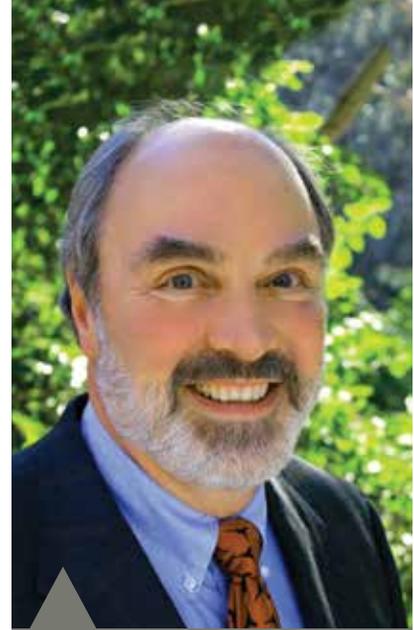


# LAW IN ORDER

## *The Warren Report*



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### EVICTIONS: WIN, LOSE OR DRAW?

**W**hen a property owner seeks to exercise the remedy of eviction, a relatively straightforward question is raised: who has the superior right to possession of the rental unit, the landlord or the tenant? If it is the landlord, a tenant may be compelled to vacate the premises they occupy. If it is the tenant, there will be no dispossession and the persons occupying the premises will be entitled to remain in possession.

You should note the clear distinction between termination of one's right to possession and termination of the lease. They are not the same.

Most leases, notably the Texas Apartment Association (TAA) lease, contain default provisions. If there is a default under the agreement between the parties, and the act of default is committed by the tenant, the owner has the right to end the tenant's right to possession. It is not, however, a right that can be exercised unilaterally.

If the resident does not voluntarily move out in a timely manner following receipt of a notice to vacate, an eviction lawsuit will need to be filed and prosecuted by the property owner. If the tenant decides to oppose the eviction, a trial will be necessary.

The trial will originate in the Justice of the Peace court.

A prerequisite to the filing and pursuit of an eviction suit is to give a notice to vacate. The notice to vacate will advise the resident there has been a default under the lease. It will also state, due to the default, the tenant's right to possession has



been terminated and the resident must vacate by a certain date. The default typically arises either due to non-payment of rent, holding over beyond the end of the lease term, or engaging in conduct that is prohib-

ited by the agreement between the parties. An appropriate notice to vacate will unequivocally advise the tenant their right to possession of the premises has been terminated.

You should note the clear distinction between termination of one's right to possession and termination of the lease. They are not the same. In eviction proceedings, it is neither necessary nor advisable to terminate the lease. The lease is the contract between the parties and it contains all the essential terms of agreement.

The lease imposes contractual obligations on both the resident and the property owner. You want it in place. You want to terminate only a resident's right to possession. To win in an eviction proceeding, never terminate the lease (at least until the eviction case is completely concluded). If you prematurely advise a tenant that his lease has been terminated, you will be jeopardizing your right to regain possession due to a default under the lease. If you want to prevail in an eviction, do not terminate the lease.

It is critical that preparation and delivery of the notice to vacate be done properly. If it is not, the eviction may fail. The failure, moreover, may have one of two forms. There may be a legal failure, in which case the owner's ability

to prevail at the eviction trial is jeopardized. There may be also a practical failure. A failure of this type may still result in you getting a judgment awarding you possession. But dispossession of your resident is not the only, or necessarily the best, way to win the eviction.

The core relationship between a rental property owner and a resident is contractual. Contained within the contracts are matter-of-fact solutions to many problems that arise. Such documentation has been so well-crafted, in fact, that emotion, compassion and empathy can be effectively removed. Or can they?

In the business of providing housing to others, you are frequently faced with people who are experiencing some sort of problem. Perhaps your resident cannot afford to pay rent on time. Perhaps someone is living in the rental premises who lacks your permission to do so. The potential problems are endless. Be prepared to “think outside the box.” A hollow victory is often not a win, especially in this context.

We live during a time when respect for others often is hard to find. That societal shortcoming pervades our daily lives more than it should. In the rental housing industry, when a tenancy appears to have gone bad, it is important not to overlook the value of compassion and empathy.

This “Law in Order: The Warren Report” is not going to teach you or even discuss the procedures of an eviction. Rather, you have a wonderful opportunity to learn the eviction process from beginning to end at an upcoming “Evictions” seminar taught by this author on October 16, 2019. If you have not already done so, you are strongly encouraged to register for this

seminar, which will be given at the Austin Apartment Association office. The primary purpose of this article, however, is to explore the facets of an eviction case which present an opportunity to win during the process without having to dispossess your tenant.

