

# **TEXAS FORECLOSURE MANUAL**

**Third Edition**

**William H. Locke, Jr.  
Ralph Martin Novak, Jr.  
G. Tommy Bastian**



Austin     2014

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Third Edition, 2014

# TEXAS FORECLOSURE MANUAL

## Third Edition

WILLIAM H. LOCKE, JR.

Bill Locke is a shareholder with Graves, Dougherty, Hearon & Moody, A Professional Corporation, in Austin, Texas. He earned both his B.A. and J.D., with honors, from the University of Texas and was admitted to the bar in 1972. He is a twenty-year maintaining member of the College of Law of the State Bar of Texas; fellow member of the Texas Bar Foundation; director of the Real Estate, Probate and Trust Law Council; and a founding director of the Texas College of Real Estate Lawyers. He is a former president of the Corpus Christi Bar Association. He is listed in *The Best Lawyers in America* for real estate, *Who's Who in America*, and *Who's Who in American Law*, is a fellow of the American College of Real Estate Lawyers, is a frequent speaker for continuing legal education programs, and is the author of numerous articles relating to real estate law. He is board certified in commercial real estate, residential real estate, and farm and ranch real estate law. In addition to conceiving and bringing to fruition this book, which is an outgrowth of experiences in the economic downturn of the 1980s and his desire to help other practitioners avoid traps for the unwary, he regards the following as accomplishments: establishing the Palmer Drug Abuse Program in Corpus Christi in 1979 and in Austin in 2000 as programs helping teens and young adults recover from alcohol and drug abuse; conceiving of obtaining designations of the Corpus Christi Aquarium as the official aquarium of the state of Texas and the Mexic-Arte Museum of Austin, Texas, as the official Mexican and Mexican American fine art museum of Texas; and conceiving and participating in the implementation as chairman of the Corpus Christi Zoning and Planning Commission of the neighborhood zoning plan process for the city of Corpus Christi.

RALPH MARTIN NOVAK, JR.

Marty Novak recently retired. Formerly, he was a real estate attorney in the Office of the General Counsel at the University of Texas. Before joining the University of Texas System, he was a partner at Brown McCarroll L.L.P., Hilgers and Watkins, P.C., and Kleberg, Dyer, Redford and Weil, P.C. He is board certified by the Texas Board of Legal Specialization in commercial real estate and is a member of the College of the State Bar of Texas. Over the years he has been a frequent speaker for continuing legal education programs offered by the State Bar of Texas, the University of Texas School of Law, and the University of Houston Law Center. In addition to being coauthor of the *Texas Foreclosure Manual*, he has contributed to the mechanic's lien section of the *Texas Collections Manual* published by the State Bar of Texas and is the author of *Christianity and the Roman Empire: Background Texts*, a widely praised work on early Christian history that has been used as required reading at a number of universities in the United States and abroad.

Mr. Novak holds a Bachelor of Arts in History and Anthropology, with honors, from Rice University (1973); a Masters Degree in Roman History from the University of Chicago (1975); and a Doctor of Jurisprudence, with honors, from the University of Houston (1982). He is married to Amy Novak and has two children, Becky and Michael.

## G. TOMMY BASTIAN

G. Tommy Bastian, board certified by the Texas Board of Legal Specialization in residential real estate law, focuses his practice on mortgage banking issues related to title, real estate, probate, and class-action litigation, as well as legislative matters. He is the author of more than fifty articles and publications, including a chapter in the Texas Practice Series, *Texas Foreclosure: Law and Practice*. He has served as a frequent lecturer on both state and national issues related to mortgage banking. Mr. Bastian is a graduate of Howard Payne University, Texas Tech Law School, the U.S. Army Command and General Staff College, and the U.S. National Defense Security University. He is actively involved in the Texas Mortgage Bankers Association, American Land Title Association Education Committee, Mortgage Banking Association, and Texas Land Title Association. In 2006, he served on the Residential Foreclosure Task Force mandated by Texas House Bill 1582 and was the course director for the State Bar's Advanced Real Estate Law Course. Mr. Bastian served as the principal drafter for the three Texas Supreme Court Task Forces responsible for creating Rules 735 and 736 dealing with foreclosure of home equity, reverse mortgage, home equity line of credit, and transferred tax liens. He received the Texas Mortgage Bankers Distinguished Service Award in 2010. He enjoys cultivating roses, which he then uses to illustrate many of his CLE presentations.



