SCAC MEETING AGENDA
Friday, September 30th & Saturday October 1st, 2022
In Person at TAB – Austin, TX

FRIDAY, SEPTEMBER 30, 2022:

I. WELCOME FROM C. BABCOCK

II. STATUS REPORT FROM CHIEF JUSTICE HECHT

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the August 19th meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. TEXAS RULE OF CIVIL PROCEDURE 76a

15-165a Sub-Committee:
Richard Orsinger – Chair
Hon. Ana Estevez – Vice Chair
Prof. Alexandra Albright
Prof. Elaine Carlson
Nina Cortell
Prof. William Dorsaneo
John Kim
Hon. Emily Miskel
Pete Schenkkan
John Warren

A. October 25, 2021 Referral Letter with supporting documents
B. August 12, 2022 Memo from Sub-Committee
1. Attachment A – Proposed Revision of Rule 76a
2. Attachment B – Redline Proposed Changes to 76a
3. Attachment C – Side by Side Comparison of 76a

C. September 1, 2022 Letter from Professor Dustin Benham
D. April 24, 1990 Jutice Gonzalez & Justice Hecht's concurring & dissenting statement on adopitoin of TRCIP 76a & 166b
E. Texas Uniform Trade Secrets Act § 134A.001
F. TRCP 192.6 Protective Order
G. Flow Chart for Sedona Conference's Model Rule on Sealing in Federal Court (Dec. 2021)
H. Sedona Conference Rule
I. March 22, 2022 Memo on Sedona Conference proposed sealing rule
J. September 20, 2022 Stephen Yelonosky's Proposed Revision to 8-16-22 Proposal
K. September 20, 2022 Stephen Yelonosky's Proposed Revision to 76a
L. Clean Version of Stephen Yelonosky's 9.20.22 Proposed Revision

V. REMOTE PROCEEDINGS RULES – PROPOSED CHANGES TO TRCP 18C, 21; TRAP 14, 39, 59; RJA 12

Remote Proceedings Task Force to present to committee for comment:
Kennon Wooten
Lisa Hobbs
Hon. Tracy Christopher

M. December 14, 2021 Referral Letter with supporting documents
N. November 9, 2011 Report of Remote Hearings Task Force, Subcommittee 1 (TRCP 18c, 21; TRAP 14, 39, 59; RJA 12)
O. SBOT Appellate Section Survey on Oral Arguments

VI. CPS AND JUVENILE CASES

Legislative Mandates Sub-Committee Members:
Jim Perdue – Chair
Peter Schenkkan – Vice Chair
Prof. Elaine Carlson
Hon. David Evans
Robert Levy
Richard Orsinger
Jamie Bernstein – Executive Director, Texas Children's Commission

P. May 31, 2019 Referral Letter, with supporting documents (brought back September 2022)
Q. September 28, 2022 Sub-committee memo re Proposed rule re Shckling in Juvenile Proceedings
1. Ex. 1 – HB 2737
2. Ex. 2 – August 23, 2022 Texas Children's Commission memo on restraints in Juvenile proceedings

SATURDAY, OCTOBER 1st:

I. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP & OUT OF TIME APPEALS IN PARENTAL RIGHTS TERMINATION CASES

Appellate Sub-Committee Members:
Pamela Baron – Chair
Hon. Bill Boyce – Vice Chair
Prof. Elaine Carlson
Prof. William Dorsaneo
Connie Pfeiffer
Richard Phillips
Scott Stolley
Charles Watson

R. May 31, 2019 Letter with supporting documents
S. September 28, 2022 Sub-committee memo in Parental Termination Cases

II. TEXAS RULE OF CIVIL PROCEDURE 193.7

167-206 Sub-Committee Members:
Robert Meadows – Chair
Hon. Tracy Christopher – Vice Chair
Prof. Albright
Manuel Berrelez
Harvey Brown
Alistair Dawson
David Jackson
Hon. Ana Estevez

T. May 6, 2022 Referral Letter with supporting documents

III. REMOTE PROCEEDINGS RULES – PROPOSED CHANGES TO TRCP 18C, 21; TRAP 14, 39, 59; RJA 12

Remote Proceedings Task Force to present to committee for comment:
Kennon Wooten
Lisa Hobbs
Hon. Tracy Christopher

Additional Time allowed to continue Friday's discussion

Tab A

October 25, 2021

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Civil Procedure 76a. Since its adoption in 1990, the Court has received a number of complaints about Texas Rule of Civil Procedure 76a. Courts and practitioners alike complain that the Rule 76a procedures are time consuming and expensive, discourage or prevent compliance, and are significantly different from federal court practice. The Committee should draft any rule amendments that it deems advisable and, in making its recommendations, should take into account the June 2021 report of the Legislative Mandates Subcommittee.

Texas Rule of Civil Procedure 162. In the attached email, Judge Robert Schaffer proposes amendments to Texas Rule of Civil Procedure 162. The Committee should review and make recommendations.

Texas Rule of Civil Procedure 506.1(b). Texas Rule of Civil Procedure 506.1(b) states in part: "A plaintiff must file a $500 bond. A defendant must file a bond in an amount equal to *twice the amount of the judgment*." (Emphasis added.) The Court asks the Committee whether the bond amount—double the judgment—is too high, especially as justice court jurisdiction has increased. The Court also asks the Committee to consider other changes that would clarify whether attorney fees are included in calculating the bond amount.

Texas Rule of Evidence 404(b). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amendments to Texas Rule of Evidence 404(b). The Committee should review and make recommendations.

Texas Rule of Evidence 601(b). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes the repeal of Texas Rule of Evidence 601(b). The Committee should review and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

Tab B

Memorandum

TO: **Supreme Court Advisory Committee**

FROM: **Subcommittee on Rule 16-165a, Chair Richard R. Orsinger, Vice-Chair Honorable Ana Estevez**

RE: **Proposed Changes to Tex. R. Civ. P 76a**

DATE: **August 12, 2022**

I. Matter Referred to Subcommittee:

On October 25, 2021, Chief Justice Nathan Hecht sent a letter to SCAC Chairman Chip Babcock referring the following matter to this Subcommittee:

> **Texas Rule of Civil Procedure 76a.** Since its adoption in 1990, the Court has received a number of complaints about Texas Rule of Civil Procedure 76a. Courts and practitioners alike complain that the Rule 76a procedures are time consuming and expensive, discourage or prevent compliance, and are significantly different from federal court practice. The Committee should draft any rule amendments that it deems advisable and, in making its recommendations, should take into account the June 2021 report of the Legislative Mandates Subcommittee.

II. Background

This topic was referred to the Subcommittee on Rules 16-165a on November 2, 2021. Since that time, the Subcommittee and interested persons who volunteered to work on the project, has met several times via zoom to discuss what changes, if any, should be made to Rule 76a. The Subcommittee has also engaged in email discussions. It should be noted that there are different perspectives on sealing court records among the Subcommittee members and others who volunteered to help. The proposed changes to Rule 76a that the Subcommittee presents do not reflect the consensus of the Subcommittee because of many diverse views, including some opposition to sealing court records under any circumstances. Several drafts of the proposed changes to Rule 76a were circulated, ultimately resulting in a proposed draft, which is a composite of different perspectives.

III. Issues for Discussion/Proposed Changes

The Subcommittee and volunteers identified the following areas of Rule 76a that should be discussed and possibly changed. * Some Subcommittee members do not support some of these suggested changes.

A. Whether there should be some types of information that should not have a presumption of openness to the general public and should have a less burdensome process available to be sealed. These specific areas include:

1. trade secrets;
2. information that is confidential under a constitution, statute, or rule;
3. information subject to a confidentiality agreement or protective order;
4. information subject to a pre-suit non-disclosure agreement with a non-party; and
5. an order changing the name of a person to protect that person from a well-founded fear of violence.

These categories are called "Paragraph 3 information in this memo." The Subcommittee process led to a suggestion that advance notice should be given before Paragraph 3 Information is filed unsealed.

B. If an easier process is adopted for information that is not presumed to be open to the general public, what should be changed? The Subcommittee suggests two processes depending on the type of information that is being sealed. This permits a party or non-party

1. The current Rule 76a standard to seal would apply to all information that is not included within Paragraph 3 of the proposed new Rule 76a draft.

    a. notice requirements – less burdensome notice suggested
    b. hearing requirements – remain the same
    c. changes in process to unseal documents
    d. actual notice requirements for non-parties interested in the unsealing

2. Information that is not presumed to be open to the general public (Paragraph 3 Information)

    a. less burdensome notice requirement
    b. no hearing requirement, unless requested; burden changes
    c. changes in process to unseal documents
    d. actual notice requirements for non-parties interested in the unsealing
    e. requires a notice of intent to file confidential information before filing the information unsealed

IV. Discussion

A. **Information that should be presumed to meet the standard of sealing** and should be treated differently than other information. The Subcommittee process identified five areas of information that should not have a presumption of openness to the general public and, therefore, the burden on whether the information should be sealed should be shifted in favor of sealing (for Paragraph 3 information).

1. **Trade secrets** – presumption of openness in 76a does not apply to trade secrets – *see HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021).

2. **Information that is confidential under a constitution, statute, or rule -** Every individual has a privacy interest in avoiding the disclosure of certain personal matters under both the United States and Texas Constitutions. *See Nguyen v. Dallas Morning News, L.P.,* No. 02-06-00298 –CV, 2008 WL 2511183 at *14 (Tex. App.—Fort Worth June 19, 2008, no pet.) (mem op.).

3. **Information subject to a confidentiality agreement or protective order –** The Subcommittee recognizes the potential for overuse or misuse if litigants enter into confidentiality agreements for areas of information that do not truly contain confidential, privileged, or protected information. In order to deter abuse, the Subcommittee has included a sanctions paragraph in Rule 76a.

4. **Information subject to a pre-suit non-disclosure agreement with a non-party-** The Subcommittee recognizes that in commerce parties enter into non-disclosure agreements as part of a contracting process, unrelated to a pending lawsuit. When a party possessing another party's confidential information becomes involved in litigation, notice should be given to the contracting non-party before the non-party's information is filed unsealed.

