violence or stalking under Section 42.072, Penal Code, the magistrate **may** issue an order for emergency protection. [*Id.* at (c).]

In the order for emergency protection, the magistrate shall specifically describe the prohibited locations and the minimum distances, if any, that the party must maintain, unless the magistrate determines for the safety of the person or persons protected by the order that specific descriptions of the locations should be omitted. [*Id.* at (e).] If an order for emergency protection prohibits a person from going to or near a child care facility or school, the magistrate shall send a copy of the order to the child care facility or school. [*Id.* at (i).]

An order for emergency protection must contain the following statement printed in bold-face type or in capital letters:

**"A VIOLATION OF THIS ORDER BY COMMISSION OF AN ACT PROHIBITED BY THE ORDER MAY BE PUNISHABLE BY A FINE OF AS MUCH AS \$4,000**



OR BY CONFINEMENT IN JAIL FOR AS LONG AS ONE YEAR OR BY BOTH. AN ACT THAT RESULTS IN FAMILY VIOLENCE OR A STALKING OFFENSE MAY BE PROSECUTED AS A SEPARATE MISDEMEANOR OR FELONY OFFENSE. IF THE ACT IS PROSECUTED AS A SEPARATE FELONY OFFENSE, IT IS PUNISHABLE BY CONFINEMENT IN PRISON FOR AT LEAST TWO YEARS. THE POSSESSION OF A FIREARM BY A PERSON, OTHER THAN A PEACE OFFICER, AS DEFINED BY SECTION 1.07, PENAL CODE, ACTIVELY ENGAGED IN EMPLOYMENT AS A SWORN, FULL-TIME PAID EMPLOYEE OF A STATE AGENCY OR POLITICAL SUBDIVISION, WHO IS SUBJECT TO THIS ORDER MAY BE PROSECUTED AS A SEPARATE OFFENSE PUNISHABLE BY CONFINEMENT OR IMPRISONMENT.”

“NO PERSON, INCLUDING A PERSON WHO IS PROTECTED BY THIS ORDER, MAY GIVE PERMISSION TO ANYONE TO IGNORE OR VIOLATE ANY PROVISION OF THIS ORDER. DURING THE TIME IN WHICH THIS ORDER IS VALID, EVERY PROVISION OF THIS ORDER IS IN FULL FORCE AND EFFECT UNLESS A COURT CHANGES THE ORDER.” [Art. 17.292(g), V.A.C.C.P.]

*Family, family violence, and household* have the meanings assigned by Chapter 71, Family Code. [*Id.* at (m).]

#### **§10.01.04 Service of a Magistrate's Order**

An order for emergency protection is effective on issuance, and the defendant shall be served a copy of the order in open court. An order for emergency protection remains in effect up to the 61<sup>st</sup> day but not less than 31 days after the date of issuance. [Art. 17.292(j), V.A.C.C.P.]

#### **Commentary**

To the extent that a condition imposed by an order for emergency protection conflicts with an existing court order granting possession of or access to a child, the condition imposed by the magistrate's order prevails for the duration of the order for emergency protection. [*Id.* at (f).] The magistrate issuing an order for emergency protection shall send a copy of the order to the chief of police in the municipality where the member of the family or household or individual protected by the order resides, if the person resides in a municipality, or to the sheriff and the constable of the county where the person resides, if the person does not reside in a municipality. If the victim of the offense is not present when the order is issued, the magistrate issuing the order shall order an appropriate peace officer to make a good faith effort to notify, within 24 hours, the victim that the

order has been issued by calling the victim's residence and place of employment. The clerk of the court shall send a copy of the order to the victim. [Art. 17.292(h), V.A.C.C.P.]

To ensure that an officer responding to a call is aware of the existence and terms of an order for emergency protection issued under this article, each municipal police department and sheriff shall establish a procedure within the department or office to provide adequate information or access to information for peace officers of the names of persons protected by an order for emergency protection issued under this article and of persons to whom the order is directed. The police department or sheriff may enter an order for emergency protection in the department's or office's record of outstanding warrants as notice that the order has been issued and is in effect. [*Id.* at (k).]

### **Commentary**

A person commits an offense if the person violates an order issued under Article 17.292, Code of Criminal Procedure. [§ 25.07 (a), V.A.P.C.] The offense is a Class A misdemeanor on the third offense, and a third degree felony if the defendant has violated the order or a condition of bond by committing an assault or stalking. [*Id.* at (g).]

## **§10.02 Temporary *Ex Parte* Protective Orders**

To ensure that law enforcement officers responding to calls are aware of the existence and terms of protective orders issued under Subtitle B, Title 4, Family Code, each law enforcement agency shall establish procedures in the agency to provide adequate information or access to information for law enforcement officers of the names of each person protected by an order issued under this subtitle and of each person against whom protective orders are directed. [ § 86.001(a), V.A.Fam.C.] A law enforcement agency may enter a protective order in the agency's computer records of outstanding warrants as notice that the order has been issued and is currently in effect. On receipt of notification by a clerk of court that the court has vacated or dismissed an order, the law enforcement agency shall remove the order from the agency's computer record of outstanding warrants. [*Id.* at (b).]

### **§10.02.01 Definition and Issuance**

In certain circumstances, a person may request a court having jurisdiction to issue an order protecting the person, members of the person's household or others from *family violence* (see definition of family violence in previous section), as well as the prosecuting attorney or DPRS. [§§ 82.001-.043, V.A.Fam.C.] If a

court finds from the application that there is a clear and present danger of family violence, the court, without further notice to any other member of the family or household and without a hearing, may enter a temporary *ex parte* order for the protection of the applicant or any other family or household member. *Ex parte* means "...for the benefit of one party only without notice to, or argument by, any person adversely interested." [*Black's Law Dictionary* 616 (8<sup>th</sup> ed. 2004); see § 83.001, V.A.Fam.C.] The court shall render a protective order if it finds that family violence has occurred and will likely occur in the future. [§§ 81.001 and 85.001(b), V.A.Fam.C.]

### **§10.02.02 Requisites of A Temporary *Ex Parte* Order**

An application for a protective order may be filed by any of a variety of family members as well as county or district attorneys. [§ 82.002, V.A.Fam.C.] Generally, the application contains: (1) the names of the parties seeking protection and their relationship to the individual alleged to have committed family violence, (2) the facts and circumstances of the family violence, and (3) a request for one or more orders. An individual may apply for the issuance of a temporary *ex parte* order under Chapter 83, Family Code. In a temporary *ex parte* order, the court may direct a respondent to do or refrain from doing specified acts. [§ 83.001(b), V.A.FAM.C.] Under certain provisions the court may also exclude a party from the residence [see § 83.006, V.A.Fam.C.]

A temporary *ex parte* order is valid for the period specified in the order, not to exceed 20 days. On the request of an applicant or on the court's own motion, a temporary *ex parte* order may be extended for additional 20-day periods. [§ 83.002, V.A.Fam.C.] During the time the order is valid, a temporary *ex parte* order prevails over any other court order made under Title 5 (Parent-Child Relationship) to the extent of any conflict between the orders. [ § 83.005, V.A. Fam. C.]

### **§10.02.03 Service of Notice of Application for a Temporary *Ex Parte* Protective Order**

Each respondent to an application for a protective order is entitled to service of notice of an application for a protective order, except in a suit for dissolution of a marriage. [§ 82.043(a) and (e), V.A.Fam.C.] The clerk shall issue a notice of application for the protective order and it shall be served in the same manner as service of citation under the Texas Rules of Civil Procedure, including personal service or service by registered or certified mail, but not by publication. [§ 82.043(c), V.A.Fam.C.; Rule 106, T.R.C.P.] However, service of notice of the application is not required before issuance of a temporary *ex parte* order under

Chapter 83, Family Code. If duly served with the notice, the respondent may file an answer anytime before the hearing. [§§82.021 and 82.043(d), V.A.Fam.C.]

Upon request by an applicant for a temporary *ex parte* protective order that excludes the respondent from the respondent's residence, the court granting the temporary order shall render a written order ("civil standby", see Commentary following §10.03.05) to the sheriff, constable, or chief of police to provide a law enforcement officer from the respective department to:

1. Accompany the applicant to the residence subject to the order;
2. Inform the respondent that the court has ordered that the respondent be excluded from the residence;
3. Protect the applicant while the applicant takes possession of the residence; and
4. Protect the applicant if the respondent refuses to vacate the residence while the applicant takes possession of the applicant's necessary personal property. [§ 86.003, V.A.Fam.C.]

#### **Comment**

A person commits an offense if the person violates an order issued under Chapter 83, Family Code. [ § 25.07(a), V.A.P.C.]

#### **§10.02.04 Return of Service for Temporary *Ex Parte* Protective Order**

Return of service shall be made in the same manner as a citation under the rules of Civil Procedure. It shall be endorsed by the officer, state when service was made, set forth the manner of service, and be signed by the officer officially. The return of the officer or authorized person serving the notice should be made on the notice itself, or, if on another piece of paper, it should be attached to the notice. [Rule 107, T.R.C.P.]

The executing officer shall complete an officer's return, which shall include:

1. The date and time received;
2. The manner in which executed, that is, how the notice was served;
3. The time and place the process was served;

4. The executing officer's signature;
5. The department name;
6. The elected official's name (if applicable);
7. If not executed, the diligence used to try to execute the notice and reason(s) it was not executed. [Rules 16 and 107, T.R.C.P.]

**§10.03 Family Code, Chapter 85, Final Protective Order**

**§10.03.01 Definition and Issuance**

At the close of the hearing on an application for a protective order, the court shall find whether:

1. Family violence has occurred; and
2. Family violence is likely to occur in the future. [§ 85.001, V.A.Fam.C.]

After making the findings, the court shall render a protective order as provided by § 85.022 applying only to a person found to have committed family violence; and may render a protective order as provided by § 85.021 applying to both parties that is in the best interest of the person protected by the order or member of the family or household of the person protected by the order. [§ 85.001, V.A.Fam.C.]

**§10.03.02 Requisites for Final Protective Order**

When the court will makes the findings set out above and issues the order, which must include statutory language that warns of penalties for failure to obey, [ §§ 85.001 and 85.026, V.A.Fam.C.] The court may enter an order that applies to both parties, which provides:

1. Prohibiting a party from:
  - A. Removing a child who is a member of the family or household from:
    - (i) The possession of a person named in the order; or
    - (ii) The jurisdiction of the court; or

- B. Transferring, encumbering, or otherwise disposing of property, other than in the ordinary course of business that is mutually owned or leased by the parties. [ § 85.021(1), V.A. Fam. C.]
2. In addition, the court may grant exclusive possession of a residence to a party if the residence:
    - A. Is jointly owned or leased by the party receiving exclusive possession and a party being denied possession;
    - B. Is owned or leased by the party retaining possession; or
    - C. Is owned or leased by the party being denied possession and that party has an obligation to support the party or a child of the party granted possession of the residence. [*Id.* at (2).]
  3. Provide for the possession of and access to a child of a party if the person receiving possession of or access to the child is a parent of the child. [*Id.* at (3).
  4. Require the payment of support for a party or for a child of a party if the person required to make the payment has an obligation to support the other party or the child. [*Id.* at (4).] OR
  5. Award to a party the use and possession of specified property that is community property or jointly owned or leased property. [*Id.* at (5).]

Except as provided by § 85.025(b) and (c), Family Code, the duration of a protective order under Chapter 85, Family Code is effective for the period stated in the order not to exceed two years, or if a period is not stated in the order, until the second anniversary of the date the order was issued. [§ 85.025(a), V.A.Fam.C.] If a person who is the subject of a protective order is confined or imprisoned on the date the protective order would expire under, the period for which the order is effective is extended, and the order expires on the first anniversary of the date the person is released from confinement or imprisonment. [*Id.* at (c).]

#### **§10.03.03.01 Requisites of a Protective Order (Applicable to Person Who Committed Family Violence)**

In a Chapter 85 protective order, the court may order the person found to have

committed family violence to perform acts specified by the court that the court determines are necessary or appropriate to prevent or reduce the likelihood of family violence and may order that person to: [ § 85.022, V.A. Fam. C.]

1. Complete a battering intervention and prevention program accredited under Article 42.141, Code of Criminal Procedure;
2. Beginning on September 1, 2008, if the referral option under Subdivision (1) is not available, complete a program or counsel with a provider that has begun the accreditation process described by Subsection (a-1);\* or
3. If the referral option under Subdivision (1) or, beginning on September 1, 2008, the referral option under Subdivision (2) is not available, counsel with a social worker, family service agency, physician, psychologist, licensed therapist, or licensed professional counselor who has completed family violence intervention training that the community justice assistance division of the Texas Department of Criminal Justice has approved, after consultation with the licensing authorities described by Chapters 152, 501, 502, 503, and 505, Occupations Code, and experts in the field of family violence. [ § 85.022(a), V.A.Fam.C.]

\*Beginning on September 1, 2009, a program or provider serving as a referral option for the courts under Subsection (1) or (2) above must be accredited under Section 4A, Article 42.141, Code of Criminal Procedure, as conforming to program guidelines under that article.

#### **§10.03.04 Service of a Final Protective Order**

A protective order rendered under Subtitle B, Title 4, Texas Family Code shall be:

1. Delivered to the respondent as provided by Rule 21a, Texas Rules of Civil Procedure;
2. Served in the same manner as a writ of injunction; or
3. Served in open court at the close of the hearing as provided herein.

The court shall serve an order in open court to a respondent who is present at the hearing by giving to the respondent a copy of the order, reduced to writing and signed by the judge or master. A certified copy of the signed order shall be given to the applicant at the time the order is given to the respondent. If the

applicant is not in court at the conclusion of the hearing, the clerk of the court shall mail a certified copy of the order to the applicant not later than the third business day after the date the hearing is concluded. [ § 85.041(a) and (b), V.A. Fam. C.]

If the order has not been reduced to writing, the court shall give notice orally to a respondent who is present at the hearing of the part of the order that contains prohibitions under Section 85.022 or any other part of the order that contains provisions necessary to prevent further family violence. The clerk of the court shall mail a copy of the order to the respondent and a certified copy of the order to the applicant not later than the third business day after the date the hearing is concluded. If the respondent is not present at the hearing and the order has been reduced to writing at the conclusion of the hearing, the clerk of the court shall immediately provide a certified copy of the order to the applicant and mail a copy of the order to the respondent not later than the third business day after the date the hearing is concluded. [ § 85.041(c) and (d), V.A. Fam. C.]

The clerk of the court issuing an original or modified protective order under this subtitle shall send a copy of the order, along with the information provided by the applicant or the applicant's attorney that is required under Section 411.042(b)(6), Government Code, to the chief of police of the municipality in which the person protected by the order resides, if the person resides in a municipality, or to the appropriate constable and the sheriff of the county in which the person resides, if the person does not reside in a municipality. The clerk of a court that vacates an original or modified protective order under this subtitle shall notify the chief of police or constable and sheriff who received a copy of the original or modified order that the order is vacated. [ § 85.042(a) and (c), V.A. Fam. C.] If a protective order made under this chapter prohibits a respondent from going to or near a child-care facility or school, the clerk of the court shall send a copy of the order to the child-care facility or school. [ *Id.* at (b).]

The applicant or the applicant's attorney shall provide to the clerk of the court:

1. The name and address of each law enforcement agency, child-care facility, and school to which the clerk is required to mail a copy of the order under this section; and
2. Any other information required under Section 411.042(b)(6), Government Code. [ § 85.042(d), V.A. Fam. C.]



The clerk of the court issuing an original or modified protective order under Section 85.022 that suspends a license to carry a concealed handgun shall send a copy of the order to the appropriate division of the Department of Public Safety at its Austin headquarters. On receipt of the order suspending the license, the department shall:

1. Record the suspension of the license in the records of the department;
2. Report the suspension to local law enforcement agencies, as appropriate; and
3. Demand surrender of the suspended license from the license holder.  
[*Id.* at (e).]

On the request by an applicant obtaining a protective order that excludes the respondent from the respondent's residence, the court granting the order shall render a written order to the sheriff, constable, or chief of police to provide a law enforcement officer from the department of the chief of police, constable, or sheriff to:

1. Accompany the applicant to the residence covered by the order;
2. Inform the respondent that the court has ordered that the respondent be excluded from the residence;
3. Protect the applicant while the applicant takes possession of the residence and the respondent takes possession of the respondent's necessary personal property; and
4. If the respondent refuses to vacate the residence:
  - Remove the respondent from the residence;
  - Arrest the respondent for violating the court order. [§ 86.004, V.A.Fam.C.; see § 25.07(a), V.A.P.C.]

A person commits an offense if, in violation of a condition of bond set in a family violence case and related to the safety of the victim or the safety of the community, an order issued under Article 17.292, Code of Criminal Procedure, an order issued under Section 6.504, Family Code, Chapter 83, Family Code, if

the temporary ex parte order has been served on the person, or Chapter 85, Family Code(see § \_\_\_\_\_ below) or an order issued by another jurisdiction as provided by Chapter 88, Family Code, the person knowingly or intentionally violates the terms of the order. [ § 25.07(a), V.A.P.C.]

#### **§10.03.05 Service and Return of Service for Final Protective Order Served Like Injunction**

If a protective order is served in the same manner as a writ of injunction the return shall be returned to the court with the action of the officer indorsed thereon or annexed thereto showing how and when the officer executed the same. [Rule 689, T.R.C.P.]

The executing officer shall complete an officer's return, which shall include:

1. The date and time received;
2. The manner in which executed, that is, how the notice was served;
3. The time and place the process was served;
4. The executing officer's signature;
5. The department name;
6. The elected official's name (if applicable); and
7. If not executed, diligence used to try to execute the notice and reason(s) it was not executed. [Rule 107, T.R.C.P]

#### **Commentary**

##### **Uniform Interstate Enforcement of Protective Orders Act**

A law enforcement officer of this state is required to enforce a foreign (from another state) protective order if there is probable cause to believe that a foreign protective order exists and that the order has been violated as if it were an order issued from this state. [§ 88.004, V.A.Fam.C.] Presentation of a certified copy of a protective order is not required for enforcement. The officer may determine that there is one by relying on any relevant information [*Id.*]. A person commits an offense if the person violates an order issued under Chapter 85 or Chapter 88, Texas Family Code. [Section 25.07(a), V.A.P.C.]

**Civil Standbys**

While there are provisions for a victim of family violence to request an officer escort [§ 83.003, V.A.FAM.C.] or a “civil standby” [Art. 5.045, V.A.C.C.P.], this does not allow the respondent to request the same. Law enforcement officers shall protect the victim but whether to perform a “civil standby” is discretionary with the peace officer. [Arts. 5.01 and 5.045(a), V.A.C.C.P.; *and see* Op. Tex. Atty. Gen. Nos. JC-0112 (1999) and JC-0289 (2000).]

**FORM 29 Return of Service on Notice of Protective Order Citation  
RETURN OF SERVICE [T.R.C.P., Rule 689]**

In Person

Received on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_  
o'clock \_\_\_\_m. and executed (not executed) on the \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_m. by delivering notice to:\_\_\_\_  
\_\_\_\_\_at (address) \_\_\_\_\_, in person a true copy of this notice in  
\_\_\_\_\_ County, Texas.

Additional Information and Explanation: (Return receipt attached, additional explanation  
of alternative service authorized by court, reason returned unexecuted, etc.)

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

SERVICE ATTEMPTS (Diligence used):

DATE	TIME	LOCATION	COMMENTS	DEPUTY

MILEAGE: \_\_\_\_\_ FEE: \_\_\_\_\_

\_\_\_\_\_  
CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_ COUNTY, TEXAS

BY: \_\_\_\_\_  
DEPUTY NAME

\_\_\_\_\_  
PRINTED NAME

## XI. MENTAL HEALTH

### **§11.01 MENTAL HEALTH OFFICER**

#### **§11.01.01 Definition and Issuance**

The Texas Occupations Code provides that the Texas Commission on Law Enforcement Officer Standards and Education may issue Mental Health Officer certificates to authorized person who complete the required training. [§ 1701.404, V.A.O.C.] The commission may certify a sheriff, sheriff's deputy, constable, or other peace officer, or a justice of the peace, as a special officer for offenders with mental impairments. [*d.*] The training is not mandatory.

Mental illness means an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency that substantially impairs a person's thought, perception of reality, emotional process, or judgment; or grossly impairs behavior as demonstrated by recent disturbed behavior. [§ 571.003(14)(a)(b), V.A.H.S.C.] *Black's Law Dictionary* defines "mental illness" as a "disorder in thought or mood so substantial that it impairs judgment, behavior, perceptions of reality, or the ability to cope with the ordinary demands of life. Mental disease that is severe enough to necessitate care and treatment for the afflicted person's own welfare or the welfare of others in the community." [*Black's Law Dictionary* 1007 (8<sup>th</sup> Ed. 2004).]

