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BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

RQ-0052-GA

May 1, 2003

The Honorable Greg Abbott
Attorney General of the State of Texas
Attention: Opinion Committee Chairperson
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43089-03
I.D. # 43089

Re: Service of Process in forcible entry and detainer suits

Dear Attorney General Abbott:

On behalf of the El Paso County Justices of the Peace and Constables of El Paso County, I am soliciting your opinion regarding whether a private process server may serve process in a forcible entry and detainer suit.

Texas Rules of Civil Procedure 742 and 742a ("Rule 742" and "Rule 742a") specify the methods of service that may be used in a forcible entry and detainer suit. Rule 742 provides as follows:

> The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued the same. Tex. R. Civ. P. 742

Rule 742a provides an additional method of service, by posting plus mailing. Although both rules assume the actions they authorize will be performed by an "officer," neither rule defines "officer" or provides any other details regarding who may serve process.

Forcible entry and detainer suits are filed in justice court. Tex. Prop. Code Ann. § 24.004 (Vernon 2000). Texas Rule of Civil Procedure 536(a) specifies the persons who may serve process in justice court suits generally. This rule provides as follows:

> Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order. Tex. R. Civ. P. 536(a) ("Rule 536(a)")

Although a person "authorized by law or by written order of the court who is not less than eighteen years of age," such as a private process server, may not be an "officer," thus indicating an apparent inconsistency between Rule 536(a) and Rules 742 and 742a.

Texas Attorney General Opinion No. MW-452 (1982)("MW-452"), addressed a similar apparent inconsistency between Texas Rules of Civil Procedure 116 and 103 ("Rule 116" and "Rule 103"). Rule 116 specifies the method for serving citation by publication in district and county courts. At the time MW-452 was issued, Rule 116 provided that citation by publication was to be performed only by a sheriff or constable. Id. at 1. Rule 103 specifies the persons who may serve all forms of process in district and county courts. At the time MW-452 was issued, Rule 103 permitted citation by publication to be performed by the clerk of the court as well as a sheriff or constable. Id. at 2. Noting that the "[r]ules of civil procedure are to be construed so as to produce harmony rather than discord," the apparent inconsistency was resolved as follows:

> Any seeming conflict between Rules [103] and 116 is resolved by recognizing that the phrase in Rule 116 reading, "[t]he citation, when issued, shall be served by the sheriff or any constable...," is intended to express the mandatory nature of the duty imposed upon officers empowered to effect service of citation by publication, [citation omitted], and not to restrict those who might be authorized to effect service of citation by that method.

Id. By analogy, Rules 742 and 742a merely express the mandatory duties associated with serving process in forcible entry and detainer suits, and were not intended to restrict the scope of persons authorized to perform such duties under Rule 536(a). Rules 742 and 742a only provide *how* process may be served, while Rule 536(a) provides *who* may serve it.

MW-452 further notes that before 1981, Rule 103 permitted only sheriffs and constables to serve process of any kind. Id. at 3. Thus, prior to 1981, there was no apparent inconsistency between Rules 116 and 103: both limited the serving of process to sheriffs and constables. However, even during the time period when these two rules were in agreement, Texas Rule of Civil Procedure 104 ("Rule 104") permitted a resident citizen to be authorized by a district or county court to serve process in a particular case when

there was no sheriff or constable qualified to do so. Id. MW-452 concludes "it is clear that the Rule 116 phrase, 'shall be served by the sheriff or any constable,' was never intended to forbid the use of other persons to effect service of citation by publication." Id.

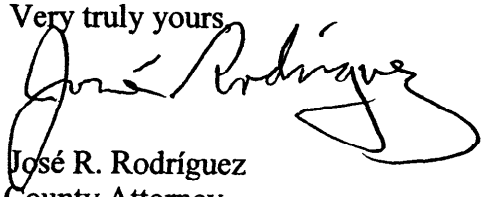
The same conclusion may be drawn regarding Rules 742 and 742a. Prior to 1990, no rule specified who ordinarily may serve process in a justice court. See 785-86 S.W.2d [Tex. Cases] lxxii (showing how Rule 536 was amended to create such a rule). Thus, Rule 103, the corresponding rule for district and county courts, would have applied in justice court. See Texas Rule of Civil Procedure 523 ("All rules governing the district and county courts shall also govern the justice courts, insofar as they can be applied, except where otherwise specifically provided by law or these rules."). As a result, prior to 1981, there was no apparent inconsistency between Rules 742 and 103: Rule 742 assumed process would be served by an "officer," and Rule 103 limited the serving of process to sheriffs and constables. However, even during the time period when these two rules were in agreement, Rule 536 provided a procedure similar to Rule 104 under which, in an emergency, a justice court could authorize "any person of good character" to serve process in a particular case. See 785-86 S.W.2d [Tex. Cases] lxxii. The term "officer" in Rule 742, and in Rule 742a by extension, like the use of the phrase "sheriff or any constable" in Rule 116, most likely was never intended to forbid the use of other persons to serve process if they met the appropriate requirements in another rule.

In addition, Rule 116 was amended in 1984 to eliminate the apparent inconsistency with Rule 103. See 661-62 S.W.2d [Tex. Cases] xli. The Texas Supreme Court commented on the amendment as follows: "TRCP 116 was not amended when TRCP 103 was changed effective January 1, 1981. It was therefore inconsistent with TRCP 103." Id. This comment further clarifies that Rule 116 was always intended to operate consistently with Rule 103, not create a different rule regarding who may serve process. By analogy, Rules 742 and 742a, both of which were last amended before 1990, when Rule 536(a) was amended to specify the persons who ordinarily may serve process in justice court, likewise were intended to operate consistently with Rule 536(a), not create a different rule regarding who may serve process.

Finally, under Texas Rules of Civil Procedure 106(b) and 536(c), in appropriate circumstances a district, county, or justice court may order that process be served in any manner "that [an] affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit." Tex. R. Civ. P. 106(b)(2) and 536(c)(2). These open-ended rules permit all the methods of service authorized in forcible entry and detainer suits under Rules 742 and 742a. Because there is nothing unique about how process is served in forcible entry and detainer suits, there is no basis to narrowly construe Rules 742 and 742a to permit only "officers" to perform service in such suits. The "limited in rem purpose" in forcible entry and detainer suits of determining the immediate right to possess real property, and the defendant's "limited interest in the subject matter of the proceeding," Op. Tex. Att'y Gen. No. DM-358, 11 (1995), tend, if anything, to support a less restrictive construction regarding who may serve process in such a suit, not a more restrictive one.

Thank you for your consideration of this matter.

Very truly yours,



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