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The State Bar of Texas is proud to publish this third edition of the *Texas Foreclosure Manual*. Originally published in 1991, this manual continues the tradition of being the premier resource for Texas lawyers whose practice includes foreclosures. It broadens the number of topics covered in the second edition, particularly in light of mortgage securitization.

Our sincere thanks are given to the editors, Bill Locke, Marty Novak, and Tommy Bastian, and the contributing authors who have labored diligently in bringing this expanded edition of the manual to fruition. The Bar is grateful for their generosity and commitment in producing this valuable contribution to the practice of law.

A handwritten signature in black ink, appearing to read "Lisa M. Tatum", with a long horizontal line extending to the right.

Lisa M. Tatum  
President, State Bar of Texas



## Preface

While representing numerous clients during the savings and loan and foreclosure crisis of the late 1980s and early 1990s, Bill Locke and Marty Novak recognized the need for a lawyers' guide to Texas foreclosure practice. For the last twenty-three years, beginning in 1991, Mr. Locke and Mr. Novak have devoted countless hours to writing, editing, and supplementing two editions of the State Bar's *Texas Foreclosure Manual*. Except from a harried lawyer who knew little about foreclosure but breathed a sigh of relief and a silent "thank you" when discovering the treasure trove of materials in the *Texas Foreclosure Manual*, Mr. Locke and Mr. Novak have worked on the manual with little fanfare or recognition.

Because securitization has radically changed mortgage banking and brought with it radical changes to foreclosure practices, Mr. Locke and Mr. Novak recognized the need for a new edition of the *Texas Foreclosure Manual* that melded the still relevant presecuritization materials from the first two editions of the manual with the new developments in foreclosure law caused by the mortgage banking meltdown and foreclosure crisis that began in 2008. The mechanics of conducting a foreclosure (that is, the demand, cure, acceleration, notice of sale, and public sale process outlined in the previous two editions) have remained the same. But the answers to questions like who has the authority to foreclose, whether the law pertaining to the note or the deed of trust controls the foreclosure process, the effect of the mortgage servicer replacing the owner or beneficiary of the note in foreclosure, the role of MERS in the foreclosure process, and the merits of new legal theories and defenses have changed significantly since the second edition of the manual was published.

This new third edition of the *Texas Foreclosure Manual* updates the current body of foreclosure law and practice and continues the tradition of serving as one of the premier guides on how to conduct a Texas foreclosure.

While Mr. Locke and Mr. Novak remain active as editors and contributors to the production of a new edition of the manual, the authorship and format of the third edition have changed significantly.

Adopting the motto that "a team that divides its tasks multiplies its success," twenty-one lawyers with hands-on, down-in-the-trenches experience in prosecuting or defending foreclosures on a daily basis agreed to contribute their foreclosure expertise by updating and drafting new chapters for the third edition of the *Texas Foreclosure Manual*. Consequently, anyone using the new edition of the manual will be guided by lawyers whose contribution to the manual is the result of actually handling hundreds of matters related to their area of foreclosure specialization.

Besides the introduction of new contributing authors to the manual, the format of the third edition has also changed. The first seventeen chapters provide a general overview of the various elements that are important to consider in conducting a foreclosure. The subsequent chapters compose the “how-to-do” section of the manual. In the final eighteen chapters, subject matter experts guide the reader through how to conduct a residential or commercial foreclosure and the more esoteric foreclosure areas like property owners association liens, reverse mortgages, and property tax loan foreclosures, and they address changes in specific areas of law, such as environmental issues affecting foreclosure, the Servicemembers Civil Relief Act, and the role of Mortgage Electronic Registrations Systems, Inc.

The objective of the third edition of the *Texas Foreclosure Manual* is to make it the best source of foreclosure expertise available. Lawyers—being lawyers—may not agree with the editors’ and contributors’ opinions on the law or how to handle certain aspects of a foreclosure. In this regard, we believe Thomas Jefferson’s maxim: “An error in opinion can be tolerated if reason or methodology is free to correct the opinion.” With this premise in mind, any reader may contact the editors with a written rejoinder so that any necessary clarification or correction can be made at TexasBarBooks, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711-2487, **books@texasbar.com**.