### **§11.02 APPREHENSION WITH A WARRANT**

#### **§11.02.01 Definition and Issuance**

A judge or magistrate issues mental health orders. An adult may file an application for an emergency detention of another person. The judge or magistrate shall examine the application and may interview the applicant. The application should contain evidence that indicates mental illness and/or a substantial risk of serious harm to themselves or others; that risk of harm is imminent unless the person is immediately restrained; and that the necessary restraint cannot be accomplished without emergency detention. [§ 573.011, V.A.H.S.C.]

The emergency detention may last for no more than 48hours, whether initiated by a magistrate's warrant or by a warrantless apprehension by a peace officer. If extremely hazardous weather exists or a disaster occurs, the magistrate may be written order make each day extend by an additional 24-hour period by which the person may be detained. The written order must declare that an emergency

exists because of weather or the occurrence of a disaster. [§ 573.021(b), V.A.H.S.C.]

### **§11.02.02 Requisites of Mental Health Warrant**

A mental health warrant shall:

1. Be styled the "State of Texas";
2. Be directed to any peace officer;
3. Name the person to be apprehended;
4. State that the court believes the person is mentally ill, the person evidences mental illness, and is likely to cause injury to himself or others if not immediately restrained, and that restraint cannot be accomplished without emergency detention;
5. Command the peace officer to take the person and immediately transport the person to a designated hospital for preliminary examination in accordance with Section 573.021, Health and Safety Code; and
6. Be signed and dated by the magistrate. [See § 573.012, V.A.H.S.C.]

### **§11.02.03 Service**

The officer must furnish a copy of the warrant and the application to the facility. [§ 573.012(f), V.A.H.S.C.] Person apprehended or detained must be advised of their rights, orally, in simple non-technical terms, within 24 hours after the time the person is admitted to the facility, and in writing in the person's primary language if possible; or through the use of a means reasonably calculated to communicate with a hearing or visually impaired person, if applicable. [§ 573.025 V.A.H.S.C.]

The code does not specify who will advise the detained person of these rights. There is nothing in the Code to indicate that the officer has a duty to inform the person of these rights. However, the following is a list of these rights, and if they should appear on the warrant, it is advisable that the officer inform the detainee of these rights:

The right to be advised of the location of detention, the reason for detention, and the fact that the detention could result in a longer period of involuntary commitment;

The right to a reasonable opportunity to communicate with and retain an attorney;

1. The right to be transported back to the location of apprehension or to the detainee's place of residence in the state, or other suitable place if not admitted for emergency detention, unless the detainee is arrested or objects to the return;
2. The right to be released if the head of the facility determines that the criteria for an emergency detention as provided by Section 573.034 no longer apply; and
3. The right to be advised that communications to a mental health professional may be used in proceedings for further detention. [§ 573.025, V.A.H.S.C.]

Transportation of the patient who has been detained under emergency detention and admission or protective custody may not be in a marked vehicle or accompanied by uniformed officer unless other means are not available. A female must be accompanied by a female attendant unless the person is accompanied by her father, husband, or adult brother or son. If the person requires medical assistance the court shall require appropriate medical personnel to accompany the person who is transporting the patient. Patients may not be transported with state prisoners. [§ 574.045(b), (d), (e) and (f), V.A.H.S.C.]

#### **§11.02.04 Return**

The officer's return shall:

1. Indicate the date and time received;
2. Record the date and time of execution;
3. Record the location where executed;
4. Record date and time person committed to facility;
5. Record name of person warrant and application are delivered to at the facility;
6. Record the name of the person apprehended;

7. Record details of the execution (who transported, transport vehicle, person taking custody from the officer, other persons accompanying the officer);
8. Show executing officer's signature;
9. State elected official's name (if applicable);
10. State department name; and
11. Be returned to court without delay.

### **§11.03 APPREHENSION WITHOUT A WARRANT**

#### **§11.03.01 Definition**

A peace officer may take a person into custody if the officer believes the person is mentally ill and there is a substantial risk of serious harm to the person or others if the mentally ill person is not immediately restrained and there is not sufficient time to obtain a warrant. This risk may be demonstrated by the person's behavior. A substantial risk of serious harm to the person or others may be demonstrated by the person's behavior or evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty. [§ 573.001, V.A.H.S.C.]

A peace officer may also take a person into custody if the officer believes the person is chemically dependent and because of that dependency is a substantial risk of harm to the person's self or other persons. The officer may observe the person's physical condition or a credible person may give the officer information relating to the condition of the respondent. [§ 462.041, V.A.H.S.C.]

When the peace officer takes the person into custody, the officer will transport the person to the nearest inpatient mental health facility or to a mental health facility deemed suitable by the mental health authority. If an appropriate inpatient mental health facility is not available, a jail or similar detention facility may not be deemed suitable except in an extreme emergency. A person detained in a jail or a non-medical facility shall be kept separate from any person who is charged with or convicted of a crime. [§ 573.001(c)-(f), V.A.H.S.C.]



**§11.03.02 Requisites of Application**

The officer shall immediately file with a magistrate an application for detention after transporting a person to a facility. This is called a peace officer's application for emergency detention without a warrant. [§ 573.002, V.A.H.S.C.]

The application for emergency detention must:

1. State that the officer has reason to believe and does believe that the person evidences mental illness;
2. State that the officer has reason to believe and does believe that the person evidences behavior that constitutes a substantial risk of serious harm to the person's self or others;
3. Give a specific description of the risk of harm;
4. State that the officer has reason to believe and does believe that the risk of harm is imminent unless the person is immediately restrained;
5. State that the officer's beliefs are derived from specific recent behavior, overt acts, attempts, or threats that were observed by or reliably reported to the officer;
6. Give a detailed description of the specific behavior, acts, attempts, or threats; and
7. State the name and relationship to the apprehended person of any person who reported or observed the behavior, acts, attempts, or threats. [*Id.* at (b).]

The person shall be transported to a facility for preliminary evaluation in accordance with § 573.021, Health and Safety Code. [§ 573.012(e), V.A.H.S.C.] The facility must complete the evaluation within 48 hours, which period may be extended by 24 hours if there is a weather emergency. [§ 573.021(b) and (c), V.A.H.S.C.] Upon completion of the evaluation, the physician may release the person if they are not found to be mentally ill or may make a written statement that the person is mentally ill. [§ 573.022, V.A.H.S.C.] If the physician determines the person should be released from emergency detention, the person shall be transported back the location of apprehension, the person's residence, or another suitable location. [§ 573.023(a), V.A.H.S.C.]

The district or county attorney or other adult may file an application for medical examination for court-ordered mental health services with the county clerk in the county in which the proposed patient (1) resides; (2) is found; or (3) is receiving mental health services by court order or under Subchapter A, Chapter 573, Health and Safety Code. [§ 574.001, V.A.H.S.C.] Only the district or county attorney may file an application that is not accompanied by a certificate of medical examination. [*Id.*]

## **§11.04        *NON COMPOS MENTIS***

### **§11.04.01    Definition**

*Non compos mentis* means insane or incompetent. [*Black's Law Dictionary* 1078 (8<sup>th</sup> Ed. 2004).] *Incapacitated person* means: (1) a minor; (2) an adult, who because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for themselves, to care of their own physical health or to manage their own financial affairs; or (3) a person who must have a guardian appointed to receive funds due the person from any governmental means. [§ 601(14) (a)-(c), V.A.Prob.C.]

A proceeding under Subchapter C or E, Chapter 574, Health and Safety Code, for court-ordered mental health services or modification of an order for in-patient treatment must be held in the statutory or constitutional county court that has the jurisdiction of a probate court in mental illness matters. [§ 574.008(a), V.A.H.S.C.] The proposed patient is entitled to be present at the hearing [§ 574.031, V.A.H.S.C.], or to have notice of the hearing. [§ 574.061, V.A.H.S.C.]

### **§11.04.02    Requisites of Notice**

The notice shall:

1. Be styled in the name of "The State of Texas;"
2. Be dated;
3. Be directed to the person being cited or notified;
4. State the style and number of the proceedings;
5. State the court in which case is pending;
6. Describe generally the nature of the proceeding;

7. Direct the person to appear or file a written response;
8. State when and where appearance or performance is required; and
9. Be signed and sealed by clerk. [§ 632(c), V.A.Prob.C.]

**§11.04.03 Service**

In cases in which it is provided that personal service must be made with respect to a citation or notice, the citation or notice must be served on the attorney of record for the person who is being cited or notified. Notwithstanding the requirement for personal service. Service may be made on the attorney by any method specified under Chapter 13, Probate Code, for service on an attorney. If there is no attorney of record in the proceeding for the person who is being cited or notified, or if an attempt to make service on the attorney was unsuccessful, a citation or notice must be served in person by the sheriff or constable on the person who is being cited or notified by delivering to the person a true copy of the citation or notice at least 10 days before the return day on the notice, exclusive of the date of service. [§ 632(f)(1), V.A.Prob.C.].

**§11.04.04 Return**

The officer's return shall:

1. Show the date and time received;
2. Record the date and time executed;
3. Record location of delivery (complete address);
4. Record to whom delivery was made;
5. Contain the executing officer's signature;
6. State the election official's name (if applicable);
7. State the department name;
8. Be sent to the issuing court or to attorney of record if requested.

Keep in mind that the court may dictate the form and information required in accordance with Rule 107 of the Texas Rules of Civil Procedure.

**§11.04.05 Liability**

If a person intentionally causes another to be committed without cause, criminal penalties may be imposed. That person can be fined not less than \$50 or more than \$25,000, confined in jail for not more than two years for each violation and each day of a continuing violation, or be subject to both fine and confinement. The court may impose both fine and confinement. [§ 571.020, V.A.H.S.C.] The attorney general, district attorney, or a county attorney may initiate prosecution for violation of the Health and Safety Code. A civil penalty of not more than \$25,000 per day for each violation of the act may also be imposed. [§ 571.023(a), V.A.H.S.C.]

## XII. TAX SEIZURES AND SUITS

### §12.01 TAX WARRANT

#### §12.01.01 Definition and Issuance

A person's personal property is subject to seizure for the payment of a delinquent tax, penalty, and interest he owes a taxing unit on property. [§ 33.22, V.A.TaxC.] At any time after a tax becomes delinquent, a tax collector may apply for a tax warrant to any court in any county in which the person liable for the tax has personal property. A tax collector may apply at any time for a tax warrant authorizing seizure of property as provided by Section 33.21, Tax Code. [§ 33.22, V.A.TaxC.]

A tax warrant is an order of a court that directs a peace officer in the county and the tax collector to seize as much of a person's personal property as may be reasonably necessary for the payment of all taxes, penalties, and interest included in the application and all costs of seizure and sale. The warrant shall direct the person whose property is seized to disclose to the officer executing the warrant the name and the address, if known, of any other person having an interest in the property. [§ 33.23(a), V.A.TaxC.; see Op. Tex. Att'y Gen. No. GA-0140 (2004) (concluding that "[u]nder section 33.23(a), a tax warrants directs 'a peace officer in the county' to seize the personal property.".)] In contrast, under Section 33.93, a tax warrant "shall direct the sheriff or a constable in the county and the collector for the municipality or the county" to seize real property. [*Id.*] A bond may not be required of a taxing unit for issuance or delivery of a tax warrant, and a fee or court cost may not be charged for issuance or delivery of a warrant. [33.23(b), V.A.TaxC.]

A tax warrant shall direct the peace officer and the collector (for personal property) or the sheriff or a constable in the county and the collector for the municipality or the county (for real property) to seize the property described in the warrant for the payment of the *ad valorem* taxes, penalties, and interest owing on the property included in the application, any attorney's fees included in the application as provided by Section 33.92(d), the amount secured by a municipal health or safety lien on the property included in the application, and the costs of seizure and sale. In the case of seizure of real property, the seizure is subject to the "right of redemption\*". The warrant shall direct the person whose property is seized to disclose to a person executing the warrant the name and address if known of any other person having an interest in the property. [§ 33.93, V.A.TaxC.]

*\*Right of redemption* refers to the right of an owner of real property that was used as the residence homestead of the owner or that was land designated for agricultural use when the suit or the application for the warrant was filed, which is sold at a tax sale to a purchaser other than a taxing unit, or (b) the owner of a mineral interest sold at a tax sale to a purchaser other than a taxing unit to redeem the property on or before the second anniversary of the date on which the purchaser's deed is filed for record by paying the purchaser:

1. The amount the purchaser bid for the property;
2. The amount of the deed recording fee; and
3. The amount paid by the purchaser as taxes, penalties, interest, and costs on the property; plus
4. A redemption premium of 25 percent of the aggregate total if the property is redeemed during the first year of the redemption period or 50 percent of the aggregate total if the property is redeemed during the second year of the redemption period. [§ 34.21(a), V.A.TaxC.]

#### **§12.01.02 Requisites of a Tax Warrant**

A tax warrant shall:

1. Be styled The State of Texas;
2. Be directed to any peace officer and the collector;
3. Show the court of issuance;
4. Show the cause number;
5. Show the date of issuance;
6. Show the named defendant(s);
7. Be signed by the clerk of the issuing court or judge officially;
8. Bear the seal of the court if from county or district court;
9. Command the officer or collector to seize, levy upon, and sell as under

execution personal or real property of the defendant to satisfy the tax, penalties, interest of the taxing units, and all costs of seizure and sale; and

10. State the number of days from issuance the warrant is valid. [See Rules 629 and 117a(5) and (6), T.R.C.P.]

### **§12.01.03 Service**

After a tax warrant is issued, the collector or peace officer shall take possession of the property pending its sale. The person against whom a tax warrant is issued or another person having possession of property of the person against whom a tax warrant is issued shall surrender the property on demand. Pending the sale of the property, the collector or peace officer may secure the property at the location where it is seized or may move the property to another location. [§ 33.23(c), V.A.TaxC.]

A person who possesses personal property owned by the person against whom a tax warrant is issued and who surrenders the property on demand is not liable to any person for the surrender. At the time of surrender, the collector shall provide the person surrendering the property a sworn receipt describing the property surrendered. [*Id.* at (d).] This does not create an obligation on the part of a person who surrenders property owned by the person against whom a tax warrant is issued that exceeds or materially differs from that person's obligation to the person against whom the tax warrant is issued. [*Id.* at (e).]

### **§12.01.04 Bond for Payment of Taxes**

A person may prevent seizure of property or sale of property seized by delivering to the collector a cash or surety bond conditioned on payment of the tax before delinquency. The bond must be approved by the collector in an amount the collector determines, but the collector may not require an amount greater than the amount of tax if imposed or the collector's reasonable estimate of the amount of tax if not yet imposed. [§ 33.24, V.A.TaxC.]

### **§12.01.05 Notice of Tax Sale**

After a seizure of personal property, the collector shall make a reasonable inquiry to determine the identity and to ascertain the address of any person having an interest in the property other than the person against whom the tax warrant is issued. The collector shall provide in writing to the peace officer charged with executing the warrant the name and address of each other person the collector identifies as having an interest in the property. [§ 33.25(a), V.A.TaxC.] The

peace officer shall deliver a written notice as soon as possible to the person against whom the warrant is issued and to any other person having an interest in the property whose name and address the collector provided to the peace officer. [i.d.]

The notice shall state the time and place of the sale and briefly describe the property seized. Posting of the notice and the sale of the property shall be conducted:

1. In a county other than a county to which Subdivision (2) applies, by the peace officer in the manner required for the sale under execution of personal property; or
2. In a county having a population of three million or more:
  - A. By the peace officer or collector, as specified in the warrant, in the manner required for the sale under execution of personal property; or
  - B. Under an agreement authorized by § 33.25(b), Tax Code.

**§12.01.06 Sale of Seized Personal Property and Distribution of Proceeds (County of 3M Population)**

The commissioners court of a county having a population of three million or more by official action may authorize a peace officer or the collector for the county charged with selling property by public auction to enter into an agreement with a person who holds an auctioneer's license to advertise the auction sale of the property and to conduct the auction sale of the property. The agreement may provide for on-line bidding and sale. [§ 33.25(a) and (b), V.A.TaxC.]

If the commissioners court of a county that authorizes a peace officer or the collector for the county to enter into an agreement with a person who holds an auctioneer's license to advertise the auction sale of the property and to conduct the auction sale of the property, the court may by official action authorize the peace officer or collector to enter into an agreement with a service provider to advertise the auction and to conduct the auction sale of the property or to accept bids during the auction sale of the property under Subsection (b) using the Internet. [i.d. at (c).] The terms of such an agreement must be approved in writing by the collector for each taxing unit entitled to receive proceeds from the sale of the property. An agreement entered into in this manner is presumed to be commercially reasonable, and the presumption may not be rebutted by any



person. [*Id.* at (d).] Failure to send or receive the required notice does not affect the validity of the sale or title to the seized property. [*Id.* at (e).]

The proceeds of a sale of property under this section shall be applied to:

1. Any compensation owed to or any expense advanced by the licensed auctioneer under an agreement entered into under Subsection (b) or a service provider under an agreement entered into under Subsection (c);
2. All usual costs, expenses, and fees of the seizure and sale, payable to the peace officer conducting the sale;
3. All additional expenses incurred in advertising the sale or in removing, storing, preserving, or safeguarding the seized property pending its sale;
4. All usual court costs payable to the clerk of the court that issued the tax warrant; and
5. Taxes, penalties, and interest included in the application for warrant. [*Id.* at (e) and (f).]

The peace officer or licensed auctioneer conducting the sale shall pay all proceeds from the sale to the collector designated in the tax warrant for distribution as required by. After a seizure of personal property defined by Sections 33.21(d)(2)-(5), the collector shall apply the seized property toward the payment of the taxes, penalties, and interest included in the application for warrant and all costs of the seizure as set out above. [§ 33.25(g) and (h), V.A.TaxC.] On issuance of a tax warrant, the collector shall take possession of the property pending its sale by the officer charged with selling the property.

#### **12.01.07 Seizure of Real Property and Notice of Sale**

After a seizure of property, the collector for the municipality or county shall make a reasonable inquiry to determine the identity and address of any person, other than the person against whom the tax warrant is issued, having an interest in the property. [ § 33.94(a), V.A. Tax C.] The collector shall deliver as soon as possible a notice stating the time and place of the sale and briefly describing the property seized to:

1. The person against whom the warrant is issued, including each person to whom notice was provided under Section 33.912(a);

2. Each person to whom notice was provided under Section 33.912(b)(1); and
3. Any other person the collector determines has an interest in the property if the collector can ascertain the address of the other person. [*Id.*]

Failure to send or receive a notice required by Section 33.94(a) does not affect the validity of the sale of the seized property or title to the property. Real property seized under a tax warrant issued under Subchapter E, "Seizure of Real Property," Chapter 33, Tax Code, or ordered sold pursuant to foreclosure of a tax lien shall be sold by the officer charged with selling the property, unless otherwise directed by the taxing unit that requested the warrant or order of sale or by an authorized agent or attorney for that unit. The sale shall be conducted in the manner similar property is sold under execution except as otherwise provided in Subtitle E, "Collections and Delinquency," Tax Code. [ § 34.01(a), V.A. Tax C.]

On receipt of an order of sale of real property, the officer charged with selling the property shall endorse on the order the date and exact time when the officer received the order. The endorsement is a levy on the property without necessity for going upon the ground. The officer shall calculate the total amount due under the judgment, including all taxes, penalties, and interest, plus any other amount awarded by the judgment, court costs, and the costs of the sale. The costs of a sale include the costs of advertising, and deed recording fees anticipated to be paid in connection with the sale of the property. To assist the officer in making the calculation, the collector of any taxing unit that is party to the judgment may provide the officer with a certified tax statement showing the amount of the taxes included in the judgment that remain due that taxing unit and all penalties, interest, and attorney's fees provided by the judgment as of the date of the proposed sale. If a certified tax statement is provided to the officer, the officer shall rely on the amount included in the statement and is not responsible or liable for the accuracy of the applicable portion of the calculation. A certified tax statement is not required to be sworn to and is sufficient if the tax collector or the collector's deputy signs the statement. [*Id.* at (b).]

#### **§12.01.08 Return**

The delivering officer's return shall:

1. Indicate the date and time received;
2. State the date and time of demand or levy;

3. Show on whom demand or levy was made;
4. Record date and time of collection or sale;
5. Record how much was collected and attach copy of disbursement to all parties;
6. Have attached all correspondence , inventory, sale notice, certified mail, and bill of sale or deed;
7. Contain executing officer's signature;
8. State elected officials name (if applicable); and
9. State department name [Rule 16, T.R.C.P.].

The officer must send the return to the issuing court or attorney of record, if requested.