5. **An order changing the name of a person to protect that person from a well-founded fear of violence.**

B. **Two different procedures to seal information**

1. **The existing Rule 76a with a few modifications (except for information included in the new proposed Paragraph 3) would still be used for sealing in some circumstances.**
- Information is presumed to be open to the general public. For information to be sealed the movant must show a specific, serious and substantial interest which clearly outweighs the presumption of openness, any probable adverse effect that sealing will have upon the general public health or safety, and that no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

   a. Less Burdensome Notice

      i. Public notice – Rule 76a currently requires posting the notice at the place where notices for meetings of county governmental bodies are required to be posted.
      The proposed change would require posting of the notice at the website maintained by the State of Texas for posting public notices (https//topics.txcourts.gov/).

      ii. Filing of notice – Rule 76a currently requires filing a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.
      The proposed change would eliminate this requirement.

   b. Requires a hearing not less than 14 days after the motion is filed and notice is posted. The movant must show that no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted. Some participants say that having a hearing within 14 days is not always possible, due to the press of other court business. Should we have a longer period for a hearing? What period of time to rule?

   c. The proposed change to Rule 76a would require public notice on the website before sealing or unsealing records.

   d. Changes in actual notice requirements in a Motion to Unseal – When a party intends to file Paragraph 3 information unsealed, that party must give notice to other parties, to the public, and to any non-party whose Paragraph 3 information would be filed unsealed. This preliminary notice requirement would allow the

court (and not a party acting unilaterally) to determine whether information should be filed unsealed. It would also give non-parties the opportunity to protect their own Paragraph 3 information. For example: Company X previously provides confidential information under an NDA to Company A. At a later time, Company A negotiates to acquire Company B. The deal falls apart and Company B sues Company A, claiming that Company A breached an agreement to purchase Company B. Company B then seeks discovery from Company A regarding any other potential acquisitions, including confidential information provided to Company A by Company X. The proposed rule change would require advance notice to Company X before Company X's confidential information is filed unsealed.

2. **Information Presumed to Meet the Standard of Sealing** (New Paragraph 3) To have information sealed, the movant need only initially show that the information is included within the categories of Paragraph 3. See Section IV.A above.

a. Less Burdensome Notice

i. Public notice – Rule 76a currently requires posting the notice at the place where notices for meetings of county governmental bodies are required to be posted.
The proposed change would require posting of the notice at the website maintained by the State of Texas for posting public notices (https//topics.txcourts.gov/).

ii. Filing of notice – Rule 76a currently requires filing a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas. The proposed change would eliminate this requirement.

b. Allows sealing without a hearing if no hearing has been requested within 14 days from the day of notice. If a hearing is requested, a person objecting to sealing or moving to unseal the information must show that sealing, or failure to unseal, would have a probable adverse effect upon the general public health or safety. The judge should also determine whether the information does not meet the requirements of Paragraph 3, in which event the presumption of openness would apply.

c. The proposed change to Rule 76a would require public notice on the website before unsealing records.

d. Changes in actual notice requirements in a Motion to Unseal – When a person files a motion to unseal, each party must forward the Motion to Unseal to any third-party who produced the document and to any other person or entity known by that party to have an interest in opposing the Motion to Unseal. Notice must also be given to all persons whose confidential information was obtained through pretrial discovery in the case. This added notice would protect those who are not involved in the litigation and would have no way of knowing that anyone was seeking to unseal their confidential information.

e. Notice of Intent to File Confidential Information: This provision requires parties and non-parties to file a notice of intent to file confidential information if they are not going to request that the information that is described in Paragraph 3 be filed under seal. It also requires that they give actual notice to those who have an interest in the information that they intend to file. This allows for those other persons to intervene before their confidential information is released to the general public.

C. Subsequent Motions to Seal or Unseal

The proposed rule continues the procedure of the ability to file a later motion to seal or unseal records, but the concept of res judicata is changed. Under the current Rule 76a.7, Continuing Jurisdiction, a ruling on a motion to seal or unseal has res judicata effect only on a party or intervenor with actual notice of the hearing. An exception applies upon a showing of changed circumstances materially affecting the order. [One suggestion is to add: "or if the public interest requires reconsideration."] Under the proposed Rule change, the res judicata effect applies to everyone, even non-parties with no notice of the prior hearing on sealing. The rationale is that courts should not have to relitigate matters already considered by them, regardless of who brings the later motion. In other words, res judicata applies to the circumstances previously adjudicated, not just participants in that hearing or non-parties who had notice but did not appear.

D. Sanctions

The proposed Rule does not create a new rule for imposing sanctions. It refers to the existing sanctions Rule 13 and Chapters 9 and 10 of the Texas Civil Practice and Remedies Code. The reminders are deemed advantageous because it reminds lawyers of their duty to be accurate and reminds Judges of their power to sanction lawyers who misuse the safe harbor of Section 3 information.

Tab B1

Subcommittee's Proposed Revision of Rule 76a**. Sealing Court Records**

8-16-22

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed, except as provided below. Information in other court records, except for information under Paragraph 3, is presumed to be open to the general public and may be sealed only if there is a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records are:

(a) all documents of any nature filed, or sought to be sealed before filing, in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents to which access is otherwise restricted by law;

(3) court orders required to be sealed by statute

(4) documents filed in an action originally arising under the Family Code;

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Information Presumed to meet the Standard of Sealing**.

(a) It is presumed that the following information within a court record meets the standard for sealing as prescribed in Paragraph 1:

(1) trade secrets or other proprietary information of a party or non-party;

(2) information that is confidential under a constitution, statute, or rule;

(3) information subject to a confidentiality agreement or protective order;

(4) information subject to a pre-suit non-disclosure agreement with a non-party; and

(5) an order changing the name of a person to protect that person from a well-founded fear of violence.

(b) After fourteen days from the date of the notice required under Paragraph 5, the information shall be ordered sealed unless a hearing has been requested or the judge determines that the information is not any of those listed in Paragraph 3(a). If a hearing is requested, the information shall be ordered sealed unless a person objecting to sealing or moving to unseal the information shows that sealing would have a probable adverse effect on the general public health or safety. If the judge determines that Paragraph 3(a) does not apply, the movant may file a new motion that does not rely on the presumption in Paragraph 3.

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information described in Paragraph 3 without requesting that it be sealed must give notice to all parties, to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest in the confidentiality of the information is otherwise known. The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal. If a timely motion to seal is filed, Paragraph 5 applies.

5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter a final order sealing the records.

6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest is otherwise known. If a hearing is requested within 14 days of the public notice, a judge may not sign an order unsealing the records until the hearing has been held.

7. **Hearing.** If a hearing is requested, a hearing, open to the public, shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party to the case, any non-party who filed a motion to seal or unseal, and any person who

requested the hearing may participate in the hearing in a manner determined by the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. **Temporary Sealing Order**. A temporary sealing order may issue only if there is a showing of a compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant to immediately give the public notice required by Pparagraph 5. A temporary sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration.

9. **Order.** An order sealing or unsealing a court record must be filed and open to the public. It must state the applicable standard and burden and give specific reasons for finding and concluding whether that standard has or has not been met by the party with the burden. An order that seals a court record must also reference the specific portions of court records which are to be sealed by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state the time period for which the sealed portions of the court records are to be sealed, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

10. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. If a court has previously ruled on a request to seal or unseal filed documents, the movant who seeks to seal or unseal the filed documents at a later time must show a material and substantial change in circumstances affecting the prior ruling since the time of the prior ruling. Such circumstances need not be related to the case in which the order was issued. If there is a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents under the appropriate standard applying to the documents at issue.

11. **Appeal**. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and participated in the hearing preceding issuance of such order it. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

12**. Application**. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

13. **Sanctions**. Non-compliance with this rule is subject to sanctions pursuant to rule 13 and Chapters 9 or 10 of the Texas Civil Practice and Remedies Code. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed and filing information presumed to meet the standard for sealing, described in Paragraph 3, without an order permitting it.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

Comment: Paragraph 3(a) resolves the conflict between the rule's prohibition on sealing court orders and legal requirements that an order be sealed or that some information within an order be concealed. For example, Chapter 82 of the CPRC gives the plaintiff the option of concealing her identity by using a pseudonym. Though not otherwise required by law, Paragraph 3(a)(5) permitting certain name change orders to be sealed, like Chapter 82, is intended to protect a person from violence.

Tab B2

Subcommittee's Proposed Revision of Rule 76a**. Sealing Court Records**

8-16-22

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed**, except as provided below. Information in other** court records**, except for information under Paragraph 3, is** presumed to be open to the general public and may be sealed only **if there is** a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records **are**:

(a) all documents of any nature filed**, or sought to be sealed before filing,** in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents to which access is otherwise restricted by law;

(3) court orders required to be sealed by statute

(4) documents filed in an action originally arising under the Family Code**;**

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Information Presumed to meet the Standard of Sealing.**

(a) It is presumed that the following information within a court record meets the standard for sealing as prescribed in Paragraph 1:

(1) trade secrets or other proprietary information of a party or non-party;

(2) information that is confidential under a constitution, statute, or rule;

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Deleted: as defined in this rule, are

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(3) information subject to a confidentiality agreement or protective order;

(4) information subject to a pre-suit non-disclosure agreement with a non-party; and

(5) an order changing the name of a person to protect that person from a well-founded fear of violence.

(b) After fourteen days from the date of the notice required under Paragraph 5, the information shall be ordered sealed unless a hearing has been requested or the judge determines that the information is not any of those listed in Paragraph 3(a). If a hearing is requested, the information shall be ordered sealed unless a person objecting to sealing or moving to unseal the information shows that sealing would have a probable adverse effect on the general public health or safety. If the judge determines that Paragraph 3(a) does not apply, the movant may file a new motion that does not rely on the presumption in Paragraph 3.

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information described in Paragraph 3 without requesting that it be sealed must give notice to all parties, to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest in the confidentiality of the information is otherwise known. The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal. If a timely motion to seal is filed, Paragraph 5 applies.

5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed **and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter a final order sealing the records.**

6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest is otherwise known. If a hearing is requested within 14 days of the public notice, a judge may not sign an order unsealing the records until the hearing has been held.