Tommy Bastian, *General Editor*

## Acknowledgments

When it comes to foreclosures, superior performance depends on superior learning, and it is hoped that the new third edition of the *Texas Foreclosure Manual* will provide superior learning for any lawyer seeking to provide superior foreclosure legal services for the lawyer's clients or employer.

Twenty-one contributing authors made this new edition possible. The editors would like to acknowledge and thank all the persons named below who participated in the mammoth project of rewriting the third edition, which is still a work in progress.

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Practice notes and forms addressing how to conduct a valid foreclosure sale

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*[chapters 18 and 19 reserved]*

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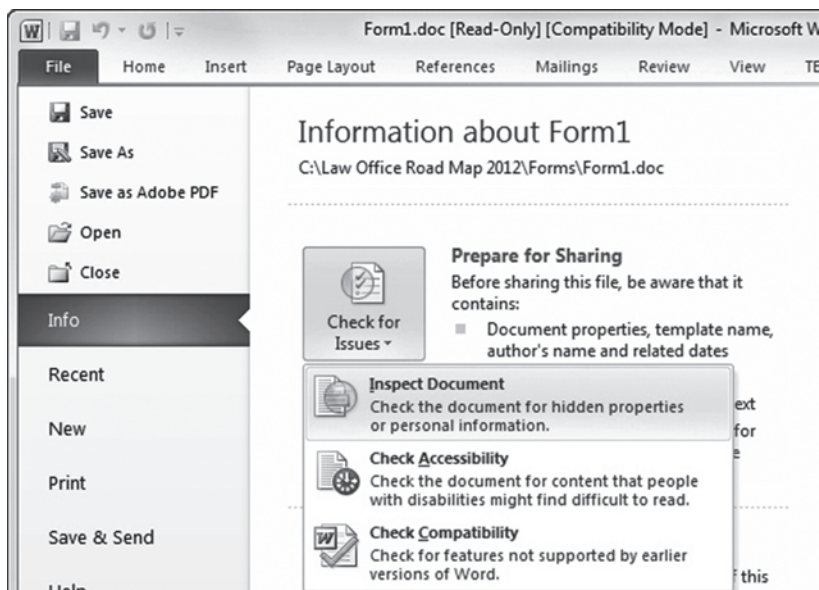
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### Notes for Other Software

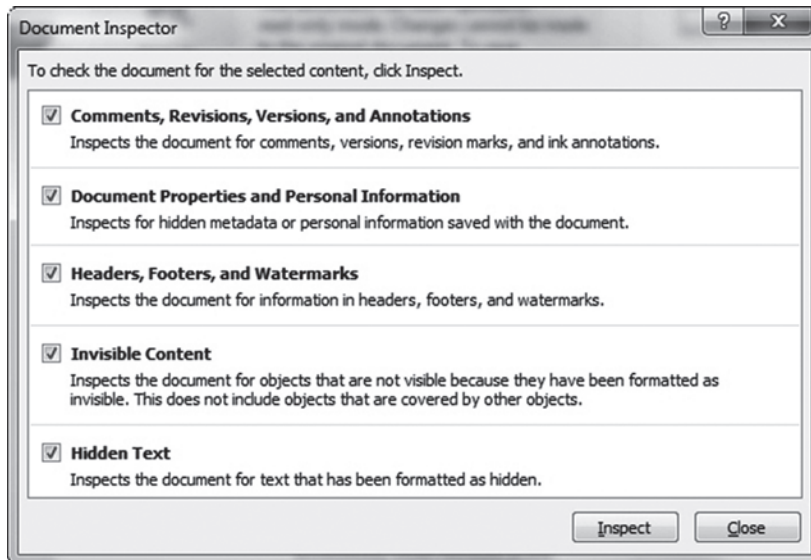
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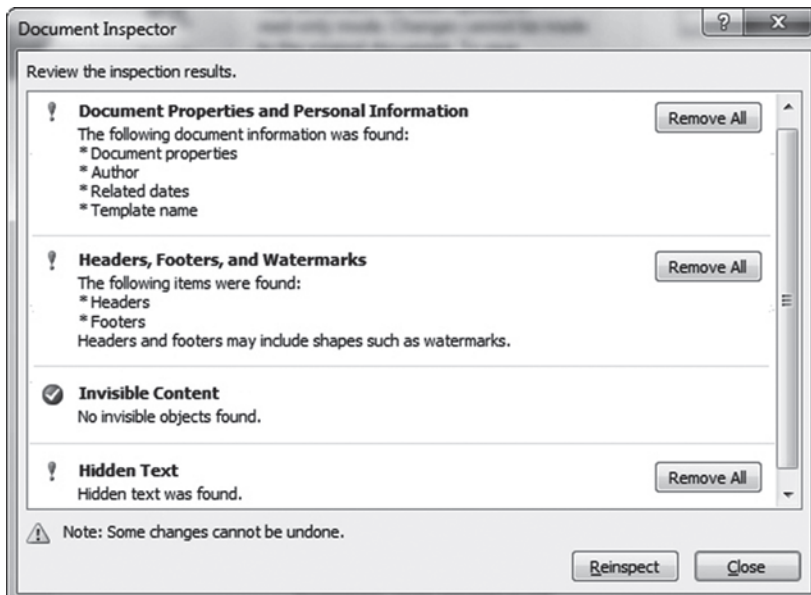
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# Introduction