## **§12.02 TAX CITATION**

### **§12.02.01 Definition and Issuance**

At any time after the tax on property becomes delinquent, a taxing unit may file suit to foreclose the lien securing payment of the tax, to enforce personal liability for the tax, or both. The suit must be in a court of competent jurisdiction for the county in which the tax was imposed. [§ 33.41(a), V.A.TaxC.] A court shall grant a taxing unit injunctive relief on a showing that the personal property on which the taxing unit seeks to foreclose a tax lien is about to be: (1) removed from the county in which the tax was imposed; or (2) transferred to another person and the other person is not a buyer in the ordinary course of business, as defined by Section 1.201, Business & Commerce Code. [*Id.* at (d).]

A taxing unit is not required to file a bond as a condition to the granting of injunctive relief. In a petition for injunctive relief, the taxing unit may also seek to secure the payment of taxes for a current tax year that are not delinquent and shall estimate the amount due if those taxes are not yet assessed. The tax lien attaches to any amounts paid into the court's registry with the same priority as for the property on which taxes are owed. [*Id.* at (f) – (h).]

### **§12.02.02 Requisites of a Tax Citation**

When a petition is filed, the clerk, when requested, shall issue a citation and deliver it as directed. The party that requests a citation be issued is responsible for

obtaining service of the citation and a copy of the petition. [Rule 99, T.R.C.P.] In cases involving "long-arm jurisdiction" (where a Texas court has jurisdiction over a nonresident defendant), the Civil Practice and Remedies Code also provides that:

1. The plaintiff or the plaintiff's attorney may prepare the appropriate citation for the defendant;
2. The citation must be in the form required by the Rules of Civil Procedure; and
3. The citation shall be served according to law and in compliance with the Rules of Civil Procedure. [§ 17.027(a) – (d), V.A.C.P.R.C.]

To be valid, a citation must:

1. Be styled "The State of Texas;"
2. Be signed by the clerk under seal of court;
3. Contain the name and location of the court;
4. Show date of filing of the petition;
5. Show date of issuance of citation;
6. Show file number;
7. Show names of parties;
8. Be directed to the defendant;
9. Show the name and address of attorney for plaintiff, otherwise the address of plaintiff;
10. Contain the time within which the Rules require the defendant to file a written answer with the clerk who issued citation;
11. Contain address of the clerk; and
12. Notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. [Rule 99 b. and c., T.R.C.P.]

The citation shall include the following notice to the defendant:

“You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.” [Rule 99c, T.R.C.P.]

Note that Rule 99c governs the issuance and form of citation in the district and county courts. Citation in the justice court is governed by Rule 534, which contains the same notice, with a change to: “...following the expiration of ten days after you were served this citation and petition...”. The date on which the citation is issued should appear on the face of the citation, but is frequently found on the back near the clerk's signature. When the officer has a question regarding the validity of citation, the officer should consult the district attorney or county attorney or the issuing court regarding the proper action to take.

### **12.02.03 Alternative Notice of Tax Foreclosure on Certain Parcels of Real Property.**

This section may be invoked and used by one or more taxing units if there are delinquent taxes, penalties, interest, and attorney's fees owing to a taxing unit on a parcel of real property, and:

1. The total amount of delinquent taxes, penalties, interest, and attorney's fees owed exceeds the appraised value of the parcel; or
2. There are 10 or more years for which delinquent taxes are owed on the parcel. [§ 33.57(b), V.A.Tx.C.].

"Appraised value" means the appraised value according to the most recent appraisal roll approved by the appraisal review board. [*Id.* at (a).]

One or more taxing units may file a single petition for foreclosure under this section that includes multiple parcels of property and multiple owners. [*Id.* at (c).] Alternatively, separate petitions may be filed and docketed separately for each parcel of property. Another taxing unit with a tax claim against the same parcel may intervene in an action for the purpose of establishing and foreclosing its tax lien without further notice to a defendant. [*Id.*] The petition must be filed in the county in which the tax was imposed and is sufficient if it is in substantially the form prescribed by Section 33.43, Tax Code, and further alleges that:

1. The amount owed in delinquent taxes, penalties, interest, and attorney's fees exceeds the appraised value of the parcel; or
2. There are 10 or more years for which delinquent taxes are owed on the parcel. [*Id.*]

Simultaneously with the filing of the above described petition, a taxing unit shall also file a motion with the court seeking an order approving notice of the petition to each defendant by certified mail in lieu of citation and, if the amount of delinquent taxes, penalties, interest, and attorney's fees alleged to be owed exceeds the appraised value of the parcel, waiving the appointment of an attorney *ad litem*. The motion must be supported by certified copies of tax records that show the tax years for which delinquent taxes are owed, the amounts of delinquent taxes, penalties, interest, and attorney's fees, and, if appropriate, the appraised value of the parcel. The court shall approve the motion if the documents in support of the motion show that:

1. The amount of delinquent taxes, penalties, interest, and attorney's fees that are owed exceeds the appraised value of the parcel; or
2. There are 10 or more years for which delinquent taxes are owed on the parcel. [[§ 33.57(d) and (e), V.A. Tax C.]

Before filing a petition under this section, or as soon afterwards as practicable, the taxing unit or its attorney shall determine the address of each owner of a property interest in the parcel for the purpose of providing notice of the pending petition. [*Id.* at (f).] If the title search, the taxing unit's tax records, and the appraisal district records do not disclose an address of a person with a property interest, consulting the following sources of information is to be considered a reasonable effort by the taxing unit or its attorney to determine the address of a person with a property interest in the parcel subject to foreclosure:

1. Telephone directories, electronic or otherwise, that cover: the area of any last known address for the person; and the county in which the parcel is located;
2. Voter registration records in the county in which the parcel is located; and

3. Where applicable, assumed name records maintained by the county clerk of the county in which the parcel is located and corporate records maintained by the secretary of state. [*Id.*]

Not later than the 45th day before the date on which a hearing on the merits on a taxing unit's petition is scheduled, the taxing unit or its attorney shall send a copy of the petition and a notice by certified mail to each person whose address is determined as set out above, informing the person of the pending foreclosure action and the scheduled hearing. A copy of each notice shall be filed with the clerk of the court together with an affidavit by the tax collector or by the taxing unit's attorney attesting to the fact and date of mailing of the notice. [*Id.* at (g).] In addition to the required notice, the taxing unit shall provide notice by publication and by posting to all persons with a property interest in the parcel subject to foreclosure. [*Id.* at (h).] The notice shall be published in the English language once a week for two weeks in a newspaper that is published in the county in which the parcel is located and that has been in general circulation for at least one year immediately before the date of the first publication, with the first publication to be not less than the 45th day before the date on which the taxing unit's petition is scheduled to be heard. When returned and filed in the trial court, an affidavit of the editor or publisher of the newspaper attesting to the date of publication, together with a printed copy of the notice as published, is sufficient proof of publication. If a newspaper is not published in the county in which the parcel is located, publication in an otherwise qualifying newspaper published in an adjoining county is sufficient. [*Id.*] The maximum fee for publishing the citation shall be the lowest published word or line rate of that newspaper for classified advertising. The notice by posting shall be in the English language and given by posting a copy of the notice at the courthouse door of the county in which the foreclosure is pending not less than the 45th day before the date on which the taxing unit's petition is scheduled to be heard. [*Id.*] Proof of the posting of the notice shall be made by affidavit of the attorney for the taxing unit, or of the person posting it. If the publication of the notice cannot be had for the maximum fee established in this subsection, and that fact is supported by the affidavit of the attorney for the taxing unit, this notice by posting is sufficient. [*Id.*]

The notice required by Subsections (g) and (h) must include:

1. A statement that foreclosure proceedings have been commenced and the date the petition was filed;
2. A legal description, tax account number, and, if known, a street address for the parcel in which the addressee owns a property interest;

3. The name of the person to whom the notice is addressed and the name of each other person who, according to the title search, has an interest in the parcel in which the addressee owns a property interest;
4. The date, time, and place of the scheduled hearing on the petition; [§ 33.57(i), V.A.Tax C.]
5. A statement that the recipient of the notice may lose whatever property interest the recipient owns in the parcel as a result of the hearing and any subsequent tax sale;
6. A statement explaining how a person may contest the taxing unit's petition as set out below, and that a person's interest in the parcel may be preserved by paying all delinquent taxes, penalties, interest, attorney's fees, and court costs before the date of the scheduled hearing on the petition;
7. The name, address, and telephone number of the taxing unit and the taxing unit's attorney of record; and
8. The name of each other taxing unit that imposes taxes on the parcel, together with a notice that any taxing unit may intervene without further notice and set up its claims for delinquent taxes. [ § 33.57(i), V.A.Tax C.]

A person claiming a property interest in a parcel subject to foreclosure may contest a taxing unit's petition by filing with the clerk of the court a written response to the petition not later than the seventh day before the date scheduled for hearing on the petition and specifying in the response any affirmative defense of the person. [*Id.* at (j).] A copy of the response must be served on the taxing unit's attorney of record in the manner required by Rule 21a, Texas Rules of Civil Procedure. The taxing unit is entitled on request to a continuance of the hearing if a written response filed to a notice of the hearing contains an affirmative defense or requests affirmative relief against the taxing unit. [*Id.*] Before entry of a judgment, a taxing unit may remove a parcel erroneously included in the petition and may take a voluntary nonsuit as to one or more parcels of property without prejudicing its action against the remaining parcels. [*Id.* at (k).]

If before the hearing on a taxing unit's petition the taxing unit discovers a deficiency in the provision of notice under this section, the taxing unit shall take reasonable steps in good faith to correct the deficiency before the hearing. [*Id.* at (l).] A notice provided by Subsections (g)-(i), set out above, is in lieu of citation



issued and served under Rule 117a, Texas Rules of Civil Procedure. [*Id.*] Regardless of the manner in which notice under this section is given, an attorney *ad litem* may not be appointed for a person with an interest in a parcel with delinquent taxes, penalties, interest, and attorney's fees against the parcel in an amount that exceeds the parcel's appraised value. To the extent of any additional conflict between this section and the Texas Rules of Civil Procedure, this section controls. Except as otherwise provided by this section, a suit brought under Section 33.57 is governed generally by the Texas Rules of Civil Procedure and by Subchapters C and D, Chapter 33, Tax Code. [*Id.* at 1.]

A judgment in favor of a taxing unit under Section 33.57 must be only for foreclosure of the tax lien against the parcel. The judgment may not include a personal judgment against any person. A person is considered to have been provided sufficient notice of foreclosure and opportunity to be heard for purposes of a proceeding if the taxing unit follows the procedures set out above for notice by certified mail or by publication and posting or if one or more of the following apply:

1. The person had constructive notice of the hearing on the merits by acquiring an interest in the parcel after the date of the filing of the taxing unit's petition;
2. The person appeared at the hearing on the taxing unit's petition or filed a responsive pleading or other communication with the clerk of the court before the date of the hearing; or
3. Before the hearing on the taxing unit's petition, the person had actual notice of the hearing. [§ 33.57(n), V.A.Tx.C.]

#### **§12.02.04 Alternative Notice of Foreclosure for Parcels in Certain Municipalities.**

One or more taxing units may invoke and use Section 33.58, Tax Code, if there are delinquent taxes, penalties, interest, and attorney's fees owing to a taxing unit on a parcel of real property, and the total amount of delinquent taxes, penalties, interest, and attorney's fees owed exceeds the appraised value of the parcel, and there are five or more years for which delinquent taxes are owed on the parcel. This section applies to such property if the parcel is located in a municipality having a population of more than 100,000 that is situated in two or more counties, at least two of which have a population of more than one million,

and in a subdivision having an average lot size of one-fifth of an acre or less. [§ 33.57(a), V.A.Tx.C.].

If a taxing unit invokes this section, the procedures and other provisions of Section 33.57 apply except as otherwise provided by this section. Notwithstanding Section 33.57(c), a petition for foreclosure under this section is sufficient if it is in substantially the form prescribed by Section 33.43 and further alleges the grounds for invoking this section provided by Subsection (a). [*Id.* at (b) and (c).]

Notwithstanding Section 33.57(e), a court shall approve a motion under Section 33.57(d) if the documents in support of the motion show that the grounds for invoking this section provided by Subsection (a) exist. If a taxing unit's petition includes multiple parcels of property and if requested by the taxing unit, the court's order of sale shall provide that the officer conducting the sale shall sell the parcels *in solido*, regardless of whether the parcels adjoin one another or have common ownership. [*Id.* at (d) and (e).]

If the officer conducting the sale of the property is ordered to sell the property *in solido* under Subsection (e), the officer shall use, in calculating the minimum bid amount under Section 33.50(b) or (c), as appropriate:

1. The aggregate of all amounts awarded against the multiple parcels of property as the aggregate amount of the judgments; or
2. The aggregate of the adjudged market values of the multiple parcels of property as the market value of the property stated in the judgment. [*Id.* at (f).]

If multiple parcels of property are sold *in solido* under an order of sale issued under Subsection (e), the amounts prescribed by Section 34.21 that must be paid in redeeming property shall, for the purpose of redeeming an individual parcel of property, be in an amount equal to the taxes, penalties, interest, and attorney's fees adjudged against that individual parcel. [ *Id.* at (g).]

#### **§12.02.05 Service of Citation in Tax Suits**

General provisions governing form and issuance of process in suits for delinquent *ad valorem* taxes, whether by personal service or publication, are provided in the Texas Rules of Civil Procedure. These procedures govern the issuance and service of citations except as otherwise specially provided. [Rule 117a(4), T.R.C.P.] Citations for tax suits must be returned within 90 days if not served.

[Rule 117a(6), T.R.C.P. (providing, “the citation shall state, “[i]f this citation is not served within 90 days after the date of its issuance, it shall be returned unserved.”).] In addition to other costs authorized by law, a taxing unit is entitled to recover in a suit to collect delinquent taxes all usual court costs including the cost of serving process. [§ 33.48(a), V.A.TaxC.]

The Rules of Civil Procedure set out the form and manner of service of citation in four categories of suits to collect delinquent *ad valorem* taxes:

1. Personal service, owner and residence known, within state;
2. Personal service, owner and residence known, out of state;
3. Service by publication: nonresident, absent from state, transient, name unknown, residence unknown, owner unknown, heirs unknown, corporate officers, trustees, receivers or stockholders unknown, any other unknown persons owing or claiming or having an interest;
4. General provisions. [Rule 117a, T.R.C.P.]

#### **§12.02.06 Personal Service of Citation**

Service of citation as described in § 2.04.01 of this Guide applies to personal service in a suit to collect taxes if the owner and residence are known and are within the state. [Rule 117a 1., T.R.C.P.; see Rules 99-108 T.R.C.P.] If the owner is a non-resident or absent from the state and not subject to citation by publication as set out below, then refer to § 2.04.02 of this Guide and Rule 108, Rules of Civil Procedure. [Rule 117a 2., T.R.C.P. ; see Rules 99-108, T.R.C.P.] The citation does not need to be accompanied by a copy of plaintiff's petition and a copy does not need to be served. [Rule 117a 4., T.R.C.P.]

#### **§12.02.07 Service by Publication or Posting In Tax Suits**

Service by publication in a tax suit is governed by Rule 117a(3) and is used when service is to be made on a person who is: a non-resident, absent from the state, transient, name unknown, residence unknown, owner unknown, heirs unknown, corporate officers, trustees, receivers or stock holders unknown, any other unknown persons owning or claiming or having an interest. [Rule 117(a)(3), T.R.C.P.] If any record owner has rendered the subject property within five years before the tax suit is filed, that person may not be served citation by publication or posting unless personal service has been issued and the return shows the officer was unable to locate the defendant. Some cases require the filing of an affidavit by the attorney filing suit. The officer should refer to Rule 117(a) for those cases.

The citation shall be published in the English language one time a week for two weeks in some newspaper published in the county where the property for which taxes are delinquent is located. The newspaper must have been in general circulation continuously for at least one year immediately prior to the first publication. The newspaper must meet all the requirements of law that apply to newspapers that are to be used for this purpose. Generally, the requirements mentioned above apply.

The first publication shall be not less than 28 days before the return date. Again, count back 29 days from the return date, starting with the day BEFORE the return day as the first day of publication. The first publication date should be no later than the 29th day. If no newspaper is published in the county where the land is located, then citation may be published in a paper published in an adjoining county which meets the requirements listed above. The minimum fee for publishing the citation shall be the lowest published word or line rate of the newspaper for classified advertising.

If citation by publication cannot be had for the allowed fee, supported by affidavit of attorney, service of citation may be made by posting a copy at the courthouse door of the county where the suit is pending. Posting must be at least 28 days prior to the return date.

#### **§12.02.08 Substituted Service of Citation on Nonresident**

In a suit to collect delinquent property taxes by the state or a political subdivision of the state in which a person who is a defendant in the suit is a nonresident, the secretary of state is an agent for service of process on that defendant if the defendant owns, has, or claims an interest in or a lien against property in this state that is the subject of the suit. This section applies regardless of whether the defendant has resided in this state. [ § 17.091(a), V.A.C.P.R.C.] Duplicate copies of the process issued by the clerk of the court in which the suit is pending must be served on the secretary of state not later than the 20th day before the date of return stated in the process. The process must include the name and address of the nonresident's home or home office. The address may be a post office box. [ *Id.* at (b).]

Immediately after being served, the secretary of state shall mail a copy of the process to the nonresident at the address provided under Subsection (b) by certified mail, return receipt requested, with the postage prepaid. The secretary of state shall certify to the court that issued the process that the secretary of state has complied with this section. [ *Id.* at (c).] Service under this section is in

addition to procedures provided by Rule 117a of the Texas Rules of Civil Procedure and has the same effect as personal service. Service of process on the secretary of state under this section must be accompanied by the fee (\$40 per person or party served) provided by Section 405.031(a), Government Code, for the maintenance by the secretary of state of a record of the service of process. [*Id.* at (d) and (e).]

### **§12.02.09 General Provisions**

A taxing unit must collect delinquent taxes, including any penalties and interest, pursuant to the limitations and procedures set out in the Tax Code, Chapter 33. One way to collect unpaid taxes is by filing suit. A taxing unit filing suit to foreclose a tax lien on real property shall join other taxing units that have claims for delinquent taxes against all or part of the same property. [§ 33.44(a), V.A.Tax C.] For purposes of joining a county, citation may be served on the county tax assessor-collector. For purposes of joining any other taxing unit, citation may be served on the officer charged with collecting taxes for the unit or on the presiding officer or secretary of the governing body of the unit. Citation may be served by certified mail, return receipt requested. A person on whom service is authorized by § 33.44, Tax Code, may waive the issuance and service of citation in behalf of the person's taxing unit. [*Id.* at (b).] A taxing unit joined in a suit as provided by this section must file its claim for delinquent taxes against the property or its lien on the property is extinguished. The court's judgment in the suit shall reflect the extinguishment of a lien. [*Id.* at (c).]

Any process authorized by the rule may issue jointly in behalf of all taxing units who are plaintiffs or intervenors in any tax suit. The citation shall also show the names of all taxing units which assess and collect taxes on the property that are not made parties to the suit, and shall contain, in substance, a recitation that each party to the suit shall take notice of, and plead and answer to all claims and pleadings then on file or thereafter filed in the cause by all other parties therein, or who may intervene therein and set up their respective tax claims against the property. [Rule 117a(4), T.R.C.P.]

A copy of plaintiff's petition does not have to accompany the citation nor does it need to be served. [*Id.*] The statement of the nature of the suit, to be set out in the citation, shall be sufficient if it contains a brief general description of the property upon which the taxes are due and the amount of such taxes, exclusive of interest, penalties, and costs. It shall state, in substance, that:

1. The plaintiff and all other taxing units who may set up their claims in the suit seek recovery of the delinquent *ad valorem* taxes due on the subject property, and the (establishment and foreclosure) of liens, if any, securing the payment of those liens, as provided by law;
2. In addition to the taxes all interest, penalties, and costs allowed by law up to and including the day of judgment are included in the suit; and
3. All parties to the suit, including plaintiff, defendants, and intervenors, shall take notice that claims for any taxes on the property becoming delinquent subsequent to the filing of the suit and up to the day of judgment, may, if request is made, be recovered in the suit without further citation or notice to the parties.
4. These accruing delinquencies, together with all interest, penalties, and costs allowed by law thereon, may be recovered in this manner. [ § 33.42, V.A.TaxC.; Rule 117a(4), T.R.C.P.]

