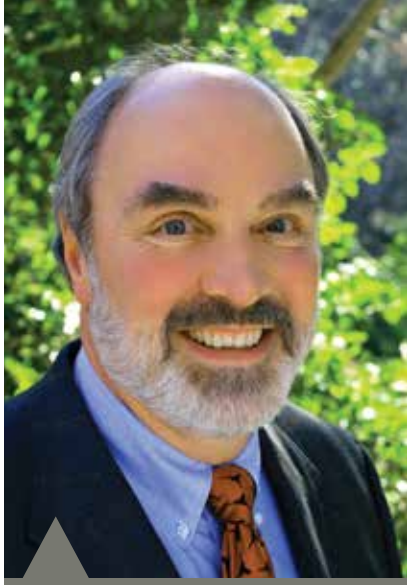

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LAW IN ORDER
The Warren Report

TAKE NOTICE OF THE LAW ABOUT NOTICES TO VACATE

"You are hereby given notice to vacate¼." That simple phrase is the core of every notice to vacate that precedes the filing of an eviction lawsuit. One may be asked to vacate several different things: the dwelling, the premises, the house, the apartment, a duplex, the leased space, etc. There is no requirement of one-size-fits-all description.

The vagueness of your stated intentions created uncertainty and enabled the recipient of the notice to question what might happen next.

The notice to vacate is neither a question nor a request. This is not a time to be polite. "We would appreciate it if you would vacate," while sounding less harsh than, "You are hereby given notice to vacate," creates a problem. The more polite phrase suggests the resident needs to agree to vacate for the vacate notice to be effective; that is far from the case.

"You failed to pay rent for the month of May 2019. If you do not pay your delinquent rent and other charges you will be asked to vacate the premises." That is another poor choice of words. It is what is called a "pay or vacate notice." The vagueness of your stated intentions created uncertainty and enabled the recipient of the notice to question what might happen next. Doubt entered the picture. Do not allow doubt. Your notice to vacate must clearly state the consequences of the tenant's default.

If you believe you may be willing to allow the default to be cured later, when you use the straightforward language, "You are hereby given notice to vacate ..." you will still be able to do that. Keep your cards close to the vest. Maintain your option not to act upon the vacate notice after (and despite) having given it. Do not create a possibly fatal ambiguity with a "pay or vacate notice."

In an eviction lawsuit, a notice to vacate is a prerequisite. It is something that has to occur before such a lawsuit is filed. Texas Property Code Section 24.005(a) says it like this: *The landlord must give a tenant who defaults or holds over written notice to vacate the premises before the landlord files a forcible detainer suit.*

The statute provides that the notice period must be at least three days, although it allows the parties to contract for a shorter or longer notice, in a written lease or agreement. In the TAA lease contract, the parties agree upon a minimum one-day notice period. Your notice to vacate, to be effective, must tell the resident of the premises in question, in no uncertain terms, that he needs to vacate those premises by a date certain; and that date *must be before* the date on which the eviction case is filed.

Do not give multiple notices to vacate. This is especially true when the vacate date set forth on one notice is *before the date* the lawsuit is filed; but in another notice, the vacate date is *after the date* the lawsuit was filed. Because the notice to vacate is a prerequisite *to the filing of suit,* a notice to vacate given after the date suit was filed is completely ineffective. If the eviction suit is filed before the date the tenant is to vacate according to the notice, the eviction suit will fail. Every time.

Occasionally the owner's representative will attempt to justify giving multiple notices. "Even though we had already filed the eviction, I just wanted them to be sure they knew we wanted them out." Or maybe something like this:

> "When I filed the eviction, it was because the tenant didn't

pay April rent. After I filed, the tenant also failed to pay May rent. That second failure was also a default under the lease, so I thought it would look good if we asked them to vacate again."

You meant no harm. Certainly you did not think giving another notice would undermine the effectiveness of the earlier notice. Both notices instructed the resident to vacate. Both notices were based upon different tenant defaults. Yet the second notice could raise the presumption that there was a period of time, between the date you filed the eviction and the date you gave the second notice to vacate, during which you had changed your mind about actually proceeding with eviction.