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The *Texas Foreclosure Manual*, third edition, is more than a form book. It is a practice guide for attorneys in Texas who handle foreclosure matters. This third edition of the manual reflects major changes in organization and adds a significant amount of new content not available in the previous edition, with many improvements for the user. The online subscription version of the *Texas Foreclosure Manual* is internally hyperlinked and fully word-searchable, allowing quick and easy launching of a desired form into word-processing software.

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## § 1 Practice Notes

The practice notes are short synopses of the law, designed to serve as a primer to the very basic matters involved in a particular chapter. These notes are, at most, black-letter law and do not try to resolve questions in controversial areas. For the attorney experienced with foreclosure matters, these notes should serve as a reminder of some of the basics; for the attorney not so experienced, they should provide an orientation to the major matters with which the attorney needs to be concerned when contemplating a particular cause of action.

Each chapter has a detailed table of contents at its beginning to aid in finding material.

## § 2 Forms

The forms in this manual (except those promulgated by the Texas Supreme Court or the Internal Revenue Service) are based on those the authors have originated for use in their own practice. The style should not be regarded as superior to others; however, an effort has been made to avoid ambiguous, cumbersome, or unnecessary wording. Many attorneys may prefer their own style for certain forms—for example, in closings and signature blocks for letters—or may want to add language or revise some forms, especially if local practice warrants

such change. Some forms may be copied verbatim. For example, chapter 2 contains forms, such as the attorney's foreclosure checklist, that may be duplicated for use in the attorney's office.

### 1. Optional content

Within major sections of the text of forms, optional paragraphs or items are usually identified by boxed instructions. Because the manual can cover only relatively common situations in foreclosure cases, language needed to address an atypical issue in a particular case may not appear in the form. The user must take care both to eliminate language appearing in the form that is not appropriate for the particular case and to add any language needed for the particular case that does not appear in the form.

### 2. Typeface conventions

Two typefaces are used in the forms. Material in Times Roman (like most of this page) is appropriate for inclusion in a finished form. In contrast, Arial type is used for boxed instructions. When Arial type is used within the form itself (rather than in a box), it appears in **boldface** for emphasis.

### 3. Bracketed material

Several types of bracketed material appear in the forms.

*Choice of terms.* In a bracketed statement such as “[trustee/substitute trustee],” the user must choose between the terms or phrases within the brackets. The choices are separated by forward slash marks.

*Optional words.* In a phrase such as “Note [and Security Agreement],” the user must determine whether to include the phrase “and Security Agreement.”

*Substitution of terms.* In a bracketed statement such as “[name of noteholder],” the user is to substitute the name of the noteholder rather than type the bracketed material verbatim.

*Instructions for use.* Material such as “[include if applicable: . . . ]” provides instructions for completing the finished form and should not be typed verbatim in the document. Bracketed instructions at the beginning of almost all the forms refer the user to section 3 of this introduction for instructions about composing the caption of the form.

### 4. Blank lines

Signature lines appear as blank lines. Spaces for dates, times, and amounts that would be filled in *after* the document is prepared also appear as blank lines. (If an actual date, time, or amount should be inserted in the form when it is prepared, “[date],” “[time],” or “\$[amount]” appears instead.)