After citation or notice has been given on behalf of any plaintiff or intervenor taxing unit, the court shall have jurisdiction to hear and determine the tax claims of all taxing units who are parties plaintiff, intervenor or defendant at the time the process is issued. [ *Id.*]

#### **§12.02.10 Return - Personal Service**

The return of the officer or authorized person serving citation should be made on the citation itself, or, if on another piece of paper, the return should be attached to the citation. The executing officer shall complete an officer's return which shall include the following:

1. The date and time received;
2. The manner in which executed, that is, how the notice was served;
3. The time and place the process was served;
4. The executing officer's signature;
5. The department name;
6. The elected official's name (if applicable); and
7. If not executed, diligence used to try to execute the notice and reason(s) it was not executed. [Rule107, T.R.C.P. (governing return of service).]

The return is then sent to the issuing court or plaintiff's attorney of record, if requested.

#### **§12.02.11 Return - Service by Mail**

If service was made by registered or certified mail, the return receipt that is mailed back to the officer must be included. [See, e.g., *American Bankers Ins. Co. v. State*, 749 S.W. 2d 195, 196 (Tex. App.--Houston [14th Dist.] 1988, no writ) (holding Rule 107 requires that, when service is made by registered mail, the return of the officer must contain the return receipt with the addressee's signature).] The receipt must have the addressee's signature on it. The signature shows that the citation and petition were received by the person to whom they were mailed. [*Id.*]

#### **§12.02.12 Return - Substituted Service**

When an alternate method of service has been authorized, the court's record must show that there was strict compliance with the method authorized. [Rules 107, 536a, T.R.C.P.] The return must include details of how, when, where, and to whom service was made.

#### **§12.02.13 Return – Service by Publication**

In addition to the requisites listed above in section 12.02.07, the return of the officer executing citation by publication shall be endorsed on or attached to the citation and:

1. Show how and when the citation was executed;
2. Specify the dates of publication; and
3. Be signed by the officer and accompanied by a printed copy of the publication. [Rule 117, T.R.C.P.]

#### **§12.02.14 Return - Unexecuted Citations**

If the citation has not been served, the return must show the “due diligence” (degree of persistence) used in attempting to serve the citation. It is preferable that the description of the diligence include each attempt at service specifying the address, date and time when service was attempted. These facts will be important to the party who may request some substituted form of service when personal service cannot be accomplished. The information concerning the inability to serve should be sufficient to support an inference that neither

alternative method of service (by delivery or by registered or certified mail) is achievable. The return must also include the reason the defendant was not served and the defendant's present location, if known. [Rule 107, T.R.C.P.]

### COMMENTARY

Fill in every return with thoroughness as if it will be contested. [*Continental Ins. Co. v. Milliken*, 64 Tex. 46, 47-8 (1885), (stating, "[t]o state that an officer executed process by serving it upon a named person is not to state the manner of service, but to give only the legal conclusion of the officer as to the compliance of his acts with the requirements of the statute. It is to state no more than that he served process by serving it upon a particular person, the manner of service is left untold.")].]

The return must include the official signature of the serving officer. [See, e.g., *Hot Shot Messenger Serv., Inc. v. State*, 818 S.W. 2d 905, 907 (Tex. App.--Austin 1991, no writ), (stating, "[t]he officer's failure to sign the return of citation renders the return fatally defective so that it will not support a default judgment on direct attack.")].] When service is made by an authorized person who is not an "officer," e.g., private process server, the signature of the authorized person must be verified. [Rule 107, T.R.C.P.; *McGraw-Hill, Inc. v. Futrell*, 823 S.W. 2d 414, 416 (Tex. App.--Houston [1st Dist.] 1992, writ denied).]

The importance of the return cannot be overemphasized. The best way to ensure that service will be complete and correct is to tell the facts of what was done to accomplish service. A statement such as, "[s]erved citation as directed," does not tell the facts. The facts have to provide enough information to the court so that a legal decision can be made as to the adequacy of service. No additional facts can be added later to explain or complete the return if the defendant questions the sufficiency of service. A return of service may be amended to add or change facts after it is returned, however, an amendment requires permission of the court. [Rule 118, T.R.C.P.; *Barker CATV Const., Inc. v. Ampro, Inc.*, 989 S.W. 2d 789, 793 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1999, no writ).] If an amendment is made with the court's permission, the amended return is regarded as filed when the original return was filed. [*Bavarian Autohaus, Inc. v. Holland*, 570 S.W. 2d 110, 113 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1978, no writ).] The date of service is especially important in determining when the defendant should have answered or appeared in order to avoid or affirm a default judgment.



**§12.03 Post-Sale Proceedings****§12.03.01 Distribution of Excess Proceeds After Expedited Foreclosure**

A person conducting a sale for the foreclosure of a tax lien under Rule 736, Texas Rules of Civil Procedure, "Expedited Foreclosure Proceeding", shall, within 10 days of the sale, pay any excess proceeds after payment of all amounts due all participants in the sale to the clerk of the court that issued the order authorizing the sale. The excess proceeds from such a sale shall be handled according to Sections 34.03 and 34.04, Tax Code. [§34.021, V.A.TaxC.]

A person, including a taxing unit, may file a petition in the court that ordered the seizure or sale setting forth a claim to the excess proceeds. The petition must be filed before the second anniversary of the date of the sale of the property. The petition is not required to be filed as an original suit separate from the underlying suit for seizure of the property or foreclosure of a tax lien on the property but may be filed under the cause number of the underlying suit. [ §34.04(a), V.A.Tax C.] A copy of the petition shall be served, in the manner prescribed by Rule 21a, Texas Rules of Civil Procedure, as amended, or that rule's successor, on all parties to the underlying action not later than the 20th day before the date set for a hearing on the petition. [ *Id.* at (b).]

At the hearing the court shall order that the proceeds be paid according to the following priorities to each party that establishes its claim to the proceeds:

1. To the tax sale purchaser if the tax sale has been adjudged to be void and the purchaser has prevailed in an action against the taxing units under Section 34.07(d) by final judgment;
2. To a taxing unit for any taxes, penalties, or interest that have become due or delinquent on the subject property subsequent to the date of the judgment or that were omitted from the judgment by accident or mistake;
3. To any other lienholder, consensual or otherwise, for the amount due under a lien, in accordance with the priorities established by applicable law;
4. To a taxing unit for any unpaid taxes, penalties, interest, or other amounts adjudged due under the judgment that were not satisfied from the proceeds from the tax sale; and
5. To each former owner of the property, as the interest of each may appear, provided that the former owner:

- A. Was a defendant in the judgment;
- B. Is related within the third degree by consanguinity or affinity to a former owner that was a defendant in the judgment; or
- C. Acquired by will or intestate succession the interest in the property of a former owner that was a defendant in the judgment. [ §34.04(c), V.A.Tax C.]

Except as provided by Subsections (B) and (C) above, a former owner of the property that acquired an interest in the property after the date of the judgment may not establish a claim to the proceeds. For purposes of this subsection, a former owner of the property is considered to have acquired an interest in the property after the date of the judgment if the deed by which the former owner acquired the interest was recorded in the real property records of the county in which the property is located after the date of the judgment.[ *Id.* at (c-1).]

Interest or costs may not be allowed under this section. An order under this section directing that all or part of the excess proceeds be paid to a party is appealable. [*Id.* at (d) and (e).]

**FORM 30 Officer's Return – Tax Warrant**

(Page 1) [Tex. Tax Code § 33.25(a)(1)]

**OFFICER'S RETURN**

Came to hand on this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, at \_\_\_\_:\_\_\_\_, o'clock a.m./p.m., and levied on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, on the following property, per the attached Tax Warrant, at \_\_\_\_\_, \_\_\_\_\_, in \_\_\_\_\_ County, Texas Zip \_\_\_\_\_ at \_\_\_\_:\_\_\_\_, o'clock a.m./p.m. The property sold included (insert property description to be sold):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

\*\*\*\*\*

A Constable's Sale, on the above listed property, was held on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, at \_\_\_\_:\_\_\_\_, o'clock am/pm at \_\_\_\_\_, \_\_\_\_\_, Texas, between the hours of ten o'clock am and four o'clock pm. (Sale Notice attached)

\*\*\*\*\*

Collected \$ \_\_\_\_\_ from purchaser at sale and applied to the judgment on this writ, per the attached work sheet.

\*\*\*\*\*

Defendant paid \_\_\_\_\_ (dollars) \$ \_\_\_\_\_ toward the tax owed on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ and the sale was canceled or the sale was canceled by \_\_\_\_\_ on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_. The cost(s) of the sale in the amount of \$ \_\_\_\_\_ was collected.

\*\*\*\*\*

After the sale, a Constable's Bill of Sale was issued in the name of \_\_\_\_\_ and forwarded to the purchaser on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, following receipt of assessor-collector certificate showing no ad valorem taxes are owed by purchaser.

\*\*\*\*\*

(Bill of Sale and Certificate Attached)

(continued)

**FORM 30 Officer's Return – Tax Warrant**

(Page 2)

FEE \_\_\_\_.

\_\_\_\_\_  
CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
COUNTY, TEXAS

BY: \_\_\_\_\_  
DEPUTY NAME

\_\_\_\_\_  
PRINTED NAME

**FORM 31 Officer's Return - Tax Citation**

(Page 1) [Tex. Civ. Prac & Rem. Code § 17.027(a) – (d); Rule 117a, T.R.C.P.]

**OFFICER'S RETURN**

Came to hand on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock am / pm and executed in \_\_\_\_\_, County, Texas by delivering to each of the within named defendant(s) in person, a true copy of this \_\_\_\_\_ together with the accompanying copy of the \_\_\_\_\_, at the following dates and times:

NAME	DATE	TIME	ADDRESS OF SERVICE

\*\*\*\*\*

DATE	TIME	ATTEMPTED SERVICE	ADDRESS & REMARKS

NOT executed as to the Defendant(s), \_\_\_\_\_ Information received as to the whereabouts of said Defendant(s) being \_\_\_\_\_.

\*\*\*\*\*

**SERVICE TO CORPORATION**

Executed the same in \_\_\_\_\_ County, Texas, on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_:\_\_\_\_\_ o'clock am / pm by summoning the \_\_\_\_\_, of \_\_\_\_\_, a Corporation, at \_\_\_\_\_, \_\_\_\_\_ County, Texas Zip \_\_\_\_\_, by delivering to \_\_\_\_\_ in person, the \_\_\_\_\_ of said Corporation, a true copy of this writ, together with accompanying certified copy of: \_\_\_\_\_.

(continued)

**Form 31      Officer's Return - Tax Citation**

(Page 2)

FEE \_\_\_\_ . \_\_\_\_

\_\_\_\_\_  
CONSTABLE

PRECINCT: \_\_\_\_\_ PLACE: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_ COUNTY, TEXAS

BY: \_\_\_\_\_

DEPUTY NAME

\_\_\_\_\_  
PRINTED NAME

## **Sheriffs' & Constables' 2008 Fees**

The Constables' Guide has grown significantly and so have printing costs. We ask that you access the 2008 Fee Guide on-line at the Comptroller's web site at [www.window.state.tx.us/lga/sher08/index.html](http://www.window.state.tx.us/lga/sher08/index.html) . The document has fees listed by county on-line, and you can link to each county's fees from the Table of Contents page of that site.

## APPENDIX 1

### COUNTY FEES AND FUNDS OF CONSTABLE

#### A. Service Fees Generally

The commissioners court of a county may set reasonable fees to be charged for services or attempted service by the offices of the sheriff and constables. The court may not set fees higher than is necessary to pay the expenses of providing the services and may not set these fees more than once during any one year period. The fees must be set before October 1 of each year to be effective January 1 of the following year. The service fees shall be posted in the constable's office. [§118.131(a)-(e), V.A.L.G.C.]

On or before October 15 of each year, the commissioners court shall provide to the state comptroller written notice of the amounts of the fees set by the court. Before December 15 of each year, the comptroller shall compile the fee information and send the compilation to: (1) the commissioners court of each county in this state; (2) any statewide association of counties or of officers of counties that requests in writing before December 15 to be informed; and (3) the State Bar of Texas. [*Id.* at (f).]

A commissioners court that receives the notice described above from the comptroller shall furnish the notice to its district clerk, county clerk, justices of the peace, sheriff, and constables. If the commissioner's court does not set fees as described above, the fees for services by the offices of the sheriff and constable are those fees which were provided by the law in effect on August 31, 1981. [§118.131(g) and (h), V.A.L.G.C.] Constables may charge only the fees set by the commissioners court. Justification documentation for new or increases in existing fees should be submitted to commissioners court before the October 1 deadline.

Each party to a suit shall be liable to the officers for all costs incurred by the party. The constable is not compelled to execute civil process from out of county until the fees have been paid unless the documents are indorsed with the words "pauper oath filed". [Rules 125 and 126, T.R.C.P.] In addition, each party in the suit is liable for all other costs incurred by the individual party in the service or execution of the document for which execution may issue. [Rule 127, T.R.C.P.]



**B. Protective Orders Service Fees**

An applicant for a protective order may not be charged a fee, cost, charge, or expense of any kind. [ § 118.131(i), Local Gov't Code and § 81.002, Family Code.] The court shall order a party against whom a protective order is rendered to pay: (1) the protective order fee of \$16.00; (2) as a cost for serving the order, the standard fee charged by the clerk of the court for service of process in general civil proceedings; (3) court costs; and (4) all other fees, charges or expenses incurred in the matter. [ § 81.003 (a) and (b), V.A.FAM.C.; *and see* § 103.021(29)(F), V.A.G.C.] The fee should be entered on the officer's return along with the name and address of the office.

**C. Child Support Enforcement Fees**

The Attorney General is the "Title IV-D" agency for Texas, and it pays specified fees for service of process and travel costs in child support cases that it prosecutes. The constable's office must submit claims once monthly on the prescribed form, which may be requested from the Attorney General's Office. The completed forms are returned to the Attorney General's Office for payment of service on the child support process. [ §§ 231.202 and 231.207 - .209, V.A.FAM.C.]

**D. Delinquent Tax Suits Fees**

A taxing unit is not liable in a suit to collect taxes for court costs, including any fees for service of process, and may not be required to post security for costs. [ § 33.49(a), V.A.Tax C.; see Op. Tex. Att'y Gen. No. DM-250(1993).] The fee amount for service of the document should be entered on the paper along with the complete name, address and phone number of the constable's office. The defendant can be ordered to pay the fee. [ § 33.48(a)(1), V.A.Tax C.] If the complete name and address is not on the document, the fee will not be paid to the constable's office.

**E. Postage for Service by Mail**

If a public official is required or permitted by law to serve legal process by mail, including process in a suit for delinquent taxes, the official may: (1) collect advance payment for the actual cost of the postage required to serve or deliver the process; or (2) assess the expense of postage as costs. This charge is in addition to service fees allowed by law. [ § 17.025, V.A.C.P.R.C.] Certified mail, return receipt requested, has the same effect as and may be used in any case

when, if registered mail is required by law, unless registered mail is required to provide insurance. [ § 136.001, V.A.C.P.R.C.]

#### **F. Rules of Civil Procedure**

Various rules of civil procedure deal with fees due a constable for duties performed. No constable shall be compelled to execute any process in civil cases coming from any county other than the one in which the constable is an officer, unless the fees allowed by law for the service are paid in advance. An exception is made when an affidavit of inability to pay costs (pauper's oath) is filed and the clerk endorses the process to reflect this. [ Rule 126, T.R.C.P.]

If any party responsible for costs fails or refuses to pay those costs within ten days after demand for payment, the clerk or justice of the peace may make a certified copy of the bill of costs then due, and place it in the hands of a constable for collection. All taxes imposed on law proceedings shall be included in the bill of costs, and the certified bill of costs has the force and effect of an execution. [Rule 129, T.R.C.P.]

A constable, upon demand and failure to pay the bill of costs, may levy upon a sufficient amount of property of the person from whom the costs are due to satisfy the same, and sell that property as under execution. If the party is not a resident of the county where the suit is pending, the payment of the costs may be demanded of the party's attorney of record. [Rule 130, T.R.C.P.]

#### **G. Deposit of Funds and Required Reports**

The constable's office shall deposit fees collected with the county treasurer. [ §113.021, V.A.L.G.C.] 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. The county auditor, or county clerk if there is no county auditor, shall maintain an account for each county, district, or state officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county. [ §§ 112.005 and 112.009, V.A.L.G.C.] Each deposit made in the county treasury must be made on a deposit warrant issued in triplicate by the county clerk. [ § 113.023, V.A.L.G.C.] All civil, county, and criminal funds collected by the constable's office are deposited into this account. Counties may employ one of three procedures for managing the funds collected in the constable's office, as follows:

1. A county officer who receives fees, commissions, funds, and other *money belonging to a county* in civil cases shall deposit the funds with

- the county treasurer on or before the next regular business day after the date on which the funds are received. If this deadline is not met, the officer must deposit the funds, without exception, on or before the seventh business day after the day on which the funds are received. The same is generally true for criminal case funds (recognizances, fines, bail bonds, forfeitures, judgments, jury fees, and other obligations) recovered in the name of the State of Texas, *i.e.*, *money belonging to the county*. However, If it is not possible for the officer to deposit the criminal case money in the county treasury by that date, the officer shall deposit the money in the county treasury as soon as possible, but **not later than the third regular business day** after the date that the money is collected. [ § 113.022(a), V.A.L.G.C. and Art. 103.004(a), V.A.C.C.P.; Op. Tex. Att'y Gen. No. JM-397 (1986).] Funds collected for civil judgments and executions are not county funds. They are to be kept in the constable's office account for disbursement to the person entitled to them. [See § 34.047, V.A.C.P.R.C.]
2. In counties of less than 50,000 population, the commissioners court may authorize an extension of the time for collected *county money* to be deposited, but the period may not exceed 30 days after the date the funds are received. [§113.022(a), V.A.L.G.C. and Art. 103.004(b) and (c), V.A.C.C.P.]
  3. All funds are deposited directly into the county treasury as they are collected. These are counties where the individual officeholders do not have bank accounts for their office. In these counties all funds are deposited into the county treasury as they are received. For these counties it will be necessary to follow the audit procedure to request disbursement of the funds to the party who is entitled to receive payment. [See Chapter 116, V.A.L.G.C.]

In a county with a population of 190,000 or less, a district, county, or precinct officer shall keep, as part of a record provided for the purpose, a statement of the fees earned by the officer and of the money received by the officer as deposits for costs, trust fund deposits in the registry of a court, fees of office, and commissions. The officer must make an entry in the record when the fees or commissions are earned or the deposits are made and when the money is received. The county auditor or, if the county does not have a county auditor, the commissioners court shall annually examine the records and accounts of each

officer and report the findings of the examination to the next grand jury or district court. [ § 114.041(a), V.A.L.G.C.]

In a county with a population of more than 190,000, a district, county, or precinct officer shall keep, as part of a record provided for the purpose by the proper county authorities, a statement of the amounts earned by the officer and of the money received by the officer as fees, commissions, or costs. The officer may designate a person to receive the money as fees, commissions, or costs on behalf of the officer under this subsection. The officer or a person designated by the officer to receive the fees, commissions, or costs must make an entry in the record when the fees, commissions, or costs are earned and when they are received. [*Id.* at (b).]

Each report required must be made in writing and must be sworn to before an officer authorized to administer oaths by the officer making the report or by a person designated by the officer to receive fees, commissions, or costs under Section 114.041(b) . A monthly report must be filed within five days after the last day of each month. [ § 114.001, V.A.L.G.C.]

#### **H. Law Enforcement Officers Standards and Education Account**

The Texas Comptroller's Office issues one check per year to each local law enforcement agency as part of an annual allocation of funds for continuing education of licensed peace officers employed by the law enforcement agency. These funds are in addition to any regular budget education accounts and should be kept separately from other agencies funds and may not be deposited in the general fund of the county. This money can only be spent for education of a licensed peace officer of the agency who:

- A. Is licensed under chapter 1701, Occupations Code;
- B. Works as a peace officer on the average of at least 32 hours a week;  
and
- C. Is compensated by a political subdivision of this state at least at the minimum wage and is entitled to all employee benefits offered to a peace officer by the political subdivision.

To provide the necessary information for an allocation of this money, a local law enforcement agency must report to the comptroller not later than November 1 of the preceding calendar year:

1. The number of agency positions described by Subsection (a)(2) authorized as of January 1 of the year the report is due;
2. The number of agency positions described by Subsection (a)(2) filled as of January 1 of the year the report is due;
3. The percentage of the money received by the agency under Subsection (a) pursuant to the allocation made by the comptroller on or before March 1 of the year preceding the year in which the report is due that was used by the agency before the date of the allocation made by the comptroller under Subsection (a) on or before March 1 of the year the report is due;
4. The number of training hours received during the 12-month or approximately 12-month period described by Subdivision (3) that were funded by money received by the agency pursuant to the allocation made by the comptroller on or before March 1 of the year preceding the year in which the report is due; and
5. That the agency has complied with the requirements of this section regarding the use of any money received by the agency pursuant to the allocation made by the comptroller on or before March 1 of the year preceding the year in which the report is due. [ § 1701.157(a)(2) and (b), V.A.O.C.]

