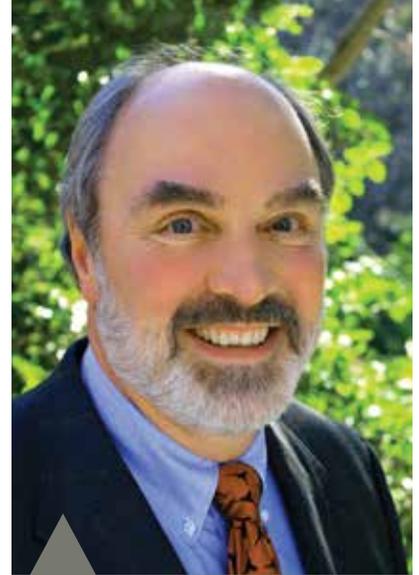


LAW IN ORDER

The Warren Report

CONQUERING THE EVICTION TRIAL



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A poor presentation before a judge is dangerous; it will influence who prevails and whether all available relief is actually awarded. In short, a poor courtroom presentation can have a significant cost.

That cost, moreover, will be more than monetary. Consistently poor presentations in court, and sometimes even just one, will negatively impact reputations. The phrase, “your reputation precedes you,” should be taken seriously. Judges are elected to conduct trials, and they remember what they see and hear.

Since they move so quickly through the court system, we tend to forget that an eviction is a lawsuit. Often there are no lawyers representing the parties. Rarely are substantial sums of money involved in the typical residential eviction case. The primary relief awarded, that being possession, can be easy to take for granted. After all, the tenant’s lease only grants them temporary occupancy, with a scheduled date for it to begin and end.

Success in an eviction suit, as in any lawsuit, requires thorough preparation and attention to detail. The detail, moreover, is not simply needed in the courtroom. There are many ways a lack of preparation and attention to detail will doom your case. Fortunately, the most common errors can be corrected.

This article is written at the

request of a well-respected Williamson County, Texas judge. That judge sees, on a daily basis, the value of you planning for the worst and expecting the best. That judge will know if you have read, and taken to heart, this article. Follow even some of the advice set forth below and you can conquer the eviction trial. This is true whether on-site personnel present the case in court, or they hire someone else to assume that responsibility. It all begins on-site, and management must ensure that the little things get done properly.

There are essentially three types of eviction cases. One is based upon *nonpayment of rent*. The second is based upon *conduct*, having nothing to do with payment, but which violates prohibited conduct provisions in the lease and results in default. The third occurs when the resident *holds over* beyond the date the lease is scheduled to end, and neither a month-to-month renewal nor a renewal for a term will follow the originally scheduled expiration date. In each type of eviction case, there are certain essential tasks which must be properly performed.

The nonpayment of rent eviction.

The lease agreement will set forth the amount to be paid for rent and the payment deadlines. When these requirements are not adhered to, the landlord has the right to terminate a resident’s right to possession.

Although there are many different dollar amounts that can accrue during a typical month, in an eviction case it is typically rent that is the only one that counts. The Justice Court, when it considers your eviction case, will not award monetary relief to you other than for unpaid rent, court costs and attorney’s fees. If your resident has incurred late fees, has unpaid utilities, or other charges such as those which accompany a bounced check, they cannot be awarded in the Justice Court eviction case.

Eviction based upon conduct violating the lease.

Most leases have provisions setting forth conduct that, if it is engaged in, constitutes a default under the lease. For those who use the TAA lease, we are talking primarily about conduct violating paragraph 20, entitled *Prohibited Conduct*. This paragraph of the lease contains an exhaustive listing of what cannot be done by the residents during the tenancy. When the provisions of paragraph 20 are not adhered to, a default arises under paragraph 32.1(B) of the TAA lease.

With the conduct-based eviction, it is important to deliver detailed notices of lease violation to the resident prior to commencement of the eviction. This enables you to prove to the judge that, within reason, you try to get the resident to eliminate his prohibited conduct, and that

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you brought the misconduct to the resident's attention before filing the eviction. When efforts to eliminate the bad conduct without having to evict were made but fail, the judge is likely to be more inclined to return possession of the rental unit to you as a result of the tenant's default.