Many of you have either read the book, seen the movie, or both for the classic novel written by Harper Lee entitled *To Kill a Mockingbird*. The key character in that story, Atticus Finch, told his daughter, Scout, “... you never really understand a person until you

those questions may enable you to become a competent evaluator of the facts and utilize traits like empathy, compassion, experience and understanding to guide your decision-making. In the end, perhaps the rent gets paid, the resident avoids eviction and you escape an avoidable vacancy and lost rent. This is one way to secure a win in an eviction proceeding.

Your job is difficult and challenging. You deal with all sorts of personalities, some good, others not. You are responsible for the owner’s bottom line,

yet seldom are you given adequate credit for your efforts and ingenuity. Considering whether to pursue the eviction remedy involves more than a win, a loss or a draw. With the right facts, and through the exercise of care in the matters preliminary to the filing of an eviction suit, winning is not so difficult.

To prevail, however, you must commit to do things right. You must take the lawsuit that you file seriously in order to commence the

eviction. Do not be careless because eviction cases begin in Justice of the Peace courts; these are powerful courts with powerful judges. They have the same ability as any other court in Texas to consider the facts and arguments and render a decision, which will have very serious consequences for at least one of the parties.

When giving a notice to vacate, everything must be done by the book. This is how evictions are won. Cutting corners will be costly in more ways than one. The Texas Property Code clearly spells out how a notice to vacate must be given and what it must say. There is no ambiguity about the

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consider things from his point of view ... until you climb into his skin and walk around in it.”

Before we go further, it is necessary to discuss the practical limitations of the eviction remedy. Assume your potential eviction is based upon non-payment of rent. Why wasn’t the rent paid on time? Does the resident want to pay the rent? Can all the rent to be paid reasonably quickly? Are you willing to communicate with the resident who is in arrears to determine the underlying causes for the non-payment of rent?

At a minimum, it is worth the inquiry. The answers you receive to

permissible methods of delivery of a notice to vacate. There are multiple methods and, if the one you select is not strictly adhered to, serious proof problems will result.

It is becoming much more commonplace for evidentiary challenges by a defendant to arise during an eviction trial. For example, was the notice to vacate properly prepared and delivered? Did it provide proper timing before the eviction lawsuit was filed? The resident whom you want dispossessed from your property (also known as the defendant in your eviction case) has learned online that challenging some aspect of the propriety of the notice to vacate can be a beneficial defense tactic. If the evidentiary and factual challenge to your evidence is not overcome, your ability to prevail at trial is in jeopardy.

It is never surprising to hear any defendant tell the judge that he or she never received the notice to vacate. That simple statement can have dire consequences. Such a statement is not a problem, however, if the notice to vacate was properly delivered, contained the right language, and its actual delivery can be proven by a competent witness. What is a competent witness in this context? One with personal knowledge concerning delivery of the notice to vacate in your particular case.

More and more, notably when non-lawyer third-party services are utilized to represent a property, a challenge concerning the notice to vacate (or for that matter any alleged defect in the plaintiff's evidence) can be quite problematic. Why? Because these services seldom require or encourage the presence in court of a witness who has personal knowledge and will be able to rebut the defendant's conten-

tions of flaws in the facts of your case. Without the presence of such a witness, the contention by the resident of, for example, a lack of delivery or improper delivery of the notice to vacate cannot be overcome. The absence at trial of a knowledgeable witness poses a significant problem because it allows the defendant to say anything, accurate or not. Inaccurate facts must be rebutted. If they are not, only one side of the story is presented. The rest of the story is never told. This is how you lose an

alism and competence by not appearing before the judge in the case, which you initiated? Why should the judge, seeing no representative acting on behalf of the plaintiff who knows any of the facts from a first-hand perspective, be inclined to rule in your favor? This is how evictions are lost.

TAA makes available to its members a form called an "Eviction Hold Off Agreement." For those of you who own a current REDBOOK, the document can be found on page 386. Although

designed to address an eviction based upon non-payment of rent, the form easily can be modified to address an eviction for other reasons. The purpose of the "Eviction Hold Off Agreement" is simply to reach an agreement based upon periodic performance by the tenant that enables the default, which is the basis for the eviction, to be eliminated. Once eliminated, moreover, the eviction need not proceed.

Some might call this a draw. But it is a win. Because you were willing to think outside the box, climb into the skin of your resident and walk around in it for a while, you enabled yourself to fix the problem.