The head of a law enforcement agency shall maintain a complete and detailed record of money received and spent by the agency under this section. Money received under this section is subject to audit by the comptroller. Money spent under this section is subject to audit by the state auditor. [*Id.* at (c).]

## APPENDIX 2

### CIVIL FEES AND COURT COSTS – JUSTICE COURT

#### *Fees in Civil Cases Before Judgment (JP Civil and Small Claims)*

Type of Fee	\$ Amount	Authority
1. JUSTICE COURT FILING FEE CHARGE FOR: ORIGINAL PETITION, COUNTERCLAIM, CROSS ACTION, THIRD PARTY ACTION, OR INTERVENTION (SEE NUMBER 7 FOR EXPLANATION OF INMATE LITIGATION FEES.), BILL OF REVIEW; SWORN WRIT OF RE- ENTRY; AND PETITION FOR RESTORATION OF UTILITIES	\$25.00	§§ 118.121 and 118.122 V.A.L.G.C.  §§ 14.001-.014, V.A.C.P.R.C. – Inmate Litigation
2. SMALL CLAIMS FILING FEE CHARGE FOR: ORIGINAL PETITION, COUNTERCLAIM, CROSS ACTION, THIRD PARTY ACTION, OR INTERVENTION, BILL OF REVIEW	\$25.00	§§ 118.121 and 118.122 V.A.L.G.C.
3. SERVICE BY SHERIFF OR CONSTABLE	Set by Commissioners Court	§ 118.131, V.A.L.G.C.
4. FEE FOR WRIT OF REENTRY	Same as Civil Filing Fee	§92.009(l), V.A.Prop.C.

**Date of Imposition of New Fees:** In 2003, the Legislature amended the Government Code to require the Comptroller to publish, by August 1 of each legislative year, a list of fees passed during a session of the Legislature that "...imposes or changes the amount of a court cost or fee collected by the clerk of a district, county, statutory county, municipal, or justice court from a party to a civil case or a defendant in a criminal case, including a filing or docketing fee, jury fee, cost on conviction, or fee or charge for services or to cover the

expenses of a public official or agency.” [§ 51.607, V.A.G.C.] With respect to all new fees after every succeeding legislative session: “[n]otwithstanding the effective date of the law imposing or changing the amount of a court cost or fee included on the list, the imposition or change in the amount of the court cost or fee does not take effect until the next January 1 after the law takes effect.” (Emphasis added.) [§ 51.607(c), V.A.G.C.] If a law contains an exception to § 51.607, then the date specified by the bill is the date the fee takes effect.

## A. COURT FEES FOR SERVICES RENDERED BEFORE JUDGMENT

### 1. and 2. Basic Lawsuit Filing Fees – Civil and Small Claims; Tenant’s Complaint for Reentry or Restoration of Utility Service; and Inmate Litigation

The \$25.00 fee paid when a case is filed with the justice court (\$25.00 for small claims court also) is for **all required filings of documents and all other processes, procedures, and services rendered in a civil suit before judgment.** [§§ 118.121(1), 118.122(a), V.A.L.G.C.] These fees are paid by the plaintiff or the party initiating the action, counterclaim, cross-action, third party action, or intervention at the time the action is initiated. An individual pays the fee one time only for filing any of these actions, unless there is a transfer of venue granted on a motion timely made. [§ 118.122, V.A.L.G.C.; Rule 89, T.R.C.P.] If a request is made for service of citation by the court clerk by registered or certified mail, the clerk shall provide this service, but may not charge the fee for service charged by the sheriff or constable. [Op. Tex. Atty. Gen. No. DM-250 (1993).] Either party is entitled to a trial by jury upon payment of the \$5.00 jury fee. [Rule 544, T.R.C.P.]

The fee for filing a sworn complaint for reentry is the same as that for filing a civil action in justice court. The fee for service of a show cause order is the same as that for service of a civil citation. The justice may defer payment of the tenant’s filing fees and service costs for the sworn complaint for reentry and writ of reentry. Court costs may be waived only if the tenant executes a pauper’s affidavit. [ §§ 92.009(l), and 93.003(l), V.A.C.P.R.C. for residential and commercial tenancies, respectively.]

The fee for filing a sworn complaint for restoration of utility service is the same as that for filing a civil action in justice court. The fee for service of a show cause order is the same as that for service of a civil citation. The justice may defer payment of the tenant’s filing fees and service costs for the sworn complaint for restoration of utility service and writ of restoration of utility service. Court costs

may be waived only if the tenant executes a pauper's affidavit. [ § 92.0091(k), V.A.C.P.R.C.]

The fees for filing Inmate Litigation are not the usual filing fees for justice court. They follow their own formula and the court should refer to Chapter 14, Civil Practice and Remedies Code for the details. [§ 14.006, V.A.C.P.R.C.]

### **3. Sheriff & Constable Service Fees – Civil Cases**

The commissioners court of a county may set reasonable fees to be charged for services by the offices of the sheriff and constable not more than once during any one-year period. The commissioners court may not set fees higher than is necessary to pay the expenses of providing the service. [§ 118.131, V.A.L.G.C.]

A witness who is represented to reside 150 miles or less from a county in which a suit is pending or who may be found within that distance at the time of trial on the suit may be subpoenaed in a suit. [§ 22.002, V.A.C.P.R.C.] A witness is entitled to \$10.00 for each day the witness attends court. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled. The party who summons the witness shall pay that witness' fee for one day at the time the subpoena is served on the witness. [§ 22.001, V.A.C.P.R.C.]

A witness summoned by a state agency is entitled to receive from the agency: (1) one dollar for each day the witness attends court; (2) mileage at the rate provided by law for state employees if the witness uses the witness' personally owned or leased motor vehicle to attend court; (3) reimbursement of the witness' transportation expenses if the witness does not use the witness's personally owned or leased motor vehicle to attend court; and (4) reimbursement of the witness' meal and lodging expenses while attending court if the court is at least 25 miles from the witness' place of residence. *Commercial lodging establishment* means a motel, hotel, inn, apartment, or similar entity that offers lodging to the public in exchange for compensation. *Commercial transportation company* means an entity that offers transportation of people or goods to the public in exchange for compensation. [§ 22.003, V.A.C.P.R.C.]

A state agency may directly pay a *commercial transportation company* for the transportation expenses and a *commercial lodging establishment* for the lodging expenses of a witness if this section otherwise requires the agency to reimburse the witness for those expenses. A state agency may not pay a *commercial transportation company* or a *commercial lodging establishment* or reimburse a



witness for transportation, meal, or lodging expenses under this section at a rate that exceeds the maximum rates provided by law for state employees. (See the state travel reimbursement rates at: <https://fmx.cpa.state.tx.us/fm/travel/travelrates.php>.) After receiving the witness' affidavit, the court clerk shall issue a certificate showing the fees incurred. The witness fee must be taxed in the bill of costs as other costs. [§ 22.003, V.A.C.P.R.C.]

#### 4. Fee for Writ of Reentry

The fee for filing a sworn complaint for reentry is the same as that for filing a civil action in justice court. The fee for service of a writ of reentry is the same as that for service of a writ of possession. The fee for service of a show cause order is the same as that for service of a civil citation. The justice may defer payment of the tenant's filing fees and service costs for the sworn complaint for reentry and writ of reentry. Court costs may be waived only if the tenant executes a pauper's affidavit. [§ 92.009(l), V.A.Prop.C.; § 93.003(l), V.A.Prop.C., for residential and commercial tenancies, respectively.]

### FEES FOR SERVICES OF PEACE OFFICERS – CRIMINAL CASES

Type of Fee	\$ Amount	Authority
1. ISSUING WRITTEN NOTICE TO APPEAR OR MAKING AN ARREST WITHOUT WARRANT.*	\$5.00	ART.102.011(A)(1),V.A.C.C.P.
2. EXECUTE OR PROCESSING ARREST WARRANT OR <i>CAPIAS</i> , OR <i>CAPIAS PRO FINE</i> .*	\$50.00	ART.102.011(A)(2),V.A.C.C.P.
3. SUMMONING WITNESS.	\$5.00	ART.102.011(A)(3),V.A.C.C.P.
4. SERVING WRIT NOT OTHERWISE LISTED.	\$35.00	ART.102.011(A)(4),V.A.C.C.P..
5. TAKING AND APPROVING BOND, RETURNING BOND.	\$10.00	ART.102.011(A)(5),V.A.C.C.P.
6. COMMITMENT OR RELEASE.	\$5.00	ART.102.011(A)(6),V.A.C.C.P.
7. SUMMONING JURY, IF ONE IS SUMMONED.	\$5.00	ART.102.011(A)(7),V.A.C.C.P.

8. ATTENDANCE OF PRISONER ( <i>HABEAS CORPUS CASE</i> ).	\$8.00 PER DAY	ART.102.011(A)(8),V.A..C.C.P.
9. PER MILE FOR MILEAGE TO PERFORM DUTIES, SPECIFIED BY STATUTE, AND NECESSARY AND REASONABLE EXPENSES AND MEALS AND LODGING.	\$0.29 PER MILE	ART.102.011(B),V.A.C.C.P.
10. CONVEYANCE OF WITNESS ATTACHED OUT OF COUNTY AND ACTUAL NECESSARY TRAVEL EXPENSES FOR PUBLIC CONVEYANCE.	\$10.00 PER DAY OR PART OF DAY	ART.102.011(c),V.A.C.C.P.
11. EXAMINING TRIALS	SET BY COMMISSIONER'S COURT NOT TO EXCEED \$5.00	ART.102.011(E), V.A.C.C.P.

\*COLLECT AT CONVICTION

## **B. "FEES FOR SERVICES OF PEACE OFFICERS"**

A defendant convicted of a felony or a misdemeanor shall pay several fees for services performed in the case of a peace officer. A fee assessed under (1) or (2) below shall be assessed on conviction, regardless of whether the defendant was also arrested at the same time for another offense, and shall be assessed for each arrest made of a defendant arising out of the offence for which the defendant has been convicted:

### **1. NOTICE TO APPEAR/ARREST WITHOUT WARRANT**

\$5 for issuing a written notice to appear in court following the defendant's violation of a traffic law, municipal ordinance, or penal law of this state, or for making an arrest without a warrant; [Art. 102.011(a)(1), V.A.A.C.P.]

### **2. EXECUTING WARRANT *CAPIAS*, OR *CAPIAS PRO FINE***

\$50 for executing or processing an issued arrest warrant or *capias*, *capias pro fine* with the fee imposed for the services of:

- A. The law enforcement agency that executed the arrest warrant or *capias*, if the agency requests of the court, no later than the 15<sup>th</sup> day after the date of the execution of the arrest warrant or *capias*, the imposition of the fee on conviction; or
- B. The law enforcement agency that processed the arrest warrant or *capias*, if: (i) the arrest warrant or *capias* was not executed; or (ii) the

executing law enforcement agency failed to request the fee within the period required. [ART. 102.011(a)(1) and (2) and (e), V.A.C.C.P.]

### **3. SUMMONS**

\$5 for summoning a witness; [*Id.* at (a)(3).]

### **4. OTHER WRITS**

\$35 for serving a writ not otherwise listed in this article; [*Id.* at (a)(4).]

### **5. TAKING/APPROVING BOND**

\$10 for taking and approving a bond and, if necessary, returning the bond to the courthouse; [*Id.* at (a)(6).]

### **6. COMMITMENT OR RELEASE**

\$5 for commitment or release [*Id.* at (a)(6).]

### **7. SUMMONING JURY**

\$5 for summoning a jury, if a jury is summoned; and [*Id.* at (a)(7).]

### **8. ATTENDING PRISONER**

\$8 for each day's attendance of a prisoner in a *habeas corpus* case if the prisoner has been remanded to custody or held to bail. [Art. 102.011 (a)(8).]

### **9. MILEAGE AND EXPENSES**

A defendant required to pay fees under the article shall also pay 29 cents per mile for mileage required of an officer to perform a service listed in this subsection and to return from performing that service. If the service provided is the execution of a writ and the writ is directed to two or more persons or the officer executed more than one writ in a case, the defendant is required to pay only mileage actually and necessarily traveled. In calculating mileage, the officer must use the railroad or the most practical route by private conveyance. The defendant shall also pay all necessary and reasonable expenses for meals and lodging incurred by the officer in the performance of services under this subsection, to the extent such expenses meet the requirements of Section 611.001, Government Code. This subsection applies to:

- A. Conveying a prisoner after conviction to the county jail;
- B. Conveying a prisoner arrested on a warrant or *capias* issued in another county to the court or jail of that county; and

- C. Traveling to execute criminal process, to summon or attach a witness, and to execute process not otherwise described by this article. [*Id.* at (b).]

#### **10. CONVEYING ATTACHED WITNESS**

If an officer attaches a witness on the order of court outside the county, the defendant shall pay \$10 per day or part of a day spent by the officer conveying the witness and actual necessary expenses for travel by the most practical public conveyance. In order to receive expenses under this subsection, the officer must make a sworn statement of the expenses and the judge issuing the attachment must approve the statement. [*Id.* at (i).]

#### **11. EXAMINING TRIALS**

A defendant shall pay for the services of a sheriff or constable who serves process and attends an examining trial in a felony or a misdemeanor case the same fees allowed for those services in the trial of a felony or a misdemeanor, not to exceed \$5. [*Id.* at (d).]

A fee under #1 or 2 above shall be assessed on conviction, regardless of whether the defendant has been convicted. [Art. 102.011(e)m V.A.C.C.P.] In addition to fees provided above, a defendant required to pay fees under this article shall also pay the costs overtime paid to a peace officer for the time spent testifying in the trial of the case or for traveling to or from testifying in the trial of the case. [*Id.* at (i).]

## Appendix 3

### Glossary

#### A

**ABANDONMENT** - The relinquishing of all title, possession or claim; a virtual, intentional throwing away of property.

**ABET** - To encourage or facilitate the commission of a crime, promote its accomplishment, or help in bringing the crime about. See *party*.

**ABEYANCE** - A condition of being undetermined; not yet settled, as to hold a case or decision in abeyance.

**AB INITIO** (Latin) - From the beginning.

**ABSTRACT** - A summary or synopsis, as an "abstract of title."

**ABSTRACT OF JUDGMENT** - A complete history, in short, abbreviated form, or the case as found in the record; when filed by the judgment creditor with the county clerk, it creates a judgment lien on the real estate of the defendant in the county where filed.

**ACCELERATION (CONTRACTUAL)** - The shortening of the time to pay a debt because of a breach of some condition in the contract.

**ACCESSORY** - Someone who helps another person to commit a crime without being present when the crime was committed. See *party*.

**ACCESSORY AFTER THE FACT** - A person who knows that a crime has been committed and assists the person who committed the crime to avoid arrest or punishment. See *party*.

**ACCESSORY BEFORE THE FACT** - A person who encourages or assists another in planning a crime or preparing to commit a crime but is not present when the crime is committed. See *party*.

**ACCOMPLICE** - A person who joins with a principal offender in committing a crime, knowingly, voluntarily, and with the same intent to commit a crime as the

principal offender.

**ACCUSED** - The defendant in a criminal case; also called suspect or actor in the Penal Code.

**ACKNOWLEDGMENT** - The formal declaration before an authorized official such as a notary that an instrument (such as a deed) executed by the person was executed voluntarily and freely.

**ACQUITTAL** - The legal and formal certification of the innocence of a person who was charged with a crime; freeing a person from a charge of guilt; finding a person *not guilty*.

**ADJUDICATION** - A formal determination or judgment in a cause by a court of law; determination of the rights of the parties in a case.

**AD LITEM** (Latin) - for the purposes of the suit; a *guardian ad litem* is a person appointed by the court to represent a minor, an incompetent person or any other person entitled to such protection by law.

**ADMINISTRATIVE HEARING** - The presentation of evidence in a quasi-judicial forum which forms the basis of some action to be taken by an administrative agency of the executive branch of government.

**ADMISSIONS** - Confessions or voluntary acknowledgments made by a party about the existence of certain facts.

**ADMONISH** - A statement in the nature of advice, caution or instruction; the giving of a warning, as to admonish a defendant of the defendant's rights.

**ADMONISHMENT** - A statement of warning, advice, caution, instruction, or reminder. See *admonish*.

**ADVANCE SHEETS** - Unbound reporters containing court opinions that are printed in advance of the bound reporter volumes.

**ADVISEMENT** - The consideration or deliberation by a court, after the argument of a cause by counsel and before the opinion is delivered; as to take a case under advisement.

**AFFIANT** - The person who swears to an affidavit or statement.

**AFFIDAVIT** - A written or printed statement or declaration of facts made voluntarily and sworn to or affirmed by an affiant before a person having authority to administer an oath or affirmation.

**AFFIDAVIT OF SERVICE** - A sworn statement that a document (such as a summons) has been delivered or exhibited to a designated person.

**AFFINITY** - A relationship established through marriage as compared to *consanguinity*, which refers to blood relationships (having a common ancestor).

**AFFIRM** - For a court of appeals to declare that a judgment, decree, or order of a lower court is valid and must stand as rendered; to declare, assert or state positively; one may affirm rather than swear (make an affirmation rather than swear an oath).

**AFFIRMATION** - A solemn assertion or declaration that an affidavit is true, that a witness will tell the truth; an affirmation can substitute for an oath.

**AFFIRMATIVE DEFENSE** - A defense that raises matters not covered in the plaintiff's claim which will defeat the plaintiff's claim even if all of the plaintiff's allegations can be proved; in criminal law, a defense which the defendant must prove by a preponderance of evidence.

**AGENT** - A person legally authorized by another (the principal) to act on behalf of the principal; this authority may be apparent (the authority exists because the principal knowingly or negligently permits the agent to use the authority without expressly conferring the authority) or real (expressly conferring the authority to act on behalf of the principal).

**ALIAS** - "Otherwise called," indicating one was called by another name, "also known as," (A.K.A.).

**ALIAS CITATION** - A citation issued after the original citation usually directed to the sheriff or constable of another county or directed to the defendant under another name.

**ALIAS EXECUTION** - An order of execution issued after the first one was unsuccessful in satisfying the judgment, ordering the sheriff to seize other

property.

**ALIBI** - A defense in which a criminal defendant claims to have been "elsewhere" when the offense with which the person was charged occurred. The defendant was in a place so removed from the place where the crime took place that the person could not have committed the crime alleged in the complaint.

**AMBIGUOUS** - Unclear, uncertain, vague, capable of more than one meaning or interpretation.

**AMICUS CURIAE** (Latin) - "A friend of the court;" a person who has no right to appear in a suit (a "non party") but who is allowed to introduce argument, authority, or evidence to protect the person's interests.

**AMORTIZATION** - The process of paying off a debt through partial payment of the principal and accrued interest at stated periods for a definite time.

**AMOUNT IN CONTROVERSY** - In a civil suit the amount sued for; the actual dollar value of the plaintiff's claim.

**ANSWER** - A pleading in a civil matter in which one party (defendant) responds to the claim of another party (plaintiff); in an answer, the defendant will deny the allegations in the plaintiff's complaint or agree with the facts but allege new information which should prevent the plaintiff from recovering on the facts originally presented.

**APPEAL** - A request or complaint to a higher court to correct an injustice or error committed by a lower court; in justice court, the removal of the cause from justice court to county court for the purpose of obtaining a review and new trial.

**APPEAL BOND** - A bond submitted by a person bringing an appeal which will: (1) assure the person's appearance in the court to which appeal is made, and (2) cover the opponent's costs if the court to which appeal is made determines that the appeal had no merit.

**APPEAL IN FORMA PAUPERIS** - A privilege given indigent persons to prosecute an appeal without payment of fees and costs associated with the appeal.

**APPEARANCE** - Coming into court as a party to a suit, as defendant or plaintiff,



by actual appearance or by a pleading; submitting to the court's jurisdiction.

**APPELLANT** - The party initiating the appeal; the party who makes an appeal from one court or jurisdiction to another.

**APPELLEE** - The party in a cause in which the other party has appealed; the party against whom appeal is taken.

**APPOINTMENT** - The selection of a person to fill an office or perform specific functions; the selection is made by a person with authority to do so.

**APPROPRIATE** - To take possession of something which does not belong to you without the permission of the owner; in criminal law - theft.

**ARRAIGNMENT** - The procedure in which the defendant is brought before the court, identified (called by name), informed of the charge (the complaint is read to the defendant), and required to enter a plea.

**ARRAY** - The entire group of persons summoned to serve as jurors; the final trial jury is selected from the array.

**ARREARS; ARREARAGES** - Money overdue and unpaid.

**ARREST** - To take a person into custody for the purpose of detaining the person to answer a criminal charge or civil demand.