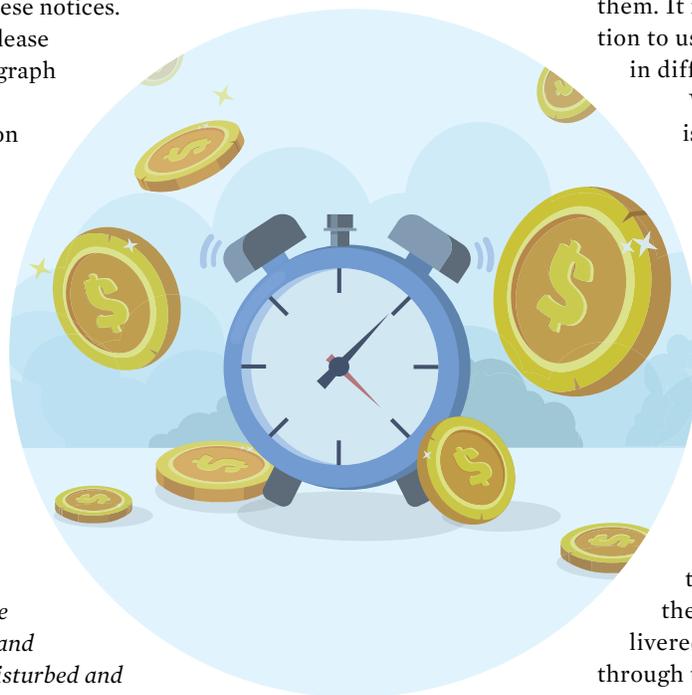
When you are about to give a notice of lease violation, TAA makes different forms available. Regardless of the form you use, you are to provide details of what was done, which resulted in the violation of the lease. Specifics are needed in these notices. Do not simply put on the lease violation notice that paragraph 20 was violated. State the date on which the violation occurred, describe generally what happened, and refer to the specific section of paragraph 20 that was violated.

For example, consider something along these lines: *"On September 15, 2018, you got into a physical altercation with another resident near the pool area. This is a violation of paragraphs 20 (b) and 20(c) of your lease, because your altercation was loud and obnoxious behavior, and disturbed and threatened the safety of others. This lease violation places you into default under paragraph 32.1(B) of your lease."*

The following language comes from paragraph 20 of the TAA lease itself. The lease violation must be detailed enough so that not only the conduct is brought to the wrongdoer's attention, but the specific provisions of the lease that have been violated need to be pointed out as well. It is often a good idea, moreover, to include in the lease violation notice that you want to meet with the resident to discuss the conduct and lease violation by a certain date. Such a discussion may resolve the issue and preserve the tenancy. Perhaps the meeting will never occur, due to the resident refusing to cooperate. This will only make it easier for the judge

to justify a decision to return possession of the rental unit to you when advised of that fact at trial.

Eviction based upon holdover. The term "holdover," according to paragraph 32.4 of the TAA lease, means to remain in possession beyond the date contained in the resident's move-out notice or the landlord's notice of non-renewal. It provides, in addition, for an increase in the then-existing monthly rent amount by 25% during



the holdover period, without notice, when you use the TAA lease.

TAA has forms of notices to vacate available to you for any of the three types of evictions described above. It is advisable to use these specific forms, complete them fully, and provide details tailored to the basics of your eviction suit.

The notice to vacate. Regardless of what the basis for the eviction case will be, an essential prerequisite is to give a notice to vacate. By law, the notice to vacate must provide the resident at least three days' advance notice to move out. That law, however, enables the parties to agree to a longer or shorter period. Those who use the TAA lease have an

agreement that shortens the notice from three days to one day.

There is occasional confusion about whether or not you have discretion to vary the period of time a resident is given to vacate before the eviction case is filed. You absolutely have that right. You are certainly permitted to consider the conduct, whether that be criminal activity or nonpayment of rent, when determining how long you will give someone to vacate before you file the eviction case against them. It is not an act of discrimination to use different lengths of time in different notices to vacate.

When the notice to vacate is given, extreme caution must be taken to ensure it is accurate, provides enough advance notice, and *is properly delivered*.

Frequently, a resident at the eviction trial may contend that he or she did not receive the notice to vacate. If such an assertion is made, you must ensure that you have someone in court who can testify about how and when the notice to vacate was delivered. Your inability to do this, through testimony by a person with direct knowledge of the facts, will leave the court no alternative but to accept the resident's sworn testimony that he or she never received the notice to vacate. That fatal flaw will cost you your case. If proper proof of delivery of the notice to vacate is lacking at trial, that fact alone may well doom the plaintiff in an eviction suit.

If that happens, the eviction process will have to start again. You do not want this to occur. A new notice to vacate will have to be given, a new eviction case will have to be filed, new case filing and service fees will be charged, and the roughly three-week waiting period between filing of the eviction and trial will restart, delaying your case and causing you more monetary loss.

It is often a good idea, moreover, to include in the lease violation notice that you want to meet with the resident to discuss the conduct and lease violation by a certain date.

Filing the eviction petition.

Most justice courts have a form petition which can be completed to commence an eviction case. Completion of this document is self-explanatory. Near the bottom of the form petition, you will be asked to specify what it is you want. Here you want to be sure you put possession, judgment for any unpaid rent, (at least through trial of the case), and reimbursement for your court costs.