7. Hearing. If a hearing is requested, a hearing, open to the public, shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party **to the case, any non-party who filed a motion to seal or unseal, and any person who requested the hearing** may participate in the hearing **in a manner determined by**

Deleted: Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case;

Deleted: ; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

Deleted: on a motion to seal court records

Deleted: Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a

the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. Temporary Sealing Order. A temporary sealing order may issue **only if there is** a showing of **a** compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant **to** immediately give the public notice required by **P**paragraph **5. A** temporary **sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration.**

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9. **Order. An order** sealing or unsealing **a** court **record must** be **filed and** open to the public. **It must** state the **applicable standard** and **burden and give** specific reasons for finding and concluding whether **that standard** has **or has not** been **met by the party with the burden. An order that seals a court record must also reference** the specific portions of court records which are to be sealed **by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state** the time period for which the sealed portions of the court records are to be sealed**, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files.** The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

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10. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. **If a** court **has previously ruled** on **a request to seal or unseal filed documents, the movant** who **seeks to seal or unseal** the **filed documents at a later time must show a material and substantial change in** circumstances affecting the **prior ruling since the time of the prior ruling.** Such circumstances need not be related to the case in which the order was issued. **If there is a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents under the appropriate standard applying to the documents at issue.**

11. **Appeal**. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party**, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and** participated in the hearing preceding issuance of such order **it**. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

12. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

13. Sanctions. Non-compliance with this rule is subject to sanctions pursuant to rule 13 and Chapters 9 or 10 of the Texas Civil Practice and Remedies Code. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed and filing information presumed to meet the standard for sealing, described in Paragraph 3, without an order permitting it.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

Comment: Paragraph 3(a) resolves the conflict between the rule's prohibition on sealing court orders and legal requirements that an order be sealed or that some information within an order be concealed. For example, Chapter 82 of the CPRC gives the plaintiff the option of concealing her identity by using a pseudonym. Though not otherwise required by law, Paragraph 3(a)(5) permitting certain name change orders to be sealed, like Chapter 82, is intended to protect a person from violence.

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Tab B3

SIDE-BY-SIDE COMPARISON of RULE 76a
Current & Proposed
8-16-22

Current Rule 76a	**Proposed Rule 76a**
1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:	1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed **except as provided below. Information in other court records, except for information under Paragraph 3 is** presumed to be open to the general public and may be sealed only **if there is** a showing of all of the following:
(a) a specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness; (2) any probable adverse effect that sealing will have upon the general public health or safety; (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.	(a) a specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness; (2) any probable adverse effect that sealing will have upon the general public health or safety; (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.
2. Court Records. For purposes of this rule, court records means: (a) all documents of any nature filed in connection with any matter before any civil court, except:	2. Court Records. For purposes of this rule, court records **are**: (a) all documents of any nature filed, **or sought to be sealed before filing,** in connection with any matter before any civil court, except:
(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;	(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents,
(2) documents in court files to which access is otherwise restricted by law;	(2) documents to which access is otherwise restricted by law;
	(3) court orders required to be sealed by statute;
(3) documents filed in an action originally arising under the Family Code.	**(4)** documents filed in an action originally arising under the Family Code.
(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public	(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public

health or safety, or the administration of public office, or the operation of government. (c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.	health or safety, or the administration of public office, or the operation of government. (c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases that involve bona fide trade secrets or other intangible property rights. **3. Information Presumed to meet the Standard of Sealing.** **(a) It is presumed that the following information within a court record meets the standard for sealing as prescribed in Paragraph 1:** **(1) trade secrets or other proprietary information of a party or non-party;** **(2) information that is confidential under a constitution, statute, or rule;** **(3) information subject to a confidentiality agreement or protective order;** **(4) information subject to a pre-suit non-disclosure agreement with a non-party; and** **(5) an order changing the name of a person to protect that person from a well-founded fear of violence.** **(b) After fourteen days from the date of the notice required under Paragraph 5a, the information shall be ordered sealed unless a hearing has been requested or the judge determines that the information does not meet the requirements of this Paragraph. If a hearing is requested, the information shall be ordered sealed unless a person objecting to sealing or moving to unseal the information shows that sealing would have a probable adverse effect upon the general public health or safety. If the judge determines that Paragraph 3(a) does not apply, the movant may file a new motion that does not rely on the presumption in Paragraph 3**. **4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information described in Paragraph 3 without requesting that it be sealed must give notice to all parties, to any third-party**

	who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest in the confidentiality of the information is otherwise known. The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal. If a timely motion to seal is filed, Paragraph 5 applies.
3. Notice. Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.	**5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give** a brief but specific description of both the nature of the case and the records which are sought to be sealed **and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter a final order sealing the records.** **6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must**

	forward it to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest is otherwise known. If a hearing is requested within 14 days of the public notice, a judge may not sign an order unsealing the records until the hearing has been held.
4. Hearing. A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.	**7.** Hearing**. If a hearing is requested**, a hearing open to the public shall be held as soon as practicable, but not less than fourteen days after the request for the hearing**. Any party to the case, any non-party who filed a motion to seal or unseal, and any person who requested the hearing may participate in the hearing in a manner determined by the court. At the court's discretion, other members of the public may speak on the issue before the court**.
5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.	**8. Temporary Sealing Order**. A temporary sealing order may issue **only if there** is a showing of a compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant to immediately give the public notice required by Paragraph 5. **A temporary sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration.**

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the	9**. Order. An order** sealing or unsealing a court record must be filed and open to the public. **It must** state the **applicable standard and burden and give** specific reasons for finding and concluding **whether that standard has or has not been met by the party with the burden.**
specific portions of court records which are to be sealed;	**An order that seals a court record must also reference the specific portions of court records which are to be sealed by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state** the time period for which the sealed portions of the court records are to be sealed**, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files.**
and the time period for which the sealed portions of the court records are to be sealed.	
The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.	The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.
7. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order.	10. **Continuing Jurisdiction**. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order.
An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order.	**If a court has previously ruled on a request to seal or unseal filed documents, the movant who seeks to seal or unseal the filed documents at a later time must show a material and substantial change in circumstances affecting the prior ruling since the time of the prior ruling.**
Such circumstances need not be related to the case in which the order was issued. However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.	Such circumstances need not be related to the case in which the order was issued. **If there is a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents under the appropriate standard that applies.**
8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the	11. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed

case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings. 9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to: (a) all court records filed or exchanged after the effective date; (b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.	by any party **any non-party who filed a motion to seal or unseal, and any person who requested the hearing and participated in it.** The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings. 12. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to: (a) all court records filed or exchanged after the effective date; (b) any motion to alter or vacate an order restricting access to court records, issued before the effective date. **13. Sanctions. Non-compliance with this rule is subject to sanctions pursuant to Rule 13 and Chapters 9 or 10 of the Texas Civil Practice and Remedies Code. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed and filing information presumed to meet the standard for sealing, described in Paragraph 3, without an order permitting it.** **Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.** **Comment: Paragraph 3(a) resolves the conflict between the rule's prohibition on sealing court orders and legal requirements that an order be sealed or that some information within an order be concealed. For example, Chapter 82 of the CPRC gives the plaintiff the option of concealing**

	her identity by using a pseudonym. Though not otherwise required by law, Paragraph 3(a)(5) permitting certain name change orders to be sealed, like Chapter 82, is intended to protect a person from violence.

Tab C

TEXAS TECH UNIVERSITY
School *of* Law™

September 1, 2022

VIA U.S. MAIL
The Honorable Nathan L. Hecht
Chief Justice, Supreme Court of Texas
Post Office Box 12248
Austin, TX 78711

VIA ELECTRONIC MAIL
Charles L. (Chip) Babcock
Chairman, Supreme Court Advisory Committee
cbabcock@jw.com

To the Honorable Court and Committee:

I currently serve as the Charles P. Bubany Endowed Professor of Law at Texas Tech University. I write to comment on Paragraph 3(a) of the August 16, 2022, draft changes to Texas Rule of Civil Procedure 76a (enclosed), presented at a recent Supreme Court Advisory Committee meeting. As drafted, Paragraph 3(a) would presumptively seal a wide swath of court records, including all information made secret by agreement or subject to a protective order.[1] It is my understanding that the Court and Committee are currently considering this provision. While there are several parts of the August draft that merit discussion, I have confined my comments to Paragraph 3(a). It should be rejected for at least five reasons.

First, Paragraph 3(a) creates a broad presumption in favor of sealing that conflicts with the longstanding federal presumption of public access to court records.[2] The United States Supreme

[1] Paragraph 3(a) also addresses trade secrets. I recognize the Court's holding in *HouseCanary, Inc. v. Title Source, Inc.* harmonizing Rule 76a with the Texas Uniform Trade Secrets Act's presumption in favor of sealing. *See generally HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021). I respect SCAC's efforts to conform Rule 76a to the Court's holding. But Paragraph 3(a)(1) goes much further. Indeed, the draft language would presumptively seal all trade secrets *and* "other proprietary information." Moreover, the TUTSA presumption is confined to misappropriation actions. *See id.* at 260 ("Section 134A.006 of TUTSA provides that trial courts hearing misappropriation actions shall preserve the secrecy of an alleged trade secret by reasonable means.") (internal quotations omitted). Paragraph 3(a)(1), on the other hand, would apparently apply in all civil cases. Moreover, TUTSA's presumptive sealing scheme may itself be subject to a future First Amendment challenge, though the outcome of such a challenge is uncertain.

[2] *See, e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98 (1978) (recognizing the common law right of public access); *Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (Willett, J.) ("The presumption of openness is Law 101: The public's right of access to judicial records is a fundamental element of the rule of law."); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (recognizing the right of public access and observing that "this right is said to predate the Constitution"); *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) ("The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the

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Court and federal circuits "recognize a general right to inspect and copy public records and documents."[3] While this right is not absolute,[4] "the working presumption is that judicial records should not be sealed."[5] A party seeking to seal court records must establish compelling reasons sufficient to overcome the public's access rights.[6] Paragraph 3(a) would reverse this framework and impermissibly shift the burden to the person seeking access. This approach would put Texas in conflict with virtually every jurisdiction, including Texas federal courts hearing Texas state-law claims.[7]

Second, a presumption in favor of sealing may violate the First Amendment. Courts generally agree that the presumption of openness emanates from the common law, or the First Amendment, or both.[8] While the outcome of a First Amendment challenge to Paragraph 3(a)'s sub-parts is admittedly uncertain, the current language raises federal issues and would subject Texas state-court litigants to federal proceedings.

Third, Paragraph 3(a) conflates the standard for issuing protective orders with the high standard for sealing court records.[9] Perhaps the most troubling aspect of Paragraph 3(a) is that it would presumptively seal all "information subject to a confidentiality agreement or protective order." As the Committee and Court are aware, protective orders are routinely entered on a minimal showing of good cause or by stipulation. Bootstrapping party agreements and protective orders into sealing orders directly contravenes the approach recently taken by the Fifth Circuit:

> At the *discovery* stage, when parties are exchanging information, a stipulated protective order under Rule 26(c) may well be proper. Party-agreed secrecy has its place—for example, honoring legitimate privacy interests and facilitating the efficient exchange of information. But at the *adjudicative* stage, when materials

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public to have confidence in the administration of justice.") (internal quotations omitted); *cf. also HouseCanary*, 622 S.W.3d at 263 ("The public's right of access to judicial proceedings is a fundamental element of the rule of law."). *See generally* Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211, 254–60 (2021).