### 5. Language in boxes

Language in boxes is not to be typed in the finished document but constitutes instructions, usually either telling the user whether to use the form language following the box, describing what information should be included at that point in the finished document or attached to it, or

providing cautionary reminders about use of the form language.

### 6. Form numbers

Forms are numbered in sequence within each chapter. All forms begin with the number of the chapter, which is followed by a hyphen and the number of the form within the chapter. This system is used to permit future expansion of any chapter without requiring the rearrangement of the entire book.

### 7. Captions

An example of the caption that should precede the form title is not reprinted in the forms that require it. Typical case styles are discussed in section 3 below.

### 8. Online subscription

The online subscription version of the *Texas Foreclosure Manual* contains the entire text of the manual and is searchable and hyperlinked to allow for easy, rapid navigation to topics of interest. Also included are electronic versions of all State Bar of Texas–copyrighted forms from the manual as editable Word files as well as printable or downloadable PDF files of forms available from the IRS or the Texas Supreme Court, all linked from the online subscription web pages for easy retrieval.

Applicable Texas and federal case and statute citations in the practice notes and forms instructions are linked to case reports and main code sections cited via Casemaker online.

*Caveat:* Note that the word-processing forms included with the online subscription contain instructional language as hidden text. Be aware that this language will be included in your completed forms unless you specifically delete it.

### § 3 Captions of Forms

#### 1. Court Designations for Caption of Petition

Although no statute or rule prescribes the form for identifying in the caption the state court in which the petition is filed, the court and county should be named. If one of several courts may hear the case, as in counties with several district courts and county courts at law, the caption should have a blank on which the clerk can write the appropriate number when the petition is filed. The court designations set out below are recommended for captions.

##### *District Court*

IN THE DISTRICT COURT  
OF \_\_\_\_\_ COUNTY, TEXAS  
\_\_\_\_\_ JUDICIAL DISTRICT

##### *Constitutional County Court*

IN THE COUNTY COURT  
OF \_\_\_\_\_ COUNTY, TEXAS

##### *Unnumbered County Court at Law*

IN THE COUNTY COURT AT LAW  
OF \_\_\_\_\_ COUNTY, TEXAS

##### *Numbered County Court at Law*

IN THE COUNTY COURT AT LAW  
NUMBER \_\_\_\_\_ OF  
\_\_\_\_\_ COUNTY, TEXAS

##### *Justice Court*

IN THE JUSTICE COURT  
FOR PRECINCT NUMBER \_\_\_\_\_  
OF \_\_\_\_\_ COUNTY, TEXAS

#### 2. Appearance of Caption

The generally accepted appearance for captions in Texas pleadings has the cause number at the top center of the first page, the parties on the left, the court designation on the right, and a dividing line between the two, as set out below. Some counties may reverse the appearance of the court and cause number.

---

No. 00–12345		
PAUL PAYNE	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	OF TRAVIS COUNTY, TEXAS
v.	§	
	§	
DON DAVIS	§	
Defendant	§	345th JUDICIAL DISTRICT

---



For probate-related pleadings, see the following example.

---

No. 00–12345		
In re Estate of	§	
	§	
[Name of debtor]	§	[Court designation]
	§	
Deceased	§	

---

#### § 4 Page Numbers

Page numbers are consecutive for both practice notes and forms within each chapter. Practice notes begin with the number of the chapter, followed by the number of the page within the chapter. Forms begin with the number of the form, followed by the number of the page within the form. This system is used to permit revisions within any chapter or form without renumbering the pages in the remaining chapters.

#### § 5 Corrections and Updates

In drafting the manual, the authors devoted a great deal of effort to making it error free, but it undoubtedly contains some errors. We would appreciate your pointing out any errors you find in the manual as well as any revisions you believe are advisable. Please mail any corrections or suggestions to the following

address:

Director, TexasBarBooks  
 State Bar of Texas  
 P.O. Box 12487  
 Austin, TX 78711-2487  
**books@texasbar.com**

Periodic updating of the manual is planned to reflect changes in the law. It is also expected that, over time, additional topics will be covered and the scope of coverage of existing topics will be expanded. We welcome your suggestions about new topics that you would find helpful. Please send your suggestions to the address shown above.