You also will be asked whether or not you are seeking attorney's fees. It is recommended you indicate that you are, and where it asks the amount of the fees you are seeking, insert the letters "TBD," which stands for "to be determined."

If you elect not to use an attorney in connection with your eviction case, you simply will not ask for this relief at trial. If you do not ask for attorney's fees when you file the case, however, and the need arises for you to have an attorney at trial, you will be unable to recover those fees from the defendant because they were not specified in your petition.

Plan for the worst and expect the best. You should always assume the tenant you are seeking to evict, known as the defendant in the eviction case, will be present at trial. If you take for granted the resident will not attend the trial, you will not be nearly as prepared as you should be. The lack of preparation will prevent you from conquering the eviction trial and likely will cause you to either lose the case entirely, or have some element of relief to which you are entitled denied.

Always pursue an eviction case that you filed through to a judgment at trial. If it was worth your effort to

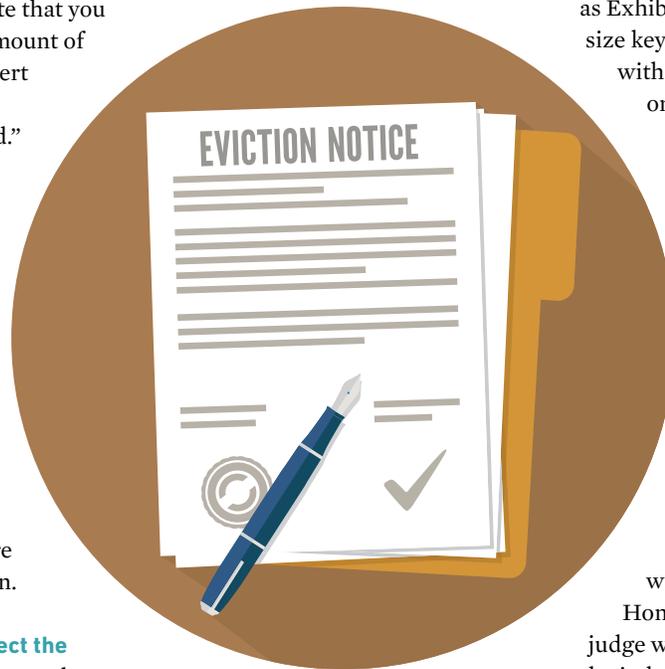
document the default with lease violation notices and notices to vacate, and worth your time and money to file and serve the eviction, it is also worth completing the case. Even if the resident vacates after you file the eviction case, you are still entitled to a judgment for possession, plus unpaid rent, court costs, attorney's fees and 18% interest under the TAA lease.

Appearing in court. When you go to court, dress for success. The

with your case. Local caseloads are so large that the judges do not have time to familiarize themselves with the facts before each trial. With that in mind, do this: simply state the background facts so the judge immediately understands what is at issue. Introduce the key documents themselves and bring extra copies. Specifically, you will want the notice to vacate and the lease. If lease violation notices have been given, you will want those as well. Use exhibit numbers, which you can handwrite on the document as Exhibit 1, Exhibit 2, etc. Emphasize key provisions of the documents with colored highlights and focus on rental amounts and due dates (TAA lease paragraph six), prohibited conduct (TAA lease paragraph 20) and default provisions (TAA lease paragraph 32). Show the judge you understand the issues by paraphrasing key provisions.

What do I say? In a typical nonpayment of rent case, something along the lines of the following will work well: Good morning, Your Honor. I'm Mary Duffy. Tell the judge who is suing who and why. Tell the judge what you want in the judgment, which will be, in most cases, possession plus money damages. When the basis for the eviction is unpaid rent, state the monthly rent amount, the date of the last payment, and the amount of the current rent delinquency. Remember to emphasize that failure to pay rent in accordance with the terms of the lease resulted in a default under paragraph 32.1(A) of the TAA lease.

This is the time when you tell the court the details of delivery of the notice to vacate, and hand the judge



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right clothes exude confidence and control, and they will give you an added edge. Do not allow your opponents to look more appropriate than you for this day in court. Your first impression comes from appearance; you won't get a chance to put on a more appropriate outfit once you enter the courtroom. Remember, your reputation precedes you.

You will win your case with competent evidence. To begin with, assume the judge is completely unfamiliar

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a highlighted copy. This is also the time when you tell the judge how the lease was violated, creating the default, supported by highlighted provisions of various lease paragraphs. End your presentation by asking for the specific relief you want: possession of the rental unit and monetary damages, which the lease states you are entitled to. It is easier when you know the judge can award only the unpaid rent, court costs and attorney's fees (if any). If you accurately tell these amounts to the judge, they likely will be written into the judgment on the spot.