**ARREST WARRANT** - A written order of the court, issued and signed by a magistrate, commanding a law enforcement officer to arrest a person and bring that person before the magistrate.

**ASSESS** - To determine the value of something.

**ASSIGN** - To transfer ownership or rights to another.

**ASSOCIATION** - A group of people who have joined together for a specific purpose.

**ATTACHMENT** - The seizure of persons or property so that they will come under the custody and control of the court; the process occurs by virtue of a writ, summons or other judicial order.

**ATTACHMENT BOND** - Money substituted for attached property to free the property; this money will be available to the person who attached the property to pay the claim if that person wins in court.

**ATTEST** - To bear witness to a fact; to verify, certify or affirm.

**ATTESTATION** - The act of witnessing the actual making of a document (execution) and subscribing to it (signing one's name as witness to its execution).

**AUCTION** - Public sales of property to the highest bidder by a person licensed and authorized to do so. Sale is made to the highest bidder.

**AUTHENTICATION** - Establishing that a writing is genuine; the process of establishing that an item of evidence is what the party wishing to offer it says it is; authentication gives legal certification to a statute, record, or other instrument (or certified copy) so that it is admissible as evidence.

**AUTOPSY** - Examination of a dead body to determine the cause of death; a post mortem examination.

## **B**

**BAIL** - In a criminal case, security (money or property) presented to the court to ensure a defendant's appearance in court on the charge brought against the defendant.

**BAIL BOND** - A surety bond or contract in which a third party guarantees that the defendant will appear in court at the designated times and that it will pay the amount of the bond if the defendant does not appear as directed.

**BAILMENT** - The delivery of personal property to someone under an express or implied contract to be held and then redelivered to the original owner when the purpose of the contract is fulfilled; storing furniture in a warehouse is a bailment.

**BENCH WARRANT** - Process issued by the court, itself (from the bench), for the arrest or attachment of a person.

**BEST EVIDENCE** - The most reliable proof of a fact that is available; original

evidence; the kind of evidence that provides the greatest certainty of the facts in question under every possible circumstance; the testimony of a person who knows about the fact; an original of a written document.

**BEYOND A REASONABLE DOUBT** - The standard of proof necessary in a criminal case; the factfinder must be convinced to a moral certainty. See *Trial Handbook pg. 58 (8<sup>th</sup> ed. 2008)*

**BILL OF ATTAINDER** - (Constitutional Law) A legislative act which pronounces a person or member of some group guilty of a crime without benefit of judicial proceedings.

**BILL OF REVIEW** - An equitable remedy which requests the court to reconsider a decision (usually a default judgment) after the time period for appeal or motion for a new trial has passed.

**BONA FIDE** (Latin) - In good faith.

**BOND** - A written instrument requiring a party to pay a sum fixed as a penalty if the party does not perform actions specified in the document.

**BOND FORFEITURE** - A suit, initiated in the name of the state, to recover from the defendant or sureties a bond because the defendant violated conditions of the bond.

**BOND FOR OFFICE** - A bond given by a public officer as security that the officer will perform all the duties of the office well and faithfully.

**BREACH** - Breaking or violating some law or obligation (as in a contract).

**BRIBERY** - Offering, giving, receiving or soliciting anything of value to influence any action by a public official in relation to the official's public duties.

**BRIEF** - A written statement or argument prepared by counsel concerning a case in court; a brief is filed with the court and contains points of law, arguments, and authorities upon which the arguments are based.

**BURDEN OF PROOF** - The duty of a specific party to prove facts in dispute in an issue between parties in a suit.

**C**

**CANON** - A law, rule, or ordinance; criterion.

**CAPACITY** - The legal ability or competency to do something; the ability to understand the consequences of one's actions.

**CAPIAS** (Latin) - A writ similar to an arrest warrant; a judicial writ commanding a peace officer to take a person into custody to answer specific charges.

**CAPIAS PRO FINE** (Latin) - A writ of execution for a fine; this type of writ orders a peace officer to take a defendant into custody, to bring defendant before the court for a show cause hearing, then to hold defendant until the defendant pays a fine and court costs or serves out the fine as specified.

**CAPITAL CASE** - A case in which the death penalty is a possible punishment.

**CARTEL** - A group of producers of a product who join together to control production, sale, and price of a product in order to achieve a monopoly with respect to that product.

**CASE-IN-CHIEF** - The part of the trial in which the party with the initial burden of proof presents the party's evidence and then rests; witnesses are presented for direct examination rather than rebuttal or argument.

**CASH BOND** - A type of appearance bond in which the defendant deposits money with the court to guarantee appearance rather than having other parties (sureties) sign a bond.

**CAUSE OF ACTION** - The facts that give a person the right to judicial relief; the basis of a law suit.

**CERTIFICATE OF ACKNOWLEDGMENT** - A written document in which a notary or otherwise authorized official certifies that the parties who signed an instrument appeared before the official on a specific date and acknowledged that the instrument is a free and voluntary act and deed; this certificate of acknowledgment is attached to the instrument to which it refers.

**CERTIFIED CHECK** - A check whose payment will be guaranteed by the bank on which it is drawn.

**CERTIORARI** (Latin) - "To be informed of"; the name of a writ of review or inquiry; a proceeding in which an appellate court reviews the action of a lower court.

**Cf** - An abbreviated form of the Latin word confer (meaning "compare"); a "signal" used in legal footnotes directing the reader's attention to another part of the work (to another volume, case, etc.) where contrasted, similar, or explanatory views or statements may be found.

**CHALLENGE FOR CAUSE** - A challenge to a juror during *voir dire* examination raising a matter which disqualifies the person from serving as a juror in a particular case.

**CHANGE OF VENUE** - The transfer of a case either from one precinct and county to another precinct and county; or there may be a transfer within the same county to another precinct.

**CHARGE** (to the jury) - The instructions given to a jury regarding the applicable law in a case which the jurors must apply to the facts of the case, as they determine them, in order to reach a verdict. Justices of the peace do not "charge the jury" in civil cases, but they do in criminal.

**CHATTEL** - An article of personal property as distinguished from real property.

**CIRCUMSTANTIAL EVIDENCE** - Proof of facts which indirectly, logically, and rationally lead to a conclusion regarding the ultimate fact to be proved. For example, A is charged with assaulting B. No one saw A strike B, but C testifies that C saw A run from the scene of the assault. C's testimony is circumstantial evidence (should lead toward a conclusion that A assaulted B).

**CITATION** - An order or summons issued by a court of competent jurisdiction commanding the person named in the order to appear in court on a date named in the order and to do something stated in the order, or show cause why the person should not comply.

**CITATION OF AUTHORITIES** - The reading, production of, or reference to legal authorities and precedents (such as constitutions, statutes, reported cases, and

treatises), in arguments to court, in legal textbooks, law review articles, briefs, motions, and other legal writing to substantiate or fortify the propositions advanced.

**CIVIL** - The body of law setting forth individual rights and duties, governing property and ownership interests, establishing a system of government, and embodying the laws of a society. Compare with criminal law.

**CLAIM** - A legal demand or assertion of a right.

**CLAIMANT** - One who asserts a right, legal demand, or claim.

**CLASS ACTION** - An action brought by a small, representative number of plaintiffs in a situation where many more people are similarly involved and injured, to include all the persons so involved in the final outcome or decision.

**CLEAR TITLE** - A title to property that is free of encumbrance, obstruction, burden, or limitation; a marketable title.

**CLERK** - A person employed in the office of a court; in justice court, the clerk shall (1) maintain central docket records for all cases filed in that court, (2) maintain an index of all court judgments for cases arising in that court, and (3) assist the judge in handling matters before the court; a clerk may administer oaths and affidavits, make certificates, and affix the court's seal to those certificates. See TJCTC Deskbook, Vol. 1 (2008 ed.).

**CLOSING ARGUMENT** - The final statements by the parties, or their attorneys, to the jury or court, summarizing the evidence that they think they have established and that the other party has failed to establish during the trial.

**CODE OF CRIMINAL PROCEDURE** - A collection of laws containing the procedures to be used in all criminal cases.

**COMMISSIONERS COURT** - The governing body of officers of a county charged with a variety of executive duties; the county judge presides over the commissioners court.

**COMMON LAW MARRIAGE** - A non-ceremonial marriage created by agreement of the parties and followed by co-habitation; the parties must have the legal capacity to be married, agree to be married, live together as husband and wife, and present themselves to others as husband and wife.

**COMMUNITY PROPERTY** - Property owned in common by husband and wife

each having an undivided one-half interest by reason of their marital status. Nine states have community property systems: Texas, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Washington, and Wisconsin.

**COMPARATIVE NEGLIGENCE** - The measurement of negligence by percentage; in tort, a determination of liability by comparing each party's negligence as it contributed to the damages. See *proportionate responsibility*.

**COMPENSATORY DAMAGES** - Payment or restitution to compensate an injured party for the injury sustained - and nothing more; the actual value of the injury (including lost wages).

**COMPLAINT** - An affidavit or sworn statement made before the court which charges the commission of an offense within the jurisdiction of the court.

**COMPULSORY COUNTERCLAIM** - A counterclaim which must be asserted because it is logically related to the original claim and arises out of the same subject matter on which the original claim is based.

**COMPULSORY PROCESS** - Compelling the attendance of a person in court through subpoena, arrest warrant, attachment, or other process.

**CONSANGUINITY** - Blood relationship; the connection or the relationship of persons descended from a common ancestor.

**CONSERVATOR** - A guardian; someone appointed by the court to: manage the affairs of an incompetent person; liquidate a business; etc.

**CONSPIRATOR** - One who joins or agrees to join with at least one other person for the purpose of committing some unlawful or criminal act. See *accomplice*.

**CONSTITUTION** - The fundamental law of a nation or state that establishes the branches and powers of the government and the basic principles for regulation of society.

**CONTEMPT** - A willful disregard of public authority.

**CONTEMPT (OF COURT)** - An act intended to embarrass, hinder, or obstruct the court in the administration of justice or intended to lessen the court's authority or dignity.

**CONTEMPT (CONSTRUCTIVE)** - A willful disregard or disobedience of the court occurring outside the court's presence, (such as disobeying a court order); notice and hearing are required before person is held in constructive contempt.

**CONTEMPT (DIRECT)** - A willful disregard or disobedience of the court committed in the immediate view and presence of the court, or so near the presence of the court as to interrupt the orderly course of proceedings.

**CONTINUANCE** - The adjournment or postponement of an action pending in court, to a later date, usually done upon motion of a party to the action.

**CONTRA** - Against; opposite to; on the contrary.

**CONTRACT** - An oral or written agreement between two or more parties whereby one party makes an offer which is accepted by another party and all parties mutually agree on the terms and obligations.

**CONTRIBUTORY NEGLIGENCE** - An act or omission amounting to lack of ordinary care on the part of the complaining party, which, concurring with defendant's negligence, is proximate cause of injury. See *proportionate responsibility*.

**CONTROVERSY, AMOUNT IN** - The amount claimed or sued for; part of subject matter jurisdiction of a court.

**CONTROVERTING PLEAS** - A pleading filed by one party in response to a pleading of the other party, which denies the truth of the other party's pleadings.

**CONVERSION** - The unauthorized act of appropriating personal property of another for the person's own beneficial use and enjoyment; in criminal law, an act of theft.

**CONVEYANCE** - A transfer of legal title to land; in criminal law, a vehicle.

**CONVICTION** - The result of a criminal trial which ends in a judgment that the person is guilty as charged.

**CORPORATE SURETY** - A corporation authorized by law to answer for the default of a principal should the principal fail to perform an agreement (usually in relation to a bail bond).



**CORPORATION** - A legal entity created under the authority of law that exists separate and distinct from its members.

**CORROBORATE** - To add weight or credibility to a thing by additional and confirming facts or evidence.

**COUNTERCLAIM** - A claim presented by a defendant against a plaintiff in the same action; can be compulsory or permissive. See *cross-action*.

**COUNTY** - The largest territorial division of a local government within the State that derives its authority by specific grants from the State.

**COURT COSTS** - Fees and charges required by law to be paid to the courts or some of the court's officers, the amount of court costs is fixed by law.

**COURT OF RECORD** - A court whose proceedings are recorded by a court reporter; justice courts are not courts of record; county and district courts are courts of record; appeals from a court of record are upon the record made at trial. See *de novo*.

**CREDIBLE PERSON** - One who is competent to testify and worthy of belief.

**CREDITOR** - A person to whom a debt is owed by another (a debtor); a person may be a creditor by contract or by judgment of the court.

**CRIMINAL CASE** - An action, suit, or cause initiated to punish an infraction of the criminal laws.

**CROSS ACTION** - An independent action brought by a defendant in a suit against another defendant in the suit based upon a cause of action growing out of the same transaction which is in controversy (can be based on contract or tort). See *counterclaim*.

**CROSS-EXAMINATION** - The examination of a witness by the party opposed to the one who produced the witness.

**CUMULATIVE** - When referring to remedies in civil suits, cumulative means "in addition to" other possible remedies; not an exclusive remedy but one of several.

**CUMULATIVE EVIDENCE** - Evidence which goes to prove what has already been established by other evidence; additional or corroborative evidence.

**CURRENT WAGES** - Wages paid periodically or as the services are rendered or the work is performed; not including past-due wages; wages for the current pay-period.

**CURTILAGE** - Any land immediately surrounding a dwelling house and including the nearby buildings used for domestic purposes; this land may or may not be enclosed.

## D

**DAMAGES** - Compensation in money for injury, loss, or damage to person, property, or rights through the unlawful act, omission or negligence of another.

**DEBT** - A sum of money due by certain and express agreement.

**DEBTOR** - One who owes a debt; a borrower.

**DECEDENT** - A dead person; deceased.

**DECLARATION AGAINST INTEREST** - A statement which conflicts with the pecuniary or property interest of the person making the statement; admissible as evidence as an exception to hearsay if the statement was against the interest of the person making it at the time it was made.

**DECLARATORY JUDGMENT** - A binding adjudication of rights where the plaintiff is in doubt about legal rights in a situation; no coercive relief (such as damages or injunction) is granted.

**DECORUM** - An observance of correct judicial procedure and custom.

**DEED** - A conveyance of real property; a writing signed by the grantor, whereby title to the real property is transferred from one to another.

**DEED OF TRUST** - An instrument placing legal title to real property with a trustee to secure the repayment of money; a deed of trust serves the function of a mortgage.

**DE FACTO** (Latin) – Actual; existing in fact; having effect even though not formally enacted; compare with "*de jure*."

**DEFAULT** - The omission or failure to perform a legal duty; when a defendant in a lawsuit omits to answer a lawsuit within the time allowed, or fails to appear at trial, the defendant is said "to make default."

**DEFAULT JUDGMENT** - A judgment entered by the court upon the failure of a party to plead or appear at the appointed time.

**DEFECTIVE** - Lacking in some particular that is essential to completeness, safety or legal sufficiency.

**DEFERRED DISPOSITION** - A punishment alternative similar to probation whereby a guilty criminal defendant is required to live under certain conditions imposed by the court, and no final judgment is ever entered unless the terms of deferred disposition are not completed.

**DE JURE** (Latin) – Existing; in accordance with the law; compare to "*de facto*."

**DELIVERY BOND** - A bond given upon the seizure of goods conditioned for their restoration to the defendant, or the payment of their value, if so adjudged.

**DEMAND** - The assertion of a legal right.

**DEMONSTRATIVE EVIDENCE** - Evidence addressed directly to the senses without intervention of testimony; physical evidence; evidence such as a gun, map, photograph.

**DENIAL** - In civil cases a defense pleading denying the allegations of the plaintiff's petition and putting in issue all the allegations made in the complaint or petition; usually called "*a general denial*."

**DE NOVO** (Latin) – Anew; afresh; a second time; appeal from justice court is *de novo*.

**DEPONENT** - One who gives testimony under oath which is reduced to writing, such as a deposition.

**DEPOSITION** - The testimony of a witness taken, not in open court but usually before a trial; this testimony is reduced to writing, duly authenticated, and

intended to be used during the trial of the case. See *discovery*.

**DETAINER** - The act of withholding from a person lawfully entitled to the possession of land or goods; the restraint of a person's personal liberty against the person's will.

**DETERIORATION** - (Of a commodity) A hurt or impairment, involving some degeneration in the substance of the thing, such as that arising from decay, corrosion, or disintegration.

**DICTA** - Statements and comments of opinion by a judge or court concerning some rule of law or other issue not essential to the determination of that specific case.

**DILATORY** - Tending or intended to cause delay, gain time, or put off a decision.

**DILIGENCE** - Persistent activity, prudence or care; due *diligence* is the degree of care which is properly expected from a reasonable and prudent person under the particular circumstances.

**DIRECT EVIDENCE** - Proof which tends to show the existence of a fact in question without proof of any other fact; proof of a fact by witnesses who saw the action committed or heard the words spoken.

**DISCOVERY** - Pretrial procedures that can be used by a party to obtain information about a suit from the side in order to assist in preparing for the trial. See "*deposition*" and "*interrogatories*."

**DISCOVERY CONTROL PLAN** – Description of what type of discovery plaintiff is seeking in a civil suit; required to be filed in every suit filed in a Texas court.

**DISCRETION** - Power or privilege of the court to act according to the judge's judgment, unhampered by legal rule.

**DISINTERESTED** - Having nothing to gain or lose as a result of the transaction or proceeding; impartial, fair and free of self-interest.

**DISJUNCTIVE PLEADING** - Statements in pleadings or complaints which express or charge a thing alternatively, with the conjunction *or*.

**DISMISSAL** - An order or judgment disposing of a case by sending it out of court, without holding a trial on the issue.

**DISMISSAL WITHOUT PREJUDICE** - Dismissal of a civil case without affecting the right of the plaintiff to sue again on the same cause of action.

**DISMISSAL WITH PREJUDICE** - An adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause.

**DISPARATE TREATMENT** - Treating employees or applicants differently on the basis of race, color, religion, sex, age, national origin, or disability.

**DISQUALIFICATION** - The state of being ineligible or unfit; as a judge, by reason of having interest in a case, or a juror by reason of holding a fixed, preconceived opinion.

**DISQUALIFY** - To divest or deprive of qualifications; to render ineligible or unfit.

**DISSENT** - The explicit disagreement of one or more judges of a court with the decision passed by the majority upon a case before them.

**DISTRAIN** – To seize property. For example, a landlord seizes property of a tenant on the rental or leased premises.

**DISTRESS WARRANT** - A writ authorizing an officer to make a seizure of goods or merchandise to hold for rent in a commercial setting; it may be issued only by a justice of the peace regardless of amount of rent due.

**DOCKET** - A formal record of the courts in which all the acts done in court in the conduct of each case are entered in a concise form, from its beginning to its conclusion.

**DOCTRINE OF CARVING** - The rule that out of a single transaction the State may carve out only one conviction; a rule of jeopardy which is no longer followed in Texas.

**DOCUMENTARY EVIDENCE** - Evidence supported by writings and documents, as distinguished from *oral* evidence.

**DOMAIN** - The complete and absolute ownership of land.

**DOMICILE** - A person's fixed and permanent home to which the person intends to return if the person is ever absent from it.

**DOMICILE OF CORPORATION** - Place considered by law as center of corporate affairs and place where its functions are discharged.

**DORMANT** - Inactive; idle; applies to a judgment that can no longer be enforced.

**DOUBLE JEOPARDY** - A second prosecution for an offense after acquittal or conviction or multiple prosecutions for the same offense; a Fifth Amendment guarantee enforceable against states through the Fourteenth Amendment.

**DUCES TECUM** (Latin) - the name of a type of writ requiring a party to appear in court and bring some document or other item to court so that it may be viewed and inspected by the court. See *subpoena duces tecum*.

**DUE PROCESS OF LAW** - An exercise of the powers of government in an orderly manner so that a person's individual rights are protected and laws are applied fairly.

**DUPLICITIOUS** – Deceitful or double-dealing; an indictment that alleges two or more matters in one plea; double pleading.

**DURESS** - Subjecting a person to unlawful or improper pressure so the person is forced to do some act that the person otherwise would not have done.

**DYING DECLARATION** – In evidence, a statement by a person who is dying and knows that death is imminent about (1) the way the person received the injuries causing the imminent death; (2) who inflicted those injuries; or (3) the connection between the injuries and a person suspected of having caused those injuries.

## E

**EASEMENT** - A right to use the land of another for a special or limited purpose not inconsistent with the general property rights of the owner.

**ELEMENTS OF PROOF** - (or elements of crime) In a criminal case, those factors

or things the State must prove in its case in order to obtain a conviction.