[3] *Nixon*, 435 U.S. at 597.

[4] *See, e.g.*, *Dall. Morning News v. Fifth Ct. of Appeals*, 842 S.W.2d 655, 659 (Tex. 1992) (opinion accompanying order overruling motion for leave to file pet. for writ of mand. and motion for temporary relief) (Gonzalez, J.) (rejecting "the view that the press and the public have an absolute right to immediate physical access to all exhibits introduced into evidence and that this right is paramount over all other rights").

[5] *Le*, 990 F.3d at 419.

[6] *See, e.g.*, *id.* at 421 ("[T]he presumption of openness . . . can be rebutted only by compelling countervailing interests favoring nondisclosure.").

[7] *See, e.g.*, *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022) ("To decide whether something should be sealed, the court must undertake a document-by-document, line-by-line balancing of the public's common law right of access against the interests favoring nondisclosure.") (internal quotations omitted).

[8] *See, e.g.*, *Bernstein*, 814 F.3d at 141 ("The presumption of access to judicial records is secured by two independent sources: the First Amendment and the common law.") (internal quotations omitted); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) ("The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment."). *Cf. HouseCanary*, 622 S.W.3d at 263 ("[Rule 76a's] procedures serve our fundamental commitment to open courts, which is rooted in the common law and the First Amendment.") (internal quotations omitted).

[9] *See, e.g.*, *Le*, 990 F.3d at 419 (fretting about "the growing practice of parties agreeing to private discovery and presuming that whatever satisfies the lenient protective-order standard will necessarily satisfy the stringent sealing-order standard").

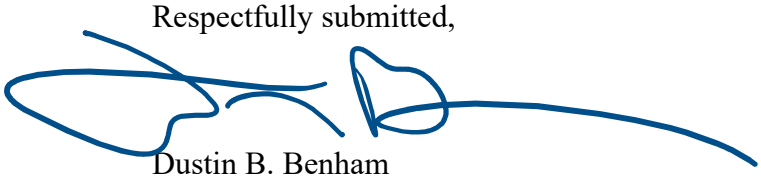
> enter the court record, the standard for shielding records from public view is far more arduous.[10]

Courts distinguish between protective orders and sealing orders for good reason—filed materials often deal with the merits of a case. And the public and press have a special stake in observing merits disputes to ensure that courts execute their duties with competence and integrity.[11]

Fourth, Paragraph 3(a) would cede control of the sealing process to the parties, contrary to the wisdom of federal courts that have roundly condemned overreliance on agreed sealing.[12] Understandably, litigants want privacy. But civil lawsuits are brought in public courts. The public is, as a practical matter, absent from most proceedings. This state of affairs ordinarily leaves the judge as the only steward of the public's access rights. As such, judges are obligated to closely consider sealing requests and reject unwarranted agreed sealing.[13]

Fifth, the federal Advisory Committee on Civil Rules is considering proposals to amend the Federal Rules of Civil Procedure and create a uniform national sealing procedure.[14] One of the most prominent proposals recognizes the presumption of public access and directly conflicts with Paragraph 3(a).[15] While the ultimate timeline and substance of the federal process are uncertain, prudence would counsel that Texas take additional time to observe and gain insight from federal rulemaking on this issue.

Respectfully submitted,



Dustin B. Benham
Charles P. Bubany Endowed Professor of Law

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[10] *See, e.g.*, *id.* at 420 (emphasis in original); *see also June Med. Servs.*, 22 F.4th at 521 ("The district court here also used the wrong legal standard for sealing documents. Different legal standards govern protective orders and sealing orders.").

[11] *See, e.g.*, *June Med. Servs.*, 22 F.4th at 519 ("This right serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.") (internal quotations omitted).

[12] *See, e.g.*, *Brown v. Maxwell*, 929 F.3d 41, 46 (2d Cir. 2019) (unsealing summary judgment record and observing that district court "[s]ealing [o]rder that effectively ceded control of the sealing process to the parties themselves").

[13] *See, e.g.*, *June Med. Servs.*, 22 F.4th at 521 ("The district court also erred by failing to evaluate all of the documents individually. It is the solemn duty of the judge to scrupulously examine each document sought to be sealed. It is not easy, but it is fundamental.") (internal citations omitted).

[14] *See generally Advisory Committee on Civil Rules*, (Oct. 5, 2021), https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf.

[15] Letter from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA Sch. of L., to Members of the Advisory Committee (Aug. 7, 2020).

Subcommittee's Proposed Revision of Rule 76a**. Sealing Court Records**

8-16-22

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed**, except as provided below. Information in other** court records**, except for information under Paragraph 3, is** presumed to be open to the general public and may be sealed only **if there is** a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records **are**:

(a) all documents of any nature filed**, or sought to be sealed before filing,** in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents to which access is otherwise restricted by law;

(3) court orders required to be sealed by statute

(4) documents filed in an action originally arising under the Family Code**;**

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. **Information Presumed to meet the Standard of Sealing.**

(a) It is presumed that the following information within a court record meets the standard for sealing as prescribed in Paragraph 1:

(1) trade secrets or other proprietary information of a party or non-party;

(2) information that is confidential under a constitution, statute, or rule;

Deleted: . Other

Deleted: as defined in this rule, are

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(3) information subject to a confidentiality agreement or protective order;

(4) information subject to a pre-suit non-disclosure agreement with a non-party; and

(5) an order changing the name of a person to protect that person from a well-founded fear of violence.

(b) After fourteen days from the date of the notice required under Paragraph 5, the information shall be ordered sealed unless a hearing has been requested or the judge determines that the information is not any of those listed in Paragraph 3(a). If a hearing is requested, the information shall be ordered sealed unless a person objecting to sealing or moving to unseal the information shows that sealing would have a probable adverse effect on the general public health or safety. If the judge determines that Paragraph 3(a) does not apply, the movant may file a new motion that does not rely on the presumption in Paragraph 3.

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information described in Paragraph 3 without requesting that it be sealed must give notice to all parties, to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest in the confidentiality of the information is otherwise known. The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal. If a timely motion to seal is filed, Paragraph 5 applies.

5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed **and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter a final order sealing the records.**

6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest is otherwise known. If a hearing is requested within 14 days of the public notice, a judge may not sign an order unsealing the records until the hearing has been held.

7. Hearing. If a hearing is requested, a hearing, open to the public, shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party **to the case, any non-party who filed a motion to seal or unseal, and any person who requested the hearing** may participate in the hearing **in a manner determined by**

Deleted: Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case;

Deleted: ; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

Deleted: on a motion to seal court records

Deleted: Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a

the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. Temporary Sealing Order. A temporary sealing order may issue **only if there is** a showing of **a** compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant **to** immediately give the public notice required by **P**paragraph **5. A** temporary **sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration.**

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Deleted: The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

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Deleted: practicable. Issuance

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9. **Order. An order** sealing or unsealing **a** court **record must** be **filed and** open to the public. **It must** state the **applicable standard** and **burden and give** specific reasons for finding and concluding whether **that standard** has **or has not** been **met by the party with the burden. An order that seals a court record must also reference** the specific portions of court records which are to be sealed **by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state** the time period for which the sealed portions of the court records are to be sealed**, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files.** The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

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10. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. **If a** court **has previously ruled** on **a request to seal or unseal filed documents, the movant** who **seeks to seal or unseal** the **filed documents at a later time must show a material and substantial change in** circumstances affecting the **prior ruling since the time of the prior ruling.** Such circumstances need not be related to the case in which the order was issued. **If there is a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents under the appropriate standard applying to the documents at issue.**

11. **Appeal**. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party**, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and** participated in the hearing preceding issuance of such order **it**. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

12. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

13. Sanctions. Non-compliance with this rule is subject to sanctions pursuant to rule 13 and Chapters 9 or 10 of the Texas Civil Practice and Remedies Code. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed and filing information presumed to meet the standard for sealing, described in Paragraph 3, without an order permitting it.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

Comment: Paragraph 3(a) resolves the conflict between the rule's prohibition on sealing court orders and legal requirements that an order be sealed or that some information within an order be concealed. For example, Chapter 82 of the CPRC gives the plaintiff the option of concealing her identity by using a pseudonym. Though not otherwise required by law, Paragraph 3(a)(5) permitting certain name change orders to be sealed, like Chapter 82, is intended to protect a person from violence.

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Deleted: However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.

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Tab D

IN THE SUPREME COURT OF TEXAS

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE, TEXAS RULES OF APPELLATE PROCEDURE, AND TEXAS RULES OF CIVIL EVIDENCE

ORDERED:

1. That Texas Rules of Civil Procedure 3a, 4, 5, 10, 13, 18a, 18b, 21, 21a, 26, 45, 47, 57, 60, 63, 67, 87, 106, 107, 113, 120a, 166, 166a, 166b, 167, 167a, 168, 169, 183, 200, 201, 206, 208, 215, 216, 223, 237a, 245, 248, 269, 294, 296, 297, 298, 299, 301, 305, 306c, 308a, 534, 536, 571, 687, 749a, 749c, 751, 769, 771, 781, and 792 are amended as set forth below.

2. That Texas Rules of Civil Procedure 72, 73, 184, 184a, and 260 are repealed.

3. That Texas Rules of Civil Procedure 18c, 21b, 76a, 299a, and 536a are added as set forth below.

4. That Texas Rules of Appellate Procedure 1, 3, 4, 5, 9, 12, 15a, 17, 20, 40, 41, 43, 46, 47, 49, 51, 52, 53, 54, 56, 57, 59, 72, 74, 79, 90, 91, 100, 130, 131, 132, 133, 134, 135, 136, 140, 160, 170, 172, 181, 182, 190, 202, and 210, and certain captions and an appendix, are amended as set forth below.

5. That Texas Rule of Appellate Procedure 21 is added as set forth below.

6. That Texas Rule of Civil Evidence 703, and the comment to Rule 604, are amended as set forth below.

7. That these changes in the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence shall take effect September 1, 1990.

8. That the comments appended to these changes are incomplete, that they are included only for the convenience of the bench and bar, and that they are not a part of the rules.

9. That the Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

10. That the Clerk shall file an original of this Order in the minutes of the Court to be preserved as a permanent record of the Court.

SIGNED AND ENTERED in duplicate originals this ~~16th~~ 24th day of April, 1990.