Doubt again entered the picture. When it did, it created an opportunity for the defendant tenant to state at trial that she did not really know if or when she had to move. Even if, ultimately, she did not prevail at trial, your defendant may nonetheless get an opportunity to cure the default, when such an option was not one you preferred. Trust me, once is enough.

There is also no need to give multiple notices to vacate when there is a change of ownership or management before the eviction case proceeds to trial. An eviction case concerns *possession of premises*. According to Rule 510.3(e) of the Texas Rules of Civil Procedure (TRCP), the only issue in an eviction case is the right to actual possession [of premises] and not title [to premises]. The change in ownership, management, or both, does not change the physical premises in question.

There may be some situations where a notice to vacate, due to its age, has become stale. Imagine a hypothetical situation in which you gave a notice to vacate three months before you filed the eviction case. In that scenario, the court might wonder what prompted the delay. The court might also conclude that it was reasonable for the tenant, interpreting your three months of inaction, to determine that their three-month-old nonpayment of rent no longer bothered you and that you had become okay with it.

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While that point of view is certainly a nonsensical stretch, the defendant may get some mileage out of it. How is that possible? When a judge orders someone to be removed from the premises where they live, that determination is considered a harsh remedy. While sympathy should not play a role in a judicial decision, it occasionally does. Knowing that, do all you can to prevent a lengthy delay from coming into existence.

It should now be clear that a proper notice to vacate must exist for an eviction case to be successful for the owner. The form itself must say the right things. It must also be delivered to the right people, in the proper manner.

Property Code Section 24.005(f) and (f-1) each provide that the notice to vacate is to be given *at the premises* in question. Section 24.005 (f) provides that the notice to vacate may be given in person or by mail. Notice in person may be by personal delivery to the tenant or any person residing at the premises who is 16 years of age or older. It may also be affixed to the inside of the main entry door. Another option is for delivery by mail, including one or more of regular mail, registered mail, or certified mail return receipt requested. Regardless of the type of mailing used, the notice to vacate must be *delivered to the premises in question*.

Mailing a vacate notice, especially to an apartment, is strongly discouraged. Very few apartments have a mailbox at the premises. On the contrary, the mailbox for the premises is typically located some distance away, at a central mail facility where scores of other mailboxes are also located. No matter how close the location, problems are created, because the box is not at the *premises in question*. Why needlessly raise the issue of whether or not you complied with the statute?

You have already learned that having a proper notice to vacate is essential to prevailing in your eviction case. Your trial evidence needs to establish delivery of the notice to vacate to the premises in question. Since eviction trials happen quickly, there is a good chance you would not have a signed "green card" from the certified mailing of your notice to vacate before trial. You are unable, in addition, to provide the court anything showing that first class mail was ever actually received at the premises in question.

While sympathy should not play a role in a judicial decision, it occasionally does.

Do not take any chances by mailing the notice. Despite the fact the Property Code allows a notice to vacate to be mailed, practical interpretation of that statutory provision requires you to steer clear of using the Postal Service.

In 1994, the Texas Supreme Court held, in the case of *Thomas v. Ray,* that *when a letter containing a notice [to vacate] is properly addressed and mailed with prepaid postage, a presumption exists that the notice was received by the addressee. The presumption may [however] be rebutted by an offer of proof that the addressee did not receive the letter.*

What might such an offer of proof consist of? How about a statement from the tenant to the court stating that your defendant never received the notice, and that this is the first time, in court right now, that they ever viewed this document? A statement like that could certainly get one to thinking that the presumption of receipt was rebutted!

Do not take any chances by mailing the notice. Despite the fact the Property Code allows a notice to vacate to be mailed, practical interpretation of that statutory provision requires you to steer clear of using the Postal Service.

Without question, delivery to a person is the best option. Posting on the inside of the main entry door, where neither snow, nor rain, nor heat, nor gloom of night can remove it, is the next best choice.

As of January 1, 2016, the Texas Legislature created another viable option, but it requires jumping through some hoops. The new option is to affix the notice to vacate *to the outside* of the main entry door. But not so fast! Consider the prerequisites.