**EMOLUMENT** - Compensation for services or for an occupation.

**ENCUMBRANCE** - A claim, lien, or liability attached to and binding real or personal property; a mortgage, judgment lien, and mechanic's lien are examples of encumbrances.

**ENTERING JUDGMENT** - The formal entry by the court of the judgment on the official court records.

**ENTRAPMENT** - The act of law enforcement officers to induce a person to commit a crime not contemplated by the person, for the purpose of instituting a criminal prosecution against the person.

**EQUITABLE** - Just, fair, and right.

**EQUITABLE REMEDIES** - Extraordinary relief available in limited circumstances, used to either force a person to do an act which the person should do, or to refrain from doing an act which the person should not do; injunctions, mandamus, and like remedies are equitable remedies which can be granted only by a district court.

**ESCHEAT** - A reversion of real and personal property to the State when there is no individual competent to inherit the property; a court judgment is required for an escheat to take effect, although title vests immediately by operation of law.

**ESCROW** - A writing, deed or sum of money delivered by the grantor, promisor or obligor into the hands of a third person to be held until the performance of a condition, and then to be delivered to the grantee, promisee or obligee.

**ESTOPPEL** – A party is prevented by the party's own acts from claiming a right to the detriment of another party who was entitled to rely on the conduct and acted accordingly; usually an affirmative defense that must be pled.

**ET AL** – An abbreviation for *et alia*, which literally means “and others”. Commonly used in shortening the name of a case.

**ET SEQ** (Latin) - Meaning “and the following (one or ones).”

**ET UX** (Latin) - Literally, “and wife.” Used to show that the wife, as well as the

husband, also owns the property or is a party to the suit. Modern concepts of community property and equality have rendered this phrase an anachronism.

**EX REL** (Latin) - Upon relation or information.

**EVICTION** - The process of depriving a person of possession of land or rental property which the person has held or leased but no longer has the right to possess.

**EVIDENCE** - Testimony, writings, objects, or other things offered to prove the existence or non-existence of a fact.

**EVIDENCE (RELEVANT)** - Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. [Rule 401, T.R.E.]

**EXAMINING TRIAL** - An examination conducted by a magistrate for the purpose of inquiring into a criminal accusation against a defendant to determine whether there is sufficient evidence of guilt to justify further proceedings against the accused.

**EXCHANGING BENCHES** - The hearing of a matter by a judge in a court, other than the judge's own; usually due to the disqualification of the judge of the court where the matter is filed.

**EXCLUSIONARY RULE** - The rule which prohibits introduction into evidence of matters or material obtained in violation of search and seizure protection guaranteed by the U.S. and Texas Constitutions.

**EXCULPATORY** - That which tends to clear a person from alleged fault or guilt (as in exculpatory evidence).

**EXECUTE** - To complete; to make; to perform.

**EXECUTION OF JUDGMENT OR DECREE** - Putting into effect the final judgment of the court.

**EXECUTION SALE** - A sale by a sheriff or other ministerial officer under the authority of a writ of execution which has been levied on property of the debtor.



**EXECUTOR** - A person appointed by a testator to carry out the directions and requests in the testator's will and to dispose of the property according to the testator's testamentary provisions after the testator's death.

**EXECUTORY** - Yet to be executed or performed; remaining to be carried into operation or effect; dependent on a future performance or event, as an executory contract. Compare with *performance*.

**EXEMPT PROPERTY** - Property specified by statute which may not be seized or sold to satisfy an execution or attachment.

**EXHIBIT** - A paper, document, or some other piece of evidence produced and exhibited to a court during a trial or hearing in proof of facts and which is accepted into evidence, marked for identification, and made a part of the case.

**EX OFFICIO** (Latin) - From office; by virtue of the office; without any appointment other than that resulting from the holding of a particular office; e.g., the mayor of some small towns serves as an *ex officio* judge.

**EX OFFICIO NOTARY PUBLIC** - By virtue of holding the office of justice of the peace, the judge is a notary public.

**EX PARTE** (Latin) - On one side only; done for, in behalf of, or on the application of, one party only; to discuss or transact business with one party in the absence of the opposite party to a case.

**EXPERT WITNESS** - One who is skilled in some art, science, trade, profession or other human activity, and possesses knowledge obtained from education or experience not acquired by ordinary persons, who, upon being qualified, may testify as to the person's opinion of matters within the person's area of expertise.

**EX POST FACTO** (Latin) - After the fact; by an act of fact occurring after some previous act or fact, and relating thereto; a law passed after such occurrence of a fact which retroactively changes the legal consequences of the act.

**EXPUNCTION** – The act of erasing or eliminating for the record; to expunge.

**EXPUNGE** - To blot out; to strike out wholly; to annul.

**EX REL** (Latin)- Upon relation or information, e.g., a lawsuit initiated by the

attorney general in the name and on behalf of the State, but at the instigation of an individual who has a private interest in the matter is said to be *ex rel* of the person.

**EXTRADITION** - The surrender by one state of an individual accused or convicted of an offense outside the territorial jurisdiction of that state and within the territorial jurisdiction of the other state; the other state may try and punish the person only if the person is extradited.

**EXTRAJUDICIAL** - Something done outside the course of regular judicial proceedings; unconnected with an action in a court of law; done outside of court.

**EXTRANEOUS OFFENSE** - In criminal law, an offense other than the one for which the defendant is on trial.

**EXTRINSIC EVIDENCE** - Evidence which is not contained in the body of an agreement, contract, or similar documents; evidence not legitimately before the court.

## **F**

**FACE AMOUNT** - The amount shown on a document or contract; excludes any interest.

**FACSIMILE** - An exact copy, preserving all the marks of the original.

**FAIR MARKET VALUE** - The present market value; the price which a seller, willing but not compelled to sell, would take and a buyer, willing but not compelled to buy, would pay.

**FATAL VARIANCE** - A difference between the facts alleged in an indictment and those proved at trial which would tend to mislead the defendant in preparing or making a defense.

**FEE SALARY SYSTEM** - An illegal means of compensating a judge whereby the judge receives a fixed amount per case or a percentage of the fines and/or other court costs assessed defendants.

**FELONY** - An offense so designated by law, and punishable by death or confinement in the penitentiary.

**FIDUCIARY** - A person holding the character of a trustee, when the business transacted or the money or property handled is not the person's own or for the person's own benefit but for the benefit of another; a position of trust and loyalty.

**FINAL HEARING** - The stage of the proceedings relating to the determination of a lawsuit upon its merits as distinguished from those of preliminary questions.

**FINE** - A monetary penalty; to sentence a person convicted of an offense to pay a penalty in money.

**FORCED SALE** - A sale, against the consent of the owner made at the time and in the manner prescribed by law, in virtue of execution issued on a judgment already rendered by a court of competent jurisdiction.

**FORCIBLE DETAINER** – Terminology repealed. See *Eviction*.

**FORCIBLE ENTRY AND DETAINER** - Terminology repealed. See *Eviction*.

**FORECLOSURE** - The statutory method of enforcing payment of a debt secured by a mortgage or lien on property, by taking and selling the property.

**FORECLOSURE SALE** - A sale of mortgaged or otherwise encumbered property to obtain satisfaction of the mortgage or lien out of the proceeds.

**FORENSIC** - Having to do with jurisprudence; belonging to courts of justice.

**FORENSIC PATHOLOGIST** - A physician whose duty it is to make a legal determination of the cause of death.

**FORFEITURE OF BOND** - A judgment ordering payment of an obligation covered in a bond due to failure of the person named in the bond (principal) to perform the conditions of the bond.

**FOUR CORNERS** (Within the) -That which is contained in an instrument and nothing more; to look at the four corners of an instrument (as a contact) is to look at the instrument alone and not consider any outside information.

**FUGITIVE** - One who flees from some duty, penalty or consequence of a misdeed.

**G**

**GARNISHEE** - One who possesses money or property belonging to a defendant or who owes a debt to the defendant and the money, property or debt is attached so that it is not paid to the defendant but held for the benefit of a third party (usually, a plaintiff).

**GARNISHMENT** - A statutory proceeding whereby a person's property, money, or credits in possession or under control of or owing by another, are applied to payment of the person's debt to a third party by proper process against debtor and garnishee.

**GIVE NOTICE** - To communicate to another, in any proper or permissible legal manner, information or warning of an existing fact or state of facts or of some intended future action, such as the holding of a hearing.

**GOOD FAITH** - Honesty of intention; sincerity.

**GUARDIAN AD LITEM** - A person appointed by the court to represent a minor, an incompetent person or any other person entitled to such protection by law.

**GUILTY** - A plea by which a defendant confesses to the crime with which the defendant is charged, or a verdict by which a defendant is convicted of a crime.

**H**

**HABEAS CORPUS** (Latin) - A variety of writs used to bring a party before the court or judge to determine if the party is being unlawfully imprisoned or restrained of liberty.

**HABITABILITY** - The condition of the premises that permits an inhabitant to live free of serious defects that endanger health and safety.

**HABITUAL TRAFFIC VIOLATOR** - Any person with four or more convictions arising out of different transactions in a consecutive twelve-month period, or seven or more convictions arising out of different transactions within a twenty-four month period, such convictions being for moving violations of the traffic laws of the State of Texas or any political subdivision or if licensee is holder of provisional license.

**HEARSAY** - Evidence given in court by a witness which is not based upon personal knowledge but is merely a repetition of what the witness has heard others say; second-hand information. Written materials may also be hearsay if offered in court by a witness who did not write or otherwise create the instrument.

**HOLD HARMLESS** - To assume any liability in a situation or transaction and thereby relieve another party from responsibility in the transaction.

**HOSTILE WITNESS** - A witness who manifests so much hostility or prejudice under examination in chief that the party who has called the party is allowed to cross-examine the witness (ask the witness leading questions); a witness unfriendly to the cause of the party who calls the person to testify.

**HUNG JURY** - A jury so irreconcilably divided in opinion that they cannot agree upon a verdict.

**HYPOTHETICAL QUESTION** - A question asked of an expert witness in which the expert is asked to give an opinion about specific issues or conditions as if those issues or conditions were facts.

I

***Id*** (Latin, abbreviation of *idem*) the same; the same as the reference just cited before.

**IMPANEL** - The act of the clerk of the court in making up a list of the jurors who have been selected for a particular trial.

**IMPEACHMENT** - (of a witness) The presentation of evidence for the purpose of calling into question the truthfulness of a witness and to prove that the witness is unworthy of belief.

**IMPLIED WARRANTY** - A warranty derived by implication or inference from the nature of the transaction or the relative circumstances of the parties. A warranty based on the apparent intentions of the parties during a transaction; it is inferred from the transaction rather than stated directly.

**IN CAMERA** (Latin) - In private or in secret; done in chambers rather than before the jury in open court.

**INCOMPETENCY** - Lack of ability, legal qualification, or fitness to discharge the required duty; incapable of comprehending the nature or consequences of a proceeding.

**INCRIMINATE** - To charge with a crime or accuse another of a crime; to expose oneself to being accused of a crime.

**INCULPATORY** - Tending to establish guilt.

**INDEMNIFY** - To secure against loss or damage; to give security for the reimbursement of a person in case of an anticipated loss falling upon the person.

**INDEMNITY BOND** - A bond for payment of a specific sum by one person to a second person for a loss suffered by the second person because of the behavior of the first person or a specified third party.

**INDICTMENT** - An accusation in writing found and presented by a grand jury to the court in which it is impaneled, charging that a named person has done some act which is an offense against the law.

**INDIGENT** - Poor; an individual who is too poor to retain an attorney to represent the individual and too poor to pay court costs.

**INDIRECT EVIDENCE** - Evidence which tends to support a fact only if taken into consideration with other pieces of information. It consists of both inference and presumptions; circumstantial evidence.

**INFORMATION** - A formal accusation of crime, differing from an indictment only in that it is presented by a competent public officer instead of by a grand jury.

**INFRA** (Latin) - Below, beneath, within.

**INJUNCTION** - A court order prohibiting someone from doing some specific action or requiring that a person take action to undo some wrong.

**IN LIMINE** (Latin) - At the beginning; preliminary; a motion to exclude evidence which is anticipated to be prejudicial.

**INQUEST** - An investigation conducted by a magistrate or medical examiner to determine the cause of death and whether anyone is responsible for the death of another.

**IN RE** (Latin) - In the matter of; concerning.

**INTEREST** - Any right in the nature of property; a charge for the use of money.

**INTERLOCUTORY** - Provisional, temporary, not final.

**INTERPLEADER** - A procedure to determine the rights of parties to property held by another party who has no interest in the property.

**INTERROGATORIES** - Written questions propounded by one party and served on the adversary, who must serve written answers to the questions under oath. See "*discovery*."

**INTER VIVOS** (Latin) - From one living person to another; a type of trust fund.

**INTESTATE** - To die without making a will.

**INTRINSIC EVIDENCE** - Evidence elicited by examination of a witness who is testifying.

**INVITEE** - One who is present at a specific place because of the express or implied invitation of another; sometimes, the same as guest.

**INVOKING "THE RULE"** – On motion from either party or the court, witnesses on both sides swear an oath, and are removed from the courtroom to a place where they cannot hear the testimony of any other witness.

**IPSO FACTO** (Latin)- By the fact itself; by the mere fact.

## **J**

**JOINDER** - Can refer to issues, offenses, parties, or claims; combining two or more transactions or proceedings into one transaction or proceeding.

**JOINT STOCK COMPANY** - A partnership where the capital is divided into shares so it can be transferred without the express consent of the co-partners; a business having characteristics of both a corporation and a partnership.

**JUDGMENT** - The final decision of the court resolving a dispute and determining

the rights and obligations of the parties to the dispute; the official decision of the court. The judgment must be reduced to writing and entered in the court record.

**JUDGMENT DEBTOR** – a person/entity against whom judgment has been recovered, and which remains unsatisfied.

**JUDGMENT LIEN** – an encumbrance which arises by law when a judgment for the recovery of money is docketed and that attaches to the debtor's real estate when the abstract is recorded in the county where the real property is located. Right to subject property of judgment debtor to satisfaction of judgment.

**JUDGMENT CREDITOR** - One who has obtained a judgment against the person's debtor, under which the person can enforce execution.

**JUDGMENT N.O.V.** - Judgment notwithstanding the verdict; a judgment of the court that is opposite to the verdict reached by the jury because there was insufficient evidence to support the verdict, as a matter of law.

**JUDGMENT PROOF** - Describes a person who has no available resources out of which a judgment can be satisfied.

**JUDICIAL NOTICE** - The official recognition of certain facts which a judge may properly take and act upon without hearing evidence because the facts are generally known in the territorial jurisdiction of the court or capable of accurate determination through reliable sources.

**JURAT** - The clause written at the foot of an affidavit, stating when, where, and before whom such affidavit was sworn.

**JURISDICTION** - The power of the court to hear and decide the case.

**JURISDICTIONAL AMOUNT** - The money amount involved in the particular case or dispute by which the jurisdiction of the court to determine the case is measured; part of "subject matter" jurisdiction.

**JURISPRUDENCE** - The philosophy of law; the science which determines principles upon which legal rules are based.

**JURY** - A certain number of individuals, selected according to law, and sworn to inquire of certain matters of fact, and declare the truth upon evidence laid before



them.

**JURY PANEL** - A group of prospective jurors who are summoned to appear on a stated day and from which a jury is chosen.

**JUVENILE** - A person who has not reached the age at which the person is treated as an adult for the purposes of criminal law; any person under 17 years of age and over the age of 10.

## **L**

**LACHES** - A delay in seeking relief due to neglect that makes it inequitable to accord the relief sought.

**LEADING QUESTION** - A question which suggests the desired answer.

**LEASE** - A contract for exclusive possession of land or buildings for a specific period in exchange for consideration, usually rent.

**LEGISLATIVE CONTINUANCE** - The mandatory postponement of proceedings in a cause required when the attorney for a party is a member of the legislature and requests such continuance within the time limits prescribed by law.

**LESSEE** - A person to whom a lease is given.

**LESSOR** - A person who gives a lease.

**LEVY** - To impose or assess a fine or tax by legal authority. To take or seize property in execution of a judgment.

**LIABLE** - Obligated by law or equity.

**LIABILITY** - Being responsible for actual or possible loss.

**LICENSED ATTORNEY** - An attorney who has been admitted by the Supreme Court of Texas to the practice of law and who is a current member in good standing of the State Bar of Texas.

**LIEN** - A legal right or interest that a creditor retains to transferred personal property.

**LIEU** (French)-Place or room; "in lieu" means instead of.

**LIQUIDATE** - To gather assets, convert them into cash, and distribute them according to the legal rights of the interested parties.

**LIQUIDATED CLAIM** - A claim which amount has been agreed upon by the parties, has been fixed by operation of law, or is capable of determination by mathematical computation.

**LIS PENDENS** (Latin) - A pending suit; notice of the pendency of an action affecting title to real property.

**LONG ARM STATUTE** - Legal method to acquire jurisdiction over an out-of-state defendant by substituted service.

## **M**

**MAGISTRATE** - A civil public officer invested with powers and functions which may be judicial, executive, or legislative in nature; a justice of the peace is a magistrate, as are most judges.

**MAGISTRATE'S WARNING** - A warning given by the magistrate to an accused informing the accused of the accused's legal rights.

**MALICE** - The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict injury or under circumstances that the law will imply an evil intent.

**MANDAMUS** - An order from a court to compel a public official to perform a mandatory duty or ministerial act.

**MARRIAGE CEREMONY** - The rite, religious or civil, for the solemnization of a marriage.

**MARRIAGE CERTIFICATE** - An instrument that is executed by the person officiating at a marriage ceremony which certifies the marriage, and is filed with a public authority.

**MARRIAGE LICENSE** - Permission by public authority to persons who intend to

marry, addressed to anyone authorized to solemnize marriages.

**MATTER IN CONTROVERSY (or DISPUTE)** - The subject of litigation.

**MECHANIC'S LIEN** - A claim created by law for the purpose of securing priority of payment of the value of work performed and materials furnished in improving, repairing, or maintaining real or personal property.

**MENS REA** (Latin)-A guilty mind; a criminal intent; culpable mental state.

**MISDEMEANOR** - An offense of a less serious nature that is punishable by a fine, and, sometimes, by confinement in a city or county jail, or both.

**MISTRIAL** - A trial of an action which cannot stand because of a disregard of some fundamental requisite; the termination of a trial prior to a final determination of the merits.

**MITIGATING CIRCUMSTANCES** - Circumstances surrounding the commission of an act, which in fairness can be considered as extenuating or reducing the severity or degree of moral culpability of the act, but not to excuse or justify the act.

**MITIGATION OF DAMAGES** - A rule that an injured party has a duty to use reasonable diligence and ordinary care in attempting to minimize the damages after an injury has been experienced.

**MOOT** - A nonexisting controversy where the issues that were in question no longer exist.

**MORAL TURPITUDE** - Conduct contrary to justice, honesty, modesty or good morals.

**MORTGAGE** - A contract by which a person binds the whole of the person's property, or a portion of it, in favor of another, to secure the execution of some obligation, but without losing possession.

**MOTION** - A written or oral application for a ruling or order from the court.

**MOTION FOR NEW TRIAL** - A request that the trial judge set aside the judgment and order a new trial because the trial was improper or unfair due to specific

prejudicial errors.

**MOTOR VEHICLE** - Every self-propelled device, in or by which any person or property may be transported or drawn upon a public highway, except devices moved only by human power or on stationary rails.

**MOVANT** - One who makes a motion before a court.

**MOVE** - To make an application to a court to rule, order, or take action in a matter.

**MUNIMENT** – Documentary evidence of title.

## **N**

**NARRATIVE EVIDENCE** - Testimony which is a descriptive account of a sequence of events given by a witness and not in the usual question and answer form.

**NECESSARY PARTY** - A party that must be joined in an action who has an interest in the controversy such that a final judgment cannot be made without the party.

**NEGLIGENT ACT** - An act in which a person fails to exercise that degree of reasonable care that would be exercised by a person of ordinary prudence.

**NEW TRIAL** - The rehearing of a criminal or civil action, after the verdict, before the judge or another jury; the effect of a new trial is to place the case in the same position in which it was before any trial had taken place.

**NEWLY-DISCOVERED EVIDENCE** - Testimony or evidence discovered after trial, and which was not discoverable before trial by exercise of due diligence.

**NEXT FRIEND** - One acting for the benefit of a minor or any other person not able to act on one's own behalf, without being regularly appointed as a guardian.

**NIHIL DICIT** (Latin) **JUDGMENT** - the name of a judgment which may be taken against a defendant who does not plead or answer the plaintiff's complaint within the time specified by the court.

**NISI** (Latin) - Unless; a judgment which will be made final unless cause is shown

to prohibit it.