Thomas R. Phillips, Chief Justice

Franklin S. Spears, Justice

C. L. Ray, Justice

Raul A. Gonzalez

Oscar H. Mauzy

Eugene A. Cook

Jack Hightower

Nathan L. Hecht

Lloyd Doggett

CONCURRING AND DISSENTING STATEMENT BY JUSTICE GONZALEZ AND JUSTICE HECHT

We concur in the changes to the Texas Rules of Civil Procedure adopted by this Order except the addition of Rule 76a and the concomitant amendment to Rule 166b.5.c. We agree that that it is appropriate to articulate standards for sealing court records which recognize and protect the public's legitimate interest in open court proceedings. Our concern is that the adopted rules are excessive.

Strong arguments have been made that pleadings, motions and other papers voluntarily filed by a party to avail itself of the judicial process should not be sealed absent specific, compelling reasons. The arguments are much weaker for denying protection from public disclosure of information which a person is ordinarily entitled to hold private and would not divulge except for the requirements of the discovery process. It is one thing to require that pleas to a court ordinarily be public; it is quite another to force a person to give an opponent in a lawsuit private information and then require disclosure to the world. On balance, we believe that the adopted rules do not afford litigants adequate protection of their legitimate right to privacy.

The procedural burdens created by the adopted rules are thrust principally upon already overburdened trial courts and courts of appeals. The trial courts must now conduct full, evidentiary hearings before ordering court records sealed. After records are ordered sealed, any party who did not have actual notice of earlier proceedings may request reconsideration of the order. Because it is impossible to give actual notice to the world, an order sealing records can never be effectively final. Trial courts must either hold as many hearings as there are requests by people without actual notice of prior hearings, or surrender and unseal the records. All parties, for and against sealing, are entitled to appeal. The demand of the adopted rules on the judiciary's limited resources is impossible to assess.

Finally, Rule 76a and the change in Rule 166b.5.c are probably more controversial than any rules ever adopted by this Court. Although issues relating to sealing court records have been addressed across the country, adoption of rules like these two is unprecedented. Despite strongly conflicting views of the members of our Rules Advisory Committee, the Court has not invited the same public comment on these two rules as it has on the others. People outside the rules drafting process, lawyers and non-lawyers alike, have only recently become aware that these two rules were being considered. Even without inviting comment, the Court has received a relatively large number of sharply divergent views of these rules. The stridency of the controversy, the dearth of precedent, and lack of opportunity for full public comment all counsel a more measured response by the Court than the rules it adopts. We have refused this year to change the rules pertaining to the preparation of jury charges because of conflicting comments on the proposed amendments. The reasons for deferring sweeping changes in the charge rules for further debate apply equally to Rule 76a and Rule 166b.5.c.

We agree with the Court generally that court records should be open to the public. We do not agree with the manner in which the Court has chosen to effectuate this policy.

Tab E

Texas Uniform Trade Secrets Act

Sec. 134A.006. PRESERVATION OF SECRECY.

(a) In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means. There is a presumption in favor of granting protective orders to preserve the secrecy of trade secrets. Protective orders may include provisions limiting access to confidential information to only the attorneys and their experts, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

(b) In an action under this chapter, a presumption exists that a party is allowed to participate and assist counsel in the presentation of the party's case. At any stage of the action, the court may exclude a party and the party's representative or limit a party's access to the alleged trade secret of another party if other countervailing interests overcome the presumption. In making this determination, the court must conduct a balancing test that considers:

(1) the value of an owner's alleged trade secret;

(2) the degree of competitive harm an owner would suffer from the dissemination of the owner's alleged trade secret to the other party;

(3) whether the owner is alleging that the other party is already in possession of the alleged trade secret;

(4) whether a party's representative acts as a competitive decision maker;

(5) the degree to which a party's defense would be impaired by limiting that party's access to the alleged trade secret;

(6) whether a party or a party's representative possesses specialized expertise that would not be available to a party's outside expert; and

(7) the stage of the action.

Added by Acts 2013, 83rd Leg., R.S., Ch. 10 (S.B. 953), Sec. 1, eff. September 1, 2013.

Amended by:

Acts 2017, 85th Leg., R.S., Ch. 37 (H.B. 1995), Sec. 5, eff. September 1, 2017.

Tab F

192.6 Protective Order.

(a) Motion. A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.

(b) Order. To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may - among other things - order that:

(1) the requested discovery not be sought in whole or in part;

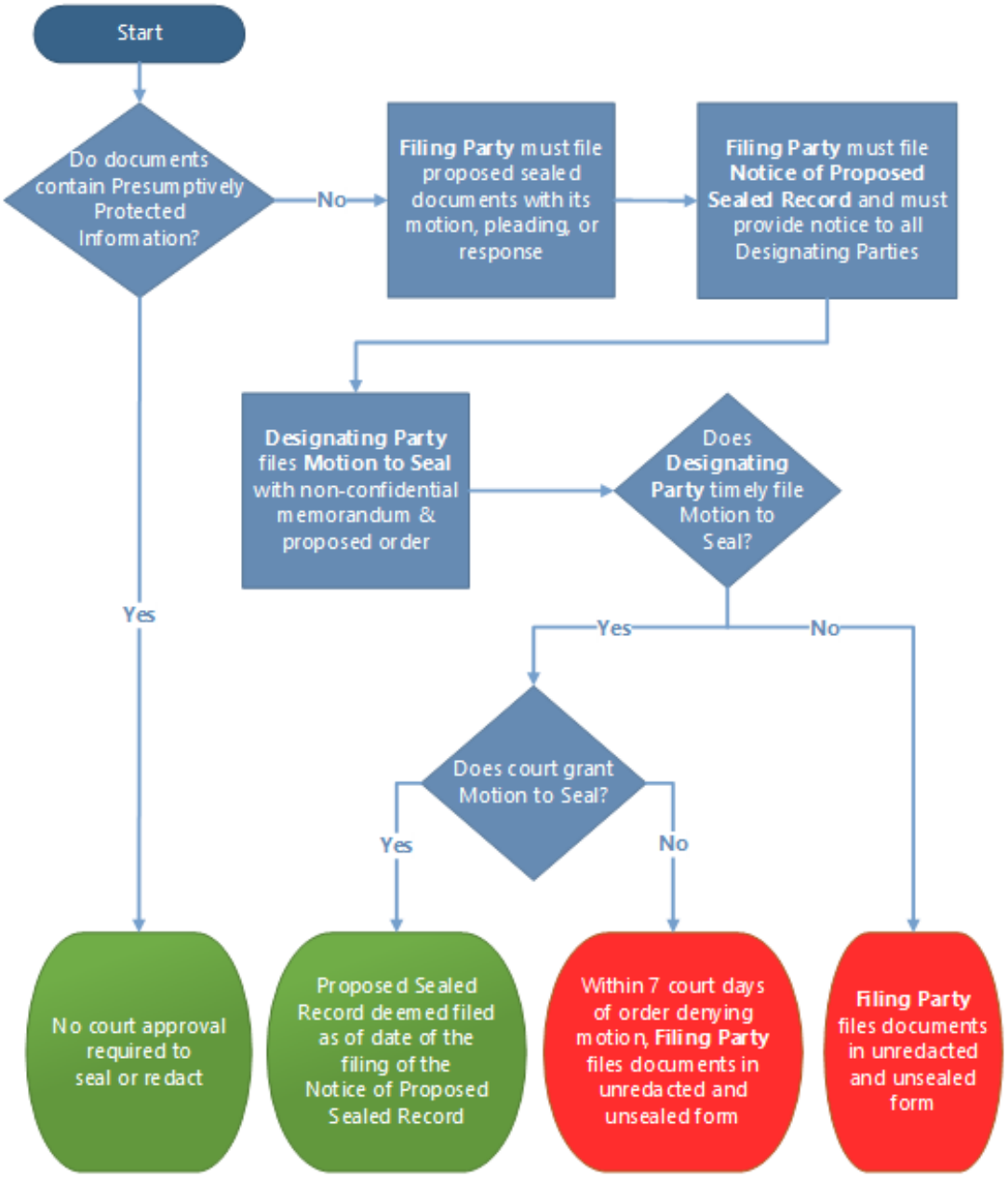
(2) the extent or subject matter of discovery be limited;

(3) the discovery not be undertaken at the time or place specified;

(4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

Tab G



[24] For example, the Northern District of California automatically unseals records after 10 years unless ordered otherwise upon a showing of good cause. *See* N.D. Cal. L.R. 79-5(g).

[25] *See* E.D. La. L.R. 5.6(B)(4) and E.D. Va. L.R. 5(C)(4).

Tab H

II. PROPOSED UNIFORM MODEL RULE FOR THE SEALING AND REDACTING OF INFORMATION FILED WITH A FEDERAL COURT WITH PROPOSED FORM OF NOTICE

Model Rule: Procedures for the Sealing and Redaction of Records in a Federal Civil Case

1.0 Definitions

As used in this Rule:

(A) **Conditionally Sealed Period.** The Conditionally Sealed Period is the time period during which a Record is temporarily sealed because it is identified in a Notice of Proposed Sealed Record, but has not yet been sealed pursuant to court order.

(B) **Confidential Information.** Confidential Information is information the Filing Party or Designating Party contends is confidential or proprietary in a Notice of Proposed Sealed Record or a motion to seal, including information that has been designated as confidential or proprietary under a protective order or nondisclosure agreement, or information otherwise entitled to protection from disclosure under statute, rule, order, or other legal authority.

(C) **Court Record.** The Court Record refers to the full collection of pleadings, motions, orders, and exhibits that make up a case file.

(D) **Designating Party.** The Designating Party is the person or entity that designated the Confidential Information at issue under this Rule. The Designating Party may be a non-party to the case and may also be the Filing Party for purposes of this Rule.

(E) **Filing Party.** The Filing Party is the party seeking to file Confidential Information.

(F) **Presumptively Protected Information.** A Record may contain Presumptively Protected Information if it includes any of the following:

(1) Personally Identifiable Information (PII) refers to information that can, either alone or when combined with other personal or identifying information, be used to distinguish or trace an individual's identity, such as social security number, or biometric records, or information that is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, or father's middle name;

(2) Information defined as Protected Individually Identifiable Health Information (PHI) by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and including information protected by comparable federal, state, or local laws, regulations, or rules governing healthcare information privacy;

(3) Information otherwise protected from disclosure by federal, state, or local laws, regulations, or rules governing data privacy;

(4) Information not otherwise covered by Federal Rule of Civil Procedure 5.2 ("Rule 5.2"), such as passport numbers, taxpayer ID numbers, military ID numbers, driver's license numbers; other national, state, or local government issued identification, license, or permit numbers; nonfinancial customer account numbers; internet or website user names, login IDs, or passwords; personal email addresses; personal telephone numbers; personal device internet protocol (IP) addresses; residence addresses; and personal geolocation data (except if such information must be publicly disclosed by rule or order, *e.g.*, residence address on initial pleading, docket form, summons, subpoena, or substantively in a given case).