What if the default is based upon prohibited conduct?

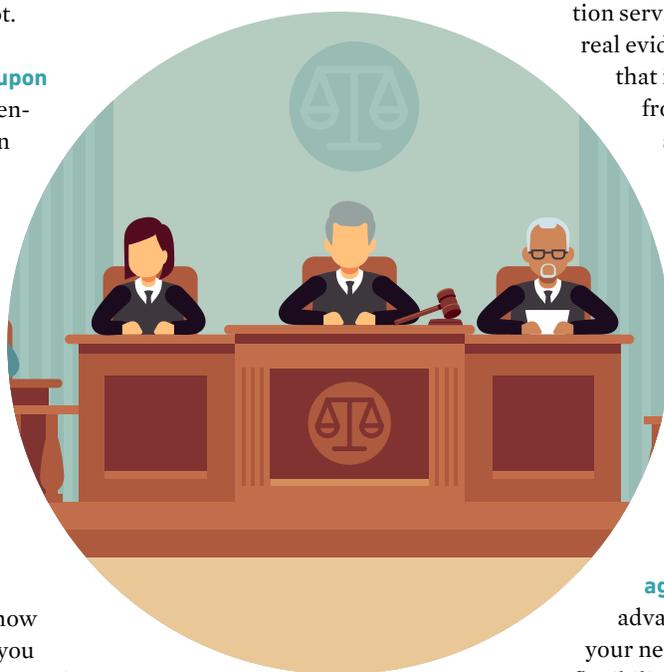
The essentials of your case presentation will be very similar to those in a nonpayment of rent case. Here, however, the focus is on paragraph 20 of the TAA lease and specifically identifying the prohibited conduct that led to a paragraph 32.1(B) default. To effectively prove these things, you need eyewitnesses, police reports, photos, notices of lease violation, and specifics.

The judge will want to know when, and in what manner, you brought the offensive conduct to the resident's attention. If there is any question whether or not you did that, make that determination before you file the eviction. Anticipate a comment from the resident to the effect of, "I had no idea they considered that a problem. If they had brought it to my attention, I would have immediately stopped."

Think ahead. Put yourself in the shoes of the resident. How is the judge likely to react to conflicting stories? What can you do to make your evidence more credible? Consider using *demonstrative evidence* (i.e. things which demonstrate a point through more than words), such as photographs, recordings, copies of important documents, emails and text messages.

What additional witnesses can you bring? What should you emphasize to be convincing and persuasive? There will be conflicting stories, and the judge will be placed into a predicament of whom to believe. The best evidence, presented persuasively, will result in success.

Conducting the trial. In an eviction, the apartment community or property owner is the plaintiff. The plaintiff begins and ends a trial; the resi-



dent (the defendant) proceeds in the middle. The plaintiff bears the burden of proof, which includes evidence of who, what, when and where, followed by why and how (there is a breach of contract) which is equal to a lease default. Once you establish a lease default, the contract and law provide for you to prevail.

Default judgment or contested trial.

When the resident fails to appear, there is a default. Nonetheless, you must spend a little time establishing your case. Explain to the judge, in summary fashion, who you are, the basis for having filed the eviction, the facts that created the lease default, and what relief you would like awarded to you in a final judgment.

The absence of the resident does not mean you are to remain silent. Remember, the judge likely will be unfamiliar with your case facts until you state what they are. Don't try to transform the judge into a dentist, and require teeth be pulled for the facts to become known. In a short summary lasting two or three minutes, you will impress an appreciative judge and establish yourself as a trial professional.

Facts win cases. If you send an eviction service alone to court, then no real evidence will be presented by that individual. Evidence comes from the mouths of people sworn to tell the truth, who then explain what really happened from firsthand knowledge. Even if the resident does not attend the trial, there is an expectation of fairness in the proceedings. Your burden may be eased when you have no opponent present, but it will not be eliminated.

Your "professional package" inspires respect. Some advanced scripting can overcome your nervousness. Likewise, a little flexibility on your part, in the right circumstances, goes a long way. If you sense the judge may be hesitant to grant you the relief you seek, be proactive. Rather than force the judge to make a decision unfavorable to you, ask whether you can resolve the court's concerns by offering to agree to delay getting the writ of possession, while still getting the judgment.

This may eliminate a needless appeal. Such a proposal also would enable the judge, through an agreement, to allow a few extra days for the resident to vacate. The face-saving opportunity you have created for the judge by such flexibility will be appreciated then, and also in the future cases you will present in that court. Remember, your reputation precedes you. Make yours the best it can be, and conquer the eviction trial! ☺

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