***NOLLE PROSEQUI*** (Latin) - A formal entry into the record by the prosecuting officer that prosecuting officer will not prosecute the case further.

***NOLO CONTENDERE*** (Latin) - A plea in criminal cases in which the defendant does not contest the charge against the defendant; *nolo contendere* has the same legal effect as a guilty plea.

**NON-RESIDENT** - One who does not reside in a specified jurisdiction.

**NOT GUILTY** - A plea in which the defendant denies guilt, or a verdict in which the defendant is found innocent.

**NOTARY PUBLIC** - A public officer whose function is to administer oaths, certify documents, take affidavits, and attest to the authenticity of signatures; a justice of the peace is an *ex officio* (by virtue of the office) notary public.

***NUNC PRO TUNC*** – (Latin) Now for then. A phrase applied to acts that may be done after the time when they should be done, with a retroactive effect; it will have the same legal effect as if it was done at the proper time. It is applied to correct a clerical error in a court's judgment.

**O**

**OATH** - Any form of affirmation by which a person agrees to be is bound in conscience to perform an act faithfully and truthfully.

**OBLIGEE** - The person in favor of whom some obligation is owed; the party to whom a bond is given.

**OBLIGOR** - The person who has engaged to perform some obligation.

**OFFICER OF THE COURT** - A term generally used to refer to any person connected with the operation of the court, including bailiffs, peace officers, and attorneys.

**OFFICIALLY ATTESTED** - An acknowledgment of an individual acting in the individual's official capacity bearing witness to another's signature being affixed to a document.

**OFFICIAL MISCONDUCT** - Any unlawful behavior by a public officer in relation to the duties of the office, willful in its character, including any willful failure, refusal, or neglect to perform any of the official duties.

**OPEN COURT** - A court to which the public has a right to be admitted; constitutional guarantee of access for redress of grievances for any person.

**OPENING STATEMENT OF COUNSEL** - Statement made at beginning of party's case to advise the jury of facts relied upon and of issues involved and to give the jury a general picture of the case so that they will understand the evidence.

**OPINION EVIDENCE** - What a witness thinks, believes, or infers in regard to facts in dispute, as distinguished from personal knowledge of the facts themselves.

**ORAL** - Spoken, not written.

**ORDER** - Every direction of a court or judge; a mandate or command.

**OVERRULE** - To refuse to sustain or recognize as sufficient an objection made in the course of a trial, as to the introduction of particular evidence, etc.

## **P**

**PARENTAL CONSENT** - The permission or acquiescence of a parent on behalf of a minor child who is legally incompetent to personally consent.

**PAROL** - Oral or verbal; not written.

**PAROL EVIDENCE** - Oral or verbal evidence; that which is given by word of mouth.

**PAROL EVIDENCE RULE** - That rule which states oral evidence is not admissible to contradict or modify a written instrument, unless such writing is ambiguous or affected by accident, fraud, duress, or mutual mistake.

**PARTIES** - The persons who are actively concerned in the prosecution and defense of any legal proceeding.

**PARTNERSHIP** - An association of two or more persons to carry on as co-owners of a business for profit.

**PARTY** - In criminal law, one who is criminally responsible for conduct either committed alone or by others and for which the person is criminally responsible. See *abet*; *accessory*; *accessory after the fact*; *accessory before the fact*.

**PAUPER** - A person who, because of poverty, is allowed to sue or defend a lawsuit without being charged with costs.

**PEACE BOND** - A type of surety bond that must be provided by someone who has threatened to breach the peace.

**PECUNIARY** - Monetary; relating to money.

**PENAL CODE** - The main body of law which defines offenses and prescribes penalties.

**PER CURIAM** (Latin) – By the court; used to describe an opinion written by the whole court not just one judge, used in appellate opinions.

**PEREMPTORY** - Absolute; self-determined; arbitrary; not requiring any cause to be shown.

**PEREMPTORY CHALLENGE** - The right to challenge and remove a prospective juror without stating the reason.

**PERFORMANCE** - The fulfillment or accomplishment of a promise, contract, or other obligation.

**PERISHABLE PROPERTY** - Any product, like fruit or fresh vegetables, which quickly deteriorates in quality and value.

**PERJURY** - Making a false statement under oath voluntarily, knowing that the statement is false.

**PERSONAL BOND** - The defendant's word or promise to appear in court to answer criminal charges; recognizance bond.

**PERSONAL PROPERTY** - Articles associated with a person, as opposed to real

property (land).

**PETIT JURY** - The ordinary jury of six or twelve individuals for the trial of a civil or criminal action, impaneled to determine any question or issue of fact according to the law and evidence as given them in the court.

**PETITION** - A written application from the complainant or plaintiff to the court, asking the court to exercise its authority in the redress of some wrong, or the granting of some favor, privilege, or license.

**PLAINTIFF** - A person who complains or sues in a civil lawsuit and is so named on the record.

**PLEA** - The answer which the defendant in a legal proceeding makes to the complaint against the defendant.

**PLEADINGS** - Oral or written statements made to the court presenting the claims and defenses of the parties.

**POSSESSION** - Having control over something with the intent to exercise that control.

**POSSESSORY LIEN** - A lien which provides that the creditor has the right to hold possession of the specific property until satisfaction of the debt.

**POST MORTEM** - After death; a term generally applied to an autopsy to ascertain the cause of death, or to the inquiry for that purpose by the coroner.

**POSTPONEMENT** - A continuance; a delay in proceedings.

**POWER OF ATTORNEY** - An instrument authorizing another to act as one's agent or attorney.

**PRECEPT** - An order or direction coming from a court or other authority to an officer or body of officers, commanding the officer or officers to do some act within the scope of their powers; a rule which imposes a standard of conduct.

**PRECINCT** - A small geographical subdivision of government within a county.

**PREDICATE** - The foundation for action.



**PREJUDICE** - A bias; a preconceived opinion.

**PREJUDICIAL ERROR** - Error substantially affecting a party's legal rights and obligations.

**PRELIMINARY HEARING** - A pretrial proceeding in which the court determines whether there is probable cause to believe the accused committed a crime and should be held for trial.

**PREPONDERANCE OF THE EVIDENCE** - The greater weight of the evidence; evidence which is more credible and convincing to the mind; evidence which is more convincing than that presented in opposition to it; the standard of proof in civil cases.

**PRESUMPTION** - An inference or conclusion in favor of a particular fact; often a statutory presumption, which may be rebuttable.

**PRESUMPTION OF INNOCENCE** - A conclusion drawn by law that in a criminal case a defendant should be acquitted unless the defendant's guilt is established by evidence beyond a reasonable doubt.

**PRETRIAL REMEDIES** - Orders or actions occurring prior to the actual determination of the merits of the case, which are entered to protect the rights of a party or to preserve the status quo.

**PRIMA FACIE EVIDENCE** - Evidence which is sufficient to prove a particular fact unless it is contradicted and overcome by other evidence.

**PRINCIPAL - CRIMINAL LAW:** Chief perpetrator of a crime; **CIVIL LAW:** Someone who directs another (an agent) to act in the person's (principal's) behalf.

**PRINCIPAL OFFICE** - Regarding a corporation, its headquarters or the place where the chief or principal affairs and business of the corporation are transacted.

**PROBABLE CAUSE** - A reasonable ground of suspicion supported by facts or circumstance sufficiently strong in themselves to cause a reasonably cautious person to believe that the accused is guilty of the offense with which the accused is charged.

**PROBATION** - Allowing a person convicted of an offense to go free, under a suspension of sentence, during good behavior and while under supervision.

**PROBATIVE** - Tending to prove, or actually proving.

**PROCESS** - (In criminal and civil law) any method used by the court to obtain or exercise jurisdiction over person or property.

**PROOF** - The establishment of a fact by the presentation of evidence.

**PROOF BEYOND A REASONABLE DOUBT** - Proof which is so certain that it prevents any other conclusion except that which it supports; proof which is so certain that it is consistent with a defendant's guilt and inconsistent with any other conclusion. The standard of proof in a criminal case. See *reasonable doubt*.

**PROPORTIONATE RESPONSIBILITY** - The concept that a claimant may not recover damages if the claimant's percentage of responsibility in the cause of action (cause of action based on tort) is greater than 50%. See Chapter 33, Civil Practice and Remedies Code. Compare with *comparative negligence*; *contributory negligence*.

**PRO SE** (Latin) - For self, on one's own behalf; in person; one who does not retain a lawyer but, instead, appears on one's own behalf in court.

**PROVE** - To establish or make certain.

**PROXIMATE CAUSE** - Act or omission which was a substantial factor in producing an injury and if it had not been for that act or omission, the injury would not have occurred; the act or omission must have occurred in a continuous sequence without any intervening factor or cause.

**PROXY** - An agent representing and acting for the principal.

**PRUDENCE** - Good judgment; care; diligence.

**PUBLICATION** - The process of giving a summons as an advertisement in a newspaper, under the conditions prescribed in the Rules of Civil Procedure, as a means of giving notice of the suit to a defendant upon whom personal service cannot be made.

**PUBLIC PLACE** - Any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

**PUBLIC PROPERTY** - Real or personal property owned by the government, used to carry out its governmental function for the benefit of the citizenry; a place where members of the general public have a right to be.

**PUBLIC SERVANT** - In law, an officer, employee, or agent of government; a juror or grand juror; an arbitrator, referee, or like person authorized to determine controversies; an attorney or notary public performing a governmental function; or a candidate for public office.

**PUNITIVE DAMAGES** - Damages awarded a plaintiff over and above the plaintiff's actual loss to punish the defendant for the actions which caused the loss; also called exemplary damages.

## Q

**QUASH** - To overthrow; to abate; to vacate; to annul; to make void.

**QUID PRO QUO** (Latin) - Something for something; the giving of one valuable thing for another.

**QUO WARRANTO** (Latin) - An extraordinary proceeding, intended to prevent a continued exercise of authority unlawfully asserted.

## R

**REAL** - Relating to land as distinguished from personal property.

**REAL PROPERTY** - Land and generally whatever is built, growing upon, or affixed to it.

**REASONABLE DOUBT** - Such a doubt as would make a reasonable person hesitate to act in the most important of his own affairs.

**REBUTTAL** - The stage of a trial at which evidence is introduced showing that

statements of witnesses as to what occurred are not true or complete; evidence which counters or offsets the direct evidence. See *Trial Handbook*.

**RECEIVERSHIP** - A remedy in which a neutral party is appointed by the court to receive and preserve the property or funds subject to litigation during the pendency of litigation.

**RECESS** - A short interval or period of time during which the court suspends business but does not adjourn.

**RECOGNIZANCE** - An obligation of record, entered into before some court or magistrate authorized to take it, with a condition that a person will do some particular act, such as appear in court.

**REGISTRAR** - An officer who is in charge of keeping records.

**REMEDY** - The means by which a right is enforced or the violation of a right is prevented, redressed, or compensated.

**RENDER** - To pronounce, state, declare, or announce in open court the judgment of the court in a given case.

**RENT** - Compensation paid for the use or occupation of property.

**REPEAL** - The annulling of a previously-existing law by the enactment of a subsequent statute which declares that the former law shall be revoked, or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force.

**REPETITIOUS** - Additional or corroborative evidence on the same point which tends to prove something that has already been established by other evidence.

**REPLEVIN** - A personal action brought to recover possession of goods alleged to be wrongfully taken; where the ultimate question is the right to possession of the property.

**REPLEVIN BOND** - A bond executed to indemnify the officer who executed a writ of replevin and to indemnify the defendant or person from whose custody the property was taken for such damages as that person may sustain because the property was taken.

**REPLEVY** - In reference to a replevin action, to redeliver goods which have been seized by an officer to the original possessor of them, upon the original possessor's giving security conditioned on prosecuting an action to determine the legality of the seizure.

**REPUGNANCY** - An inconsistency, opposition or contrariety between two or more allegations of the same pleading, or any two writings.

**REPUTATION** - The character imputed to a person in the neighborhood where the person lives.

**REQUEST FOR ADMISSION** - A formal method of discovery whereby written statements or opinions of fact are served on the opposing party.

**RES GESTAE** (Latin) - Facts and circumstances which occur automatically or without design simultaneously or almost simultaneously, thereby making them part of the incident itself; an exception to the hearsay rule.

**RESIDENCE** - The place where one actually lives, simply requiring a bodily presence.

**RES JUDICATA** (Latin) - A final judgment on the merits by a court of competent jurisdiction which is conclusive of the rights of the parties in later suits on matters determined in the first suit.

**RESTITUTION** - The restoration of something to its rightful owner; making good or giving an equivalent value for any loss, damage or injury; compensation.

**RETURN** - The endorsement made by a sheriff or constable upon a writ or notice, stating what the officer has done under it and the time and mode of service.

**RULES OF CIVIL PROCEDURE** - The body of law promulgated by the Texas Supreme Court to establish the manner and means by which civil cases are conducted by the courts.

## S

**SCIRE FACIAS** (Latin) - A writ used to enforce the execution of some matter of

record on which it is usually founded. The purpose of the writ is to give notice to the defendant of an application for an award or execution. The term "scire facias" is not only ascribed to the writ, but also to the whole proceeding; it shall conform to the requisites of citations and the returns thereon, under provisions of the Rules of Civil Procedure.

**SEAL** - A particular sign or emblem applied to a document to attest, in the most formal manner, the execution of an instrument.

**SEARCH WARRANT** - A written order issued by a magistrate and directed to a peace officer commanding the officer to search for specified property at a specified place and to seize it and bring it before the magistrate.

**SECURED CREDITOR** - A creditor who holds some special pecuniary assurance of payment of a debt, such as a mortgage or lien.

**SELF-INCRIMINATION** - The giving of evidence or answering of questions, the tendency of which would be to subject one to criminal prosecution. As provided by the Fifth Amendment of the U.S. Constitution, criminal defendants shall not be compelled to give evidence against themselves or testify before the court.

**SELF-SERVING DECLARATION** - Hearsay statement made by a party in the case which is favorable to the party.

**SENTENCE** - The judgment formally pronounced by the court or judge upon the defendant after conviction in a criminal prosecution, awarding the punishment to be inflicted, and ordering that it be carried out.

**SEQUESTER** - To deposit a thing which is the subject of a controversy in the hands of a third person, to hold for the contending parties.

**SEQUESTRATION** - A deposit which two or more persons engaged in litigation make of the thing in contest with a third party who promises to return it, when the issue is resolved, to the party to whom it is adjudged to belong.

**SERVICE** - The delivery of a writ, notice, injunction, etc., by an authorized person, to a person who is thereby officially notified of some proceeding concerning that person.

**SHALL** - As used in statutes, this word is generally imperative or mandatory.

**SINE DIE** (Latin) - Without day. Final adjournment; as in the Legislature, which at the end of a legislative session adjourns *sine die*.

**SPEEDY TRIAL ACT** - Statutory law designed to assure constitutional right to speedy trial in criminal cases, which embodies mandatory time limits within which State must be ready for trial, and providing exceptions. See Art. 32A.02, V.A.C.C.P.; (portions of this article were declared unconstitutional in *Meshell v. State*, 739 S.W. 2d 246 (Tex. Crim. App. 1987).

**STATUTE** - A law enacted by the legislature.

**STATUTE OF LIMITATIONS** - A statute declaring that no suit shall be maintained on certain causes of action unless brought within a specified period after the right accrued.

**STATUTORY LAW** - The law created or defined by legislative act.

**STIPULATION** - The name given to any agreement made by the attorneys or parties on opposite sides of a cause, regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction; usually, pertains to evidentiary matters.

**SUA SPONTE** (Latin) – Of its own will or notion; voluntarily.

**SUBPOENA** - Process initiated by a party commanding a witness to appear and give testimony, at a specified place and time to testify for the party named therein.

**SUBPOENA DUCES TECUM** (Latin) - A subpoena that directs a witness to bring to court and produce certain documents or other things desired as evidence in a judicial proceeding.

**SUBROGATION** - The substitution of a third party in place of the party having the claim, demand, or right against another party.

**SUBSTITUTED SERVICE** - Service of process in a method other than personal service (such as by certified mail or by publication).

**SUMMONS** - An order to a person to appear in court on a specific date to answer

a case filed against the person; it is a method by which the court acquires jurisdiction over a party. Compare with *Citation*.

**SUPERSEDEAS** (Latin) - The name of a writ containing a command to stay the proceedings at law or suspend a judgment or execution; also the name of the bond upon which the writ issues.

**SURETY** - One who promises to answer for the debt or default of another.

**SURETY BOND** - A bond taken out by a surety who agrees to pay a sum of money in the event that the principal fails to perform an act.

**SWORN ACCOUNT** - An account due a creditor made under oath, for goods or services rendered to the debtor.

## T

**TEMPORARY VACANCIES** - Generally, public offices which have been vacated and for which no new officer has been legally selected as a successor.

**TENANT** - One who has the temporary use and occupation of real property owned by another (landlord) for a fixed term, usually with terms set by means of a written lease.

**TERM OF OFFICE** - The period during which an elected officer or appointee is entitled to hold office, perform its functions and enjoy its privileges and emoluments.

**TESTATE** - One who has died leaving a valid will.

**TESTIFY** - To give evidence as a witness.

**TESTIMONY** - Evidence given by a competent witness, under oath or affirmation, as distinguished from evidence derived from writings and other sources; oral evidence.

**TEXAS RESIDENT** - A person living in Texas.

**“THE RULE”** – See *Invoking “The Rule”*.



**TITLE** - The right of ownership of land or property.

**TORT** - A wrong, an injury, or a violation of a duty imposed by law which results in damage or injury to a person.

**TRANSCRIPT** - A copy of the court records in a case.

**TRANSIENT** - a person, who for purposes of venue, has no fixed residence within the state.

**TRIAL** - Proceedings in open court during which the ultimate issues in a case are determined, by a factfinder (judge or a jury).

**TRIAL DE NOVO** - A new trial or retrial held in an appellate court in which the whole case is heard as if no trial had ever been held in the trial court originally hearing the case. An appeal from the justice court to a county or district court results in a trial *de novo*.

## U

**UNCONSCIONABLE** - So one-sided as to be oppressive and unfair; often used to describe terms of a contract and to deny enforcement of a contract.

**UNDER "THE RULE"** - To place the witnesses on both sides in custody of an officer and remove them from the courtroom to some place where they cannot hear the testimony as delivered by the other witnesses in the case. This is done to prevent one witness from being influenced by the testimony of another witness. See *Invoking "The Rule"*.

**UNLIQUIDATED** – An amount not ascertained; undetermined.

## V

**VENIRE FACIAS** (Latin) - A judicial writ, commanding a sheriff or other officer to bring before the court a specific number of individuals to serve on the jury.

**VENUE** - The place where a case is tried.

**VERDICT** - The formal and definitive answer by a jury impaneled and sworn for a trial of the case and reported to the court, upon the matters or issues submitted

to the jury during trial.

**VITAL STATISTICS** - Public records kept by a state, city or other governmental subdivision, under a statutory provision, of births, marriages, deaths and disease.

**VOID** - Having no legal force or binding effect, as a void judgment.

**VOIDABLE** - That which may be avoided, or declared void; not absolutely void, or void in itself but which requires some action to determine the absence of any legal force or binding effect.

**VOIR DIRE** (French) - The preliminary examination of a witness or juror, where the individual's competency, interest, etc., may be questioned; literally, "To speak the truth."

## **W**

**WAIVER** - The intentional or voluntary relinquishment of a known right.

**WILLFUL** - Voluntary; intending the result which actually comes to pass.

**WITNESS** - A person whose declaration under oath (or affirmation) is received as evidence for any purpose, whether such declaration be made on oral examination, by deposition, or by affidavit.

**WITNESS BOND** - An obligation given by a prospective witness, conditioned on the witness' faithful appearance at trial therein to give evidence.

**WRIT OF ATTACHMENT** - A writ employed to enforce obedience to an order or judgment of the court, such as attaching a disobedient party and having the party brought before the court.

**WRIT OF EXECUTION** - A writ to put in force the judgment of a court authorizing an officer to levy on and to sell certain items of the judgment debtor to satisfy the judgment.

**WRIT OF GARNISHMENT** - A writ directed to one who has possession of money or property belonging to the defendant, ordering the third person not to deliver or pay it to the defendant but to deliver or hold it for the plaintiff.

**WRIT OF *HABEAS CORPUS*** - A writ which orders that a person be brought before the court in order to test the legality of the person's detention by the person to whom the writ is directed.

**WRIT OF MANDAMUS** - A summary writ issued from a court of competent jurisdiction to command performance of a specific duty which a person is entitled to have performed.

**WRIT OF POSSESSION** - The writ of execution employed to enforce a judgment to recover possession of land. It commands the sheriff to enter the land and give possession of it to the person entitled under the judgment.