(G) Proposed Sealed Record(s). A Proposed Sealed Record is a Record that is temporarily sealed or redacted during the Conditionally Sealed Period by virtue of its attachment to a Notice of Proposed Sealed Record or motion to seal.

(H) Record. Unless the context indicates otherwise, Record means all or a portion of any document, pleading, motion, paper, exhibit, transcript, image, electronic file, or other written, printed, or electronic matter filed or lodged with the court, by electronic means or otherwise.

(I) Redacted Record. A Redacted Record is a Record that, by court order, contains a specific subset of information that is not open to inspection by the public, but the Record itself is not entirely sealed.

(J) Sealed Record. A Sealed Record is a Record that by court order is not open to inspection by the public or is temporarily sealed pursuant to the Conditionally Sealed Period.

2.0 Sealing Presumptively Protected Information

(A) No prior Court approval required.

A Filing Party who seeks to file Presumptively Protected Information identified in Rule 5.2 shall follow its requirements. For all other Presumptively Protected Information as defined by Model Rule 1.0(F), the Filing Party may redact such information without prior court approval where the extent of the redaction(s) is no greater than required to protect the disclosure of such information. Where other content in a Record supports or requires filing under seal, the provisions of Model Rule 3.0 apply, notwithstanding any redactions made under this section.

(B) No requirement to redact received materials.

A Filing Party receiving unredacted Records from a Designating Party is not required by this section to apply redactions to the Designating Party's Records before filing. This provision does not supersede any court order (such as a protective order or ESI order), law, regulation, or rule that imposes an affirmative requirement on a receiving party to redact information prior to filing, including Rule 5.2.

(C) No requirement to defend Designating Party's redactions.

A Filing Party receiving redacted Records from a Designating Party is not required to defend the appropriateness of redactions made by a Designating Party under this section in order to file them in the form received, after providing the Notice set forth in Model Rule 3.0(C). This provision does not preclude a receiving party from objecting to or challenging redactions by a Designating Party.

(D) Redactions to be no more extensive than required.

Redactions to prevent unauthorized public disclosure of information described in Model Rule 1.0(F) should be no more extensive than required to maintain the confidentiality of the Presumptively Protected Information, and should not, where feasible, obscure the type of information being redacted, if the nature of the type of information is indicated on the original document; *for example*, "D.O.B. ____".

(E) Redactions to be textual where feasible.

To apprise viewers of the bases for redactions, where the technology used to redact provides for textual redactions (as opposed to blackbox or whitebox redaction), textual redactions that characterize the redactions should be used (e.g., "PHI/PII Redacted," or "Personal Protected Information Redacted").

3.0 All Other Sealing

(A) Court approval required.

A Record must not be filed under seal or redacted without a court order, except in connection with a Notice of Proposed Sealed Record, or if the Record contains Presumptively Protected Information governed by Model Rule 2.0. A Record filed under seal in connection with a Notice of Proposed Sealed Record will be temporarily sealed unless and until an order disposing the motion to seal is entered, *e.g.*, the "Conditionally Sealed Period." Thereafter, the Record remains sealed unless determined otherwise by an order of the court. See Model Rules 1.0(A), 3.0(F), and 4.0.

(B) CM/ECF filing requirement.

(1) Unless otherwise ordered by the court, any Record to be filed under seal, Notice of Proposed Sealed Record, or motion to seal must be filed electronically with restricted access using the court's Case Management/Electronic Case Filing (CM/ECF) System. Notwithstanding this requirement, a Filing Party who is not represented by an attorney (*i.e.*, is "pro se") must not file electronically unless the pro se is approved to become a CM/ECF user in that case pursuant to local rules or court order. If a pro se party is not an approved CM/ECF user, the pro se must file such documents

in paper form, and the Clerk of Court will perform the necessary filing steps in the CM/ECF system.

(2) Proposed Sealed Records are to be filed only with the underlying motion, pleading, or response, and each such Record shall be filed separately so that each document is assigned its own ECF docket number (*e.g.*, ECF No. 2, or ECF No. 2-2). The Proposed Sealed Record(s) must be filed as separate docket entries in both sealed and unsealed and redacted and unredacted forms. Any Filing Party must file a Notice of Proposed Sealed Record pursuant to Model Rule 3.0(C).

(3) **Nonpublic Filing of Proposed Sealed or Redacted Records.** An unsealed or unredacted copy of each Proposed Sealed or Redacted Record must be filed concurrently with the motion, pleading, or response to which the Proposed Sealed or Redacted Record(s) are referenced or attached, using CM/ECF restricted viewing. All Records filed under seal or in unredacted form must state "FILED CONDITIONALLY UNDER SEAL" at the top of the Record or in such a place so as not to obscure the content of the document.

(4) **Publicly Filed Versions of Proposed Sealed and Redacted Records.** Redacted Records must be filed in redacted form in the public record. A Record to be sealed in its entirety must be filed in the public record by a placeholder slip sheet stating "DOCUMENT FILED UNDER SEAL." Each Proposed Sealed Record that is an attachment to a filing must be numbered (*e.g.*, as "Sealed Exhibit Number ___" and "Redacted Exhibit Number ___").

(5) Filing a document under seal does not exempt the filer from the service requirements imposed by federal statutes, rules, or regulations or by a court's local rules. E-service on parties in sealed or unredacted forms will be accomplished through the CM/ECF system, where available. If CM/ECF service is unavailable for such Records, a Filing Party who is an approved CM/ECF user must accomplish service same day as otherwise required by the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Local Rules. Service on a pro se party or non-party who has not been previously approved to be a CM/ECF user in the case must be made in accordance with Federal Rule of Civil Procedure 5.

(6) The motion to seal and its supporting documents, identified below in Model Rule 3.0(D), must not be filed under seal or with redactions unless the motion cannot be drafted in a manner that protects the Confidential Information from disclosure.

(7) Any order disposing of a motion to seal should be publicly filed.

(C) Notice of Proposed Sealed Record.

(1) Filing of Notice of Proposed Sealed Record. If a Filing Party intends to file a motion, pleading, or response that references or appends Confidential Information, it must file a Notice of Proposed Sealed Record. A Filing Party must file a Notice of Proposed Sealed Record even if it is the Designating Party.

(2) Content of Notice of Proposed Sealed Record. The Notice of Proposed Sealed Record must identify each Proposed Sealed or Redacted Record or generally identify the Confidential Information that was redacted from each Proposed Sealed or Redacted Record, without disclosing Confidential Information, and identify the corresponding Designating Party. Each Proposed Sealed or Redacted Record shall be referred to the ECF docket number from the motion, pleading, or response to which the Proposed Sealed Records are referenced or attached.

(3) Notice Where Records Previously Sealed or Redacted by Court Order. If Records subject to the Notice of Proposed Sealed Record were previously sealed or redacted by court order in the same action, the Filing Party must file a Notice of Proposed Sealed Record in compliance with this section and identify the prior order by ECF docket number and date. A new motion to seal is not required if the court previously ordered the Record sealed or redacted.

(4) Timing of Notice of Proposed Sealed Record. A Notice of Proposed Sealed Record must be filed immediately after any motion, pleading, or response to which the Proposed Sealed or Redacted Records are referenced or attached (*e.g.*, a motion to compel, a motion for summary judgment, or a motion in limine).

(5) Notice to Non-Party Designating Parties. If Records subject to the Notice of Proposed Sealed Record were produced by a Designating Party that is a non-party to the litigation, the Filing Party filing the Notice of Proposed Sealed Record must provide notice of the filing to the non-party in accordance with Rule 3.0(B)(5).

(D) Motion to Seal.

(1) Motion to Seal. If a Designating Party whose Record(s) are the subject of a Notice of Proposed Sealed Record seeks to maintain such Records under Seal, the Designating Party must file a motion to seal. A Filing Party who is the Designating Party must file and serve the motion to seal in compliance with this Rule.

(2) Memorandum. The motion to seal must include a nonconfidential memorandum in support that complies with Model Rule 3.0(B)(6) describing:

(a) each Record(s) to be sealed or redacted; (b) the basis for the request; and (c) how each Record(s) to be sealed or redacted meets applicable standards for sealing.

(3) **Declaration in Support.** The motion to seal must include a nonconfidential declaration in support setting forth the legal basis for filing each Record under seal or in redacted form, and such Records should not be refiled, but should be identified by their ECF docket numbers from the motion, pleading, or response to which the Proposed Sealed Record(s) is referenced or attached (*e.g.*, ECF No. 2 or ECF No. 2-2).

(4) **Timing of Motion to Seal.** A Designating Party must file its motion to seal and supporting declaration within the time frame set for the filing of any responsive pleading to the motion that references or appends a Designating Party's Confidential Information, unless otherwise ordered by the court. If a responsive pleading is not permitted, the motion to seal and supporting declaration must be filed within seven (7) court days of service of the Notice of Proposed Sealed Record.

(5) **Failure to Timely Move to Seal.** If the Designating Party does not timely file its motion to seal in accordance with this Rule, the Designating Party waives its right to maintain that the Records contain Confidential Information.

(E) **Proposed Order.** A proposed order must be filed and served with the motion to seal.

(F) **Disposition of Proposed Sealed Records.**

(1) If the Designating Party fails to timely file a motion to seal after receiving Notice pursuant to Model Rule 3.0(C) above, the Filing Party must publicly file the Confidential Information in unredacted and unsealed form within seven (7) court days of the expired motion to seal deadline.

(2) If the court grants the motion to seal, the Proposed Sealed Record will be deemed filed as of the date of the filing of the Notice of Proposed Sealed Record unless otherwise directed by the court.

(3) If the court denies the motion to seal, the Filing Party shall publicly file the Confidential Information in unredacted and unsealed form within seven (7) court days of the order denying the motion to seal, or take other action as ordered by the court.

4.0 Disposition of Sealed and Redacted Records at the Conclusion of the Case.

Unless otherwise ordered by the Court, a Sealed or Redacted Record will remain sealed or redacted after final disposition of the case. Anyone seeking to unseal or unredact a Record may petition the court by motion. The motion must be served upon all parties in the case and

upon any Designating Party that is a non-party in accordance with the service requirements in this Rule.

Tab I

March 22, 2022

To: the Supreme Court Advisory Committee

From: Subcommittee on Rules 15-165a
Richard Orsinger, Subcommittee Chair

Focus: Proposed Federal rule counterpart to Tex. R. Civ. P. 76a

Memo: On the Sedona Conference Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal (December, 2021)

1. The Sedona Conference. The Sedona Conference is a 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, intellectual property rights, and data security and privacy law. The Sedona Conference has different Working Groups, one of which is Working Group 1 on Electronic Document Retention and Production.