First, the premises must not have a mailbox. Next, it must have a keyless bolting device, alarm system, or dangerous animal preventing the landlord from entering the premises where the landlord would be able to affix the notice to vacate to the inside of the main entry door.

If the landlord reasonably believes that harm to any person would result from personal delivery to the tenant or a person residing at the premises, or would result from personal delivery to the premises by affixing the notice to the inside of the main entry door, you have also satisfied a prerequisite to outside posting.

You cannot simply assume, however, that the necessary prerequisites will be available to you. You may have to offer evidence at trial about what you did to determine that you were entitled to take the action you did when you taped the notice to vacate to the outside of the door.

Prepare to offer such testimony

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at trial. Knock on the door. Try to get in with the key. Make a note of what sounds you hear coming from inside the unit and consider how a stranger to the situation might react to those facts.

Once you decide you are eligible for posting the notice to the outside of the door, make sure you have come to the unit well prepared. Have lots of sturdy tape with you. Be sure the face of the envelope containing the notice to vacate is fully addressed with the tenant's name and address, and on it are written, in all capital letters, the words "IMPORTANT DOCUMENT." Last but not least, after you have securely affixed your notice to vacate to the outside of the main entry door, go to a post office or official mailbox. Why? Because an identical copy of the notice to vacate that was affixed to the main entry door *must be mailed, not later than 5:00 p.m. of the same day*, in the same county in which the premises in question is located. Document the USPS location where you mailed it and what time that was. You may be asked to describe your actions later.

In a perfect scenario, the mailing of that notice would be by certified mail, return receipt requested, done at a post office. In that situation, the postal clerk would give you a stamped and printed receipt indicating the date and time of the mailing. Otherwise, if you simply stick a first-class letter into a standard mailbox, you may encounter resistance concerning what time of day there was a postal pickup from that particular box. Do not take chances. Too much is riding on this. Significant sums of money could be lost through carelessness.

Finally, what should the notice to vacate contain? It should name *all tenants obligated under the lease* residing at the premises whom the plaintiff seeks to evict (TRCP 510.3[c]). Keep in mind that no judgment or writ of possession may issue in an eviction suit, or be executed against a tenant obligated under a lease and residing at the premises who is not named in the petition and served with citation. To be named in the petition requires that notice to vacate first be delivered.

Since a proper notice to vacate, with proper delivery, is an essential prerequisite to an eviction petition, be certain that each such defendant is given an opportunity to receive their own notice to vacate. The law is unclear on this point. It does not appear to require that three separate tenants, all residing in the same leased premises, should receive *their own, uniquely addressed notice to vacate*. It would be prudent to err on the side of caution, however, and give each resident their own notice to vacate.

This is especially true when the notice to vacate is affixed to the outside of the main entry door in the sealed envelope, under Property Code Section 24.005(f-1), as discussed above. Since you will have to mail a duplicate copy of the notice delivered in that manner, you want to be able to testify that each resident you are seeking to evict had their own letter addressed and mailed to them at the premises in question. Also, do not put them all in one envelope. One more thing: include the phrase "and all occupants" after the name of each resident to whom a notice to vacate is going to be delivered.

When you are faced with trial testimony by the tenant to the effect that she did not receive the notice to vacate, all you can do is prove that you adhered to the statutory requirements. Unless your delivery was directly to a person at the premises in question, all you can do is speculate about what actually happened. Be prepared. Bring a witness with you to observe what actually gets done. And do not fail to bring that same witness with you to trial. All your dutiful adherence to proper procedures before trial does is prepare you to tell a judge or juror about it at trial. Having the right witnesses in court who can testify from personal knowledge relating to the notice to vacate, could make your case presentation on the notice issue *ironclad*.

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Remember the old television show "Ironside"? It aired from 1967 through 1975. It starred the former television lawyer, Perry Mason (from the show of the same name), in the title role as a special police department consultant. "Ironside" was the star's nickname. When Ironside was involved, the case was always successfully resolved. *Ironclad* will have the same results!

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