Never think of a resolved eviction case as a loss. On the contrary, think of what you won. You won payment of the delinquent rent, albeit over a period of time. You won by avoiding a needless vacancy with down time equating to lost rent. You won when you saved having to prematurely make a vacant rental unit ready for the next occupant considerably earlier than you had planned.

In the "Eviction Hold Off Agreement," the resident, who would otherwise face eviction, agrees to a cure. Even when the eviction process has been started because the landlord gave a notice to vacate or filed an eviction lawsuit, incomplete performance



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eviction case.

The only time it ever makes sense for a representative of the owner, who brings personal knowledge of the facts, not to be present at the eviction trial is if you absolutely know the defendant will not make an appearance at trial. Unfortunately, you never know this. Assuming you do is how you lose an eviction.

Knowing that your ability to prevail at trial depends upon your ability to present competent evidence, why would a competent witness from the property not be present in the courtroom, ready to testify? Why would you put all your eggs in the basket where your win depends upon the defendant's failure to appear in court? Why would you risk your reputation for profession-

# RECYCLING REQUIRED

## Did you know?

### All apartment owners or managers must ensure recycling:

- **ACCESS** Provide sufficient recycling dumpster capacity in a convenient location for all tenants and employees (within 25 feet of all exterior landfill trash dumpsters)
- **MATERIALS** Recycling services need to collect mixed paper, cardboard, glass, aluminum, and plastics
- **SIGNAGE** Post bilingual recycling signage on or near recycling stations or containers
- **EDUCATION** Distribute annual, bilingual recycling education to all employees and tenants

Property owners or managers are required to report how the property is meeting these requirements, every year, at: [austintexas.gov/diversionplan](http://austintexas.gov/diversionplan), starting October 1.



For more information, guidance, and resources, visit [AustinTexas.gov/URO](http://AustinTexas.gov/URO)



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by the resident under the “Eviction Hold Off Agreement” will not jeopardize your ability to prevail if the case proceeds to trial. To quote from the “Eviction Hold Off Agreement,” “... our acceptance of partial payments does not and will not waive our right of eviction, and won’t void any pending eviction lawsuit.”

Proceeding under the “Eviction Hold Off Agreement” requires you to “... agree to postpone any default judgment and to postpone the eviction trial or hearing as long as [the resident complies] with the above payment schedule exactly on time and as long as all future rents becoming due during the payout schedule are paid on time.”

Another essential element of the “Eviction Hold Off Agreement” contains

the following commitments by the resident: “... if payments are not made exactly on time according to the above schedule ... we will be entitled to seek an eviction judgment.” Also, “... [the resident agrees] to voluntarily move out immediately if [the resident] fails to make payments on time as set forth [in the Eviction Hold Off Agreement].”

Stated another way, what have you got to lose? The “Eviction Hold Off Agreement” enables you to be aware of the important differences between the kind of dispassionate reasoning and analysis one is tempted to engage in at a desk in the office, and the kind of activities in which we engage when we are dealing in real time with people.

Never hesitate to consider something from another’s point of view;

you’ll be glad you did. Even if the result is an eviction judgment, you and the judge who will decide your case will know that you did not come to court lightly, but only out of necessity. Knowing this will enhance your reputation, emphasize your professionalism, and achieve greater overall success and satisfaction for all concerned and affected.

The success I am talking about can be measured by the value to both you and your resident when you opt not to evict immediately a resident who is in the midst of temporary troubles. Think outside the box and, where it is appropriate, choose instead to creatively reach a solution which is neither a win, a loss or a draw. Choose the solution that is simply the right thing. ☺

**BILL WARREN** is in his 37th year as a lawyer. His law practice focuses on a variety of issues and cases, the majority of which address the concerns of those active in the multi-family industry. He founded and manages Warren Law Firm. In addition, he serves as Of Counsel for the Texas Apartment Association and as Legal Counsel of the Austin Apartment Association. Bill is also a Credentialed Mediator in Texas. He writes and speaks regularly, and as author of Law In Order: **The Warren Report** he has had over 120 articles published. His topics cover all nature of issues pertaining to rental housing, from onsite to the boardroom to the courtroom. Bill has been Board Certified in Civil Trial Law by the Texas Board of Legal Specialization for 30 years, and is also a Fellow of the College of the State Bar of Texas. He can be reached at Warren Law Firm, 1011 Westlake Drive, Austin, Texas 78746, (512) 347-8777, or through his firm’s website at [www.WLFtexas.com](http://www.WLFtexas.com).