2. Commentary on Need for Uniformity in Filing ESI & Records in Federal Courts. There is no uniform rule governing the filing of ESI (electronically-stored information) and records under seal in Federal courts. In December 2021, Working Group 1 on Electronic Document Retention and Production released its public comment version of its *Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal.* [A copy of this 54-page document is attached.] The stated intent of the Commentary "is to minimize the burden on litigants and courts created by the lack of uniformity in United States district court procedures for sealing confidential documents and electronically stored information (ESI)." To this end, the *Commentary* "offers a Proposed Model Rule designed both to bring uniformity to the process of filing under seal and to create a fair and efficient method to deal with the sealing and redacting of ESI, so that the parties can focus on the litigation while conserving the resources of the court. The Proposed Model Rule does not provide any guidelines or guidance for what ESI is properly sealed or redacted; it only provides a procedure for doing so." [p. iii]

3. Personal Information Redacted Under FRCP 5.2. Federal Rule of Civil Procedure (FRCP) 5.2, Privacy Protection For Filings Made with the Court, *permits* a filing party to redact portions of an individual's "social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number...." There are certain exemptions. A problem with Rule 5.2 is that the filing party is not *required* to redact the personal information of another party or

a non-party, and in that instance the individual whose personal information is involved has no control over whether the filing is or is not redacted. Rule 5.2(e) allows the filing of a motion for a "protective order." Rule 5.2(e) says: "For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court."

4. Fixing Misplaced Burden. The *Commentary* notes that under many of the Federal court local rules the Filing Party must move to seal the record even if it is not that party's information and the Filing Party may not have the incentive to seal and may in fact oppose sealing. [p. 1] The *Commentary* proposes to place the burden to seek a sealing order on the Designating Party – the party who has designated information produced in pretrial discovery as confidential. [p. 1] To allow this, the *Commentary* suggests that a filing party intending to file "confidential information" must issue a "Notice of Proposed Sealed Record," to be filed along with the accompanying motion, pleading, or response, identifying the confidential information it is intends to file. [p. 1-2] "The Notice, proposed in this Commentary to be a standardized and simple form for consistency and efficiency, then triggers the obligation of the designating party to file a properly supported motion to seal. This process change not only eases the burden on the filing party, but also places the burden to seal on the proper party – the party that produced the documents with a confidential designation." [p. 2]

5. Proposed Model Rule. The *Commentary* sets out four proposed model rules for sealing and redacting information filed with a Federal court, with a proposed form of notice. [pp. 3-9]

1. Presumptively Protected Information. The proposed Rule 1.0 contains definitions, describing "Presumptively Protected Information" ("PPI") as (i) Personally Identifiable Information (Social Security No., etc.); (ii) Protected Individually Identifiable Health Information (HIPAA-protected, etc.); (iii) other information protected from disclosure by Federal, state, local law and regulations or rules; and (iv) other personal information not covered by Rule 5.2, such as passport numbers, taxpayer ID numbers, military ID numbers, driver's license number, etc. [p. 3] "Confidential Information" is information that a Filing Party or Designating Party contends is "confidential or proprietary," including information designated as confidential or proprietary under a protective order or nondisclosure agreement, or information "entitled to protection from disclosure" by statute, rule, order, or other legal authority. [p. 3]

2. Sealing Presumptively Protected Information. Under proposed Rule 2.01(A),

information governed by FRCP 5.2 continues to be covered by that rule. For other PPI, the Filing Party *may* redact, without prior court approval, provided the redactions are no greater than required to protect disclosure of the PPI. Information other than PPI is governed by proposed Rule 3.0. Under proposed Rule 2.01(B), a Filing Party is not required by "this section" to redact information that was received from a Designating Party without redaction. However, proposed Rule 2.01 does not supersede a contrary court order, law, regulation, or rule that imposes an affirmative requirement to redact prior to filing. Under proposed Rule 2.01(C), the Filing Party is not required to defend redactions made by a Designating Party, and may in fact object to or challenge such redactions. Proposed Rule 2.01(D) said that redactions "should be no more extensive than required to maintain the confidentiality of the Presumptively Protected Information, and should not, where feasible, obscure the type of information being redacted, if the nature of the type of information is indicated on the original document; for example, 'D.O.B. ____.'" Proposed Rule 2.01(E) requires that redactions apprise viewers of the bases for redaction, such a by overwriting with the words "PHI/PH Redacted" or "Personal Protected Information Redacted." [pp. 4-5]

3. All Other Sealing. Proposed Rule 3.0 relates to sealing information other than PPI.

Proposed Rule 3.0(A) requires prior approval by the court before filing any record under seal or redacted, except in connection with a Notice of Proposed Sealed Record or a record containing PPI. A record filed in connection with a Notice is temporarily sealed until an order is entered. Thereafter, the record remains sealed until further order of the court. [p. 5]

Proposed Rule 3.0(B) gives instructions on filing electronically with restricted access using the court's Case Management/Electronic Case Filing (CM/ECF) system. [pp. 5-6]

Proposed Rule 3.0(C) gives particulars about the Notice of Proposed Sealing of Record. Under Rule 3.0(C)(1), the requirement to file the Notice applies to any Filing Party, even a Designating Party. Under Rule 3.0(C)(2), the Notice must identify each record that is proposed to be sealed or redacted, or must "generally identify" the Confidential Information that was redacted, without disclosing the Confidential Information. The Notice must identify the Designating Party. Under Rule 3.0(C)(3), for records filed before the Rule became effective, the Filing Party must file a Notice. If previously sealed by court order, no new motion to

seal is required to maintain sealed status. Under Rule 3.0(C)(4), the Notice must be filed "immediately after" the motion, pleading, or response to which the proposed sealed information is *referenced* or *attached*. Examples listed is a motion to compel, motion for summary judgment, or motion in limine. Under Rule 3.0(C)(5), if the records in question were produced by a non-party to the litigation, the Filing Party must give notice of the Notice to the non-party. [p. 7]

Proposed Rule 3.0(D) relates to the Motion to Seal. Under Rule 3.0(D)(1), a Designating Party who wishes to seal must file and serve a Motion to Seal. Under Rule 3.0(D)(2), the Motion to Seal must be accompanied with a nonconfidential supporting memorandum, describing each record to be sealed, the basis for sealing, and how the standards for sealing are met for each record. Under Rule 3.0(D)(3), the Motion to Seal must include a nonconfidential declaration in support of sealing, setting forth the legal basis for sealing each record, referencing the CM/ECF docket numbers. Under Rule 3.0(D)(4), the Designating Party must file its Motion to Seal and supporting declaration within the period for responding to the motion that references or attaches the designated confidential information. Absent a deadline for the responsive pleading, the deadline is seven days after filing. Under Rule 3.0(D)(5), failure to file a compliant Motion to Seal waves the right to seal. [pp. 7-8]

Proposed Rule 3.0(E) requires that a proposed order be served with the Motion to Seal. [p. 8]

Proposed Rule 3.0(F) governs disposition of Proposed Sealed Records. [p. 8]

Proposed Rule 3.0(F)(1) says that if a Designating Party fails to file a motion to seal after receiving a Notice, the Filing Party must file the record without redaction and unsealed within seven days of the deadline expiring.

Proposed Rule 3.0(F)(2) says that, if the court grants the Motion to Seal, the sealed record will be deemed filed as of the date the Notice was filed unless the court directs otherwise.

Proposed Rule 3.0(F)(3) says that, if the court denies the Motion to Seal, the Filing Party shall filed the record without redaction and unsealed within seven days after the order denying sealing or other action by the court.

6. Disposition of Proposed Sealed Records. Proposed Rule 4.0 governs the disposition

of sealed and redacted records at the conclusion of the case. Proposed Rule 4.01 says that, unless otherwise ordered by the court, a sealed or redacted record will "remain sealed or redacted after final disposition of the case. Anyone seeking to unseal or unredact a Record may petition the court by motion. The motion must be served upon all parties in the case and upon any Designating Party that is a non-party in accordance with the service requirements in this Rule."

7. Proposed Form Notice of Proposed Sealing Order. The proposed Rule provides a form Notice of Proposed Sealed Record. [p. 10] It is in tabular form, asking for the CM/ECF No., Designating Party, Objection Anticipated, Prior ECF No., and Prior Order date.

8. Annotated Rule. The *Commentary* then sets out an annotated proposed Rule [pp. 12-31] followed by a flow chart of the procedure [pp. 32].

9. Appendix: Standards for Sealing in Federal Court. The Appendix to the *Commentary* is legal briefing on the "presumptive right to access to judicial records." [p. 33] They quote *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978): "The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." The right to access is based on the public's "desire to keep a watchful eye on the workings of public agencies." [Footnotes omitted] The *Commentary* continues that the right to access to court records derives from common law, the First Amendment, or both. The *Commentary* distinguishes the right to access to court records from the right access discovery, citing FRCP 26(c), "which permits courts to protect documents and information exchanged during discovery." [p. 33]

9.1 Common Law Right of Access. The *Commentary* says that the common law right of public access to court records starts with a presumption in favor of public access. [p. 33] The common law right to access predates the U.S. Constitution, and applies to both criminal and civil proceedings. The right is not absolute, and the court has discretion in the matter. The *Commentary* says: "Because every court has inherent, supervisory power over its own records and files, even where a right of public access exists, a court may deny access where it determines that the court-filed documents may be used for improper purposes. Examples include the use of records 'to gratify private spite or promote public scandal' or to circulate libelous statements or release trade secrets." [p. 34, footnote omitted]

9.2 First Amendment Right of Access. The *Commentary* says that the U.S. Supreme Court has declared the public right of access to criminal trials rests in the First

Amendment. Citing an 11th Circuit case, the *Commentary* says that the right to access is more limited in scope in civil proceedings. [p. 34] Citing a 3rd Circuit case, the *Commentary* says that "there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." [p. 33] The *Commentary* continues: "A party seeking the removal of a document from the public eye bears the burden of establishing that there is good cause that disclosure will work a clearly defined and serious injury to the party seeking closure, and the injury must be shown with specificity."

9.3 Federal Rule 26(c). The *Commentary* says that "Federal Rule of Civil Procedure 26(c) permits a court upon a motion of a party to enter into a protective order to shield a party from 'annoyance, embarrassment, undue oppression, or undue burden or expense.' Rule 26(c)'s procedures 'replace[] the need to litigate the claim to protection document by document,' and instead 'postpones the necessary showing of "good cause" required for entry of a protective order until the confidential designation is challenged.' The trial court has complete discretion over the entry of document protective orders." [p. 35] The *Commentary* goes on to note that a party wishing to obtain a protective order over information produced in discovery must show that "good cause" exists for a protective order. Good cause means a "showing that disclosure will work a clearly defined and serious injury to the party seeking closure; the injury must be shown with specificity." [p. 35, footnote omitted] The *Commentary* says: "Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement, requiring courts to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential." [p. 35, footnote omitted] The *Commentary* notes that a protective order at the discovery stage does not typically protect information from being filed as a public record, as that public filing is a separate determination. [p. 35]

9.4 Overview of Circuit Case Law. The *Commentary* discussed the decisions by the various Federal Courts of Appeals regarding the public's right to access to court records. [pp. 36-50] These standards are summarized on pp. 51-54.

POSSIBLE DISCUSSION POINTS FOR THE SCAC

1. The Sedona Conference did not propose a standard for sealing. Possible standards include "particularized need," "good cause," "clear and compelling reasons," "legally protected interest," "no less restrictive alternatives." TRCP 76a.1(a) permits sealing only upon a showing of:

(a) a specific, serious, and substantial interest which clearly outweighs (i) the presumption of openness and (ii) any probably adverse effect that sealing will have upon the public general health or safety; and

(b) no less restrictive means than sealing will adequately and effectively protect the specific interest asserted.

2. The *Commentary* does not include case law discussing the common law and constitutional right to privacy, which are often to be balanced against public disclosure. That case law should be presented to achieve better balance.

3. Under the proposed Rule, the parties cannot seal a court record by agreement and without meeting the requirements of the proposed Rule and obtaining court approval Proposed Rule 3.0(A). [p. 5].

4. The Local Rules of the Western and Eastern Districts of Arkansas have a similar procedure requiring the parties first to consult, then the filing party must file an application for leave to file under seal, after which the designating party has four days to file a declaration in support of sealing, showing good cause or compelling reasons why the strong presumption of public access in civil cases should be overcome, with citations to the applicable legal standard. The Eastern District of California provides for a request to seal documents, but it is framed for a party seeking to file its own confidential information under seal, not the opposing party's information. The Northern District of California provides for a party wishing to file information designated by the opposing party or a non-party to file an "administrative motion to file under seal," and to give notice to the party or non-party in question, and that party or non-party has four days to file a response.

5. TRCP 76a does not give a non-filing party an opportunity to request that the court seal its confidential information before the other party files it as a public record. In that situation, the party whose confidential information has been filed is trying to get the horse back in the barn. TRCP 76a.5 permits a party to seek an emergency sealing order with notice to all parties who have appeared in the case. But in a high-profile case, confidential or private information may be disseminated by the media before the court has a chance to rule on the non-filing party's request to seal the record.

6. The proposed Rule does not mention notice to the world or the participation of non-parties in the sealing or unsealing decision. TRCP 76a provides for public notice of a motion to seal or unseal, or an order sealing or unsealing. The proposed Rule does

not say that members of the public have standing to file a motion to unseal, in contrast to TRCP 76a.3 & .8 give the public standing to participate in the sealing hearing and appeal from an order. However, proposed Rule 4.0 mentions "[a]nyone seeking to unseal or unredact a Record may petition the court by motion." Anyone is pretty broad.

7. Should the content of the information affect the standard for sealing? In TRCP 76a(2)(b)(c), the Rule's procedures, presumptions, and standards apply to unfiled settlement agreements that seek to restrict disclosure of, and unfiled discovery concerning, matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of the government. Is a different standard used for sealing information that is irrelevant to the proceeding, or is embarrassing private information filed in court for malicious or other improper purpose, or to gratify private spite or promote public scandal, or to circulate libelous statements, etc.? FRCP 26(c) permits a protective order relating to depositions to protect against annoyance and embarrassment. The Federal District of Hawaii permits sealing of "confidential, restricted, or graphic" information or images. L.R 83.12(a). The Southern District of Indiana permits filing parties to redact, without prior court permission, confidential information that is "irrelevant or immaterial to the resolution of the matter at issue." But an unredacted copy must be served on other parties. L.R. 5-11(c)(2).

8. The proposed Rule treats redacting the same as sealing an entire record. The proposed Rule provides for a redacted version for the public and an unredacted version for the court and litigants. The Southern District of Alabama provides that "portions of a document cannot be filed or placed under seal - only the entire document may be sealed." L.R 5.2(a). Under the proposed Rule, redacting is preferred to sealing the entire document.

9. What is the difference in purpose under the proposed Rule between the nonconfidential memorandum in support and the nonconfidential declaration in support? [Proposed Rule 3.0(D), pp. 7-8] The Federal District Court of Arizona requires the motion to "set forth a clear statement of the facts and legal authority" that justify sealing. TRCP 76a does not provide what the motion to seal must contain.

10. Under the proposed Rule 3.0(F)(3), if the court declines to seal the record the Filing Party must file the record, unredacted and unsealed, within seven days of the order, "or take other action ordered by the court." [p. 8] It is unsaid but may go without saying that a Filing Party who is a Designating Party can elect not to file the

document containing the confidential information. The Eastern District of California requires the clerk to return the court record to the submitting party if the request to seal is denied. L.R. 141(e)(1). The Central District of Illinois provides that where a motion to seal is denied, the document remains sealed, unless the court orders it unsealed because it was filed in disregard of legal standards or because it so intricately connected to a pending matter that the interests of justice would be served by unsealing. L.R. 5.10(A)(4).

11. The Local Rules for the Northern District of California permit sealing when the proponent establishes that the document is privileged, protectable as a trade secret, or is otherwise entitled to protection under the law. L.R. 79-5.b. The proposed Rule does not mention documents that are privileged. Neither does TRCP 76a. Should evidentiary privilege be listed as a ground that automatically warrants sealing?

12. Proposed Rule 3.0(B)(7) prohibits sealing an order disposing of a motion to seal, but does not address sealing other court orders. Can other orders be sealed? Some Federal court local rules provide for the sealing of court orders. TRCP 76a.1 says that "[n]o court order or opinion issued in the adjudication of a case may be sealed." Does that include interlocutory orders, or just orders that dispose of the case? TRCP 76a.6 provides that an order sealing or unsealing court records cannot be sealed.

13. The proposed Rule does not apply to unfiled settlement agreements or unfiled discovery, while TRCP 76a does. The Local Rules for the Middle District of Delaware says that "[n]o settlement agreement shall be sealed absent extraordinary circumstances, such as preservation of national security, protection of trade secrets, or other valuable proprietary information, protection of especially vulnerable persons including minors and persons with disabilities, or the protection of non-parties without either the opportunity or the ability to protect themselves." LR 1.09(a).

14. The proposed Rule's mechanism does not work if the confidential information is obtained outside the discovery process, and no party or non-party has the opportunity to designate the information as confidential.

15. The proposed Rule contains no requirement that a sealing order contain particularized findings, or a clear statement of the facts and legal authority, etc. The annotation to the rule explains that this was because "district courts have widely differing standards on the substantive requirements that must be met for a court to justify removing a document, or a portion of a document, from public view." [p. 29] Some Federal court local rules require specific findings or recitals in an order

granting or denying a sealing request. TRCP 76a.6 requires an order sealing or unsealing to state "the specific reasons for finding and concluding whether the standard for sealing has been met."

16. The proposed Rule does not address the transmittal of sealed or redacted records from trial to appellate court, nor the procedures for filing in the appellate court.

17. The proposed Rule does not limit the duration of a sealing order after the case is closed. Rule 4.0 [p. 8] However, "anyone seeking to unseal or unredact" may petition the court by motion, which must be served upon all parties and any Designating Party that is a non-party. [pp. 8-9] The Local Rules for the Northern District of California says that any sealed record will be opened upon request made ten year or more after the case was closed. L.R. 79-5(g). The Southern District of California provides for the clerk to return all sealed documents to the filing party, upon entry of final judgment or termination of the appeal. L.R. 79.2. The Middle District of Delaware limits the duration of a sealing order to one year, subject to renewal. L.R 1.09(c). The Northern District of Illinois provides that, after the case is concluded, the party filing a sealed document must retrieve it within 30 days of notice from the clerk, failing which the sealed record is destroyed. L.R. 26.2(h). The Northern District of Iowa's clerk may destroy sealed records one year after the judgment became final, unless someone files an objection within one year. L.R. 5.c. TRCP 76a.7 has no automatic termination date, but allows any person to intervene after judgment to seal or unseal records. If the party already lost a sealing hearing, s/he must show changed circumstances. Even when a motion to unseal is filed, the burden remains on the party seeking to maintain sealing to justify continued sealing. TRCP 76a.7.

END

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Proposed Rule 3.0(F)(1) says that if a Designating Party fails to file a motion to seal after receiving a Notice, the Filing Party must file the record without redaction and unsealed within seven days of the deadline expiring.

Proposed Rule 3.0(F)(2) says that, if the court grants the Motion to Seal, the sealed record will be deemed filed as of the date the Notice was filed unless the court directs otherwise.

Proposed Rule 3.0(F)(3) says that, if the court denies the Motion to Seal, the Filing Party shall filed the record without redaction and unsealed within seven days after the order denying sealing or other action by the court.

6. Disposition of Proposed Sealed Records. Proposed Rule 4.0 governs the disposition

of sealed and redacted records at the conclusion of the case. Proposed Rule 4.01 says that, unless otherwise ordered by the court, a sealed or redacted record will "remain sealed or redacted after final disposition of the case. Anyone seeking to unseal or unredact a Record may petition the court by motion. The motion must be served upon all parties in the case and upon any Designating Party that is a non-party in accordance with the service requirements in this Rule."

7. Proposed Form Notice of Proposed Sealing Order. The proposed Rule provides a form Notice of Proposed Sealed Record. [p. 10] It is in tabular form, asking for the CM/ECF No., Designating Party, Objection Anticipated, Prior ECF No., and Prior Order date.

8. Annotated Rule. The *Commentary* then sets out an annotated proposed Rule [pp. 12-31] followed by a flow chart of the procedure [pp. 32].

9. Appendix: Standards for Sealing in Federal Court. The Appendix to the *Commentary* is legal briefing on the "presumptive right to access to judicial records." [p. 33] They quote *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978): "The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." The right to access is based on the public's "desire to keep a watchful eye on the workings of public agencies." [Footnotes omitted] The *Commentary* continues that the right to access to court records derives from common law, the First Amendment, or both. The *Commentary* distinguishes the right to access to court records from the right access discovery, citing FRCP 26(c), "which permits courts to protect documents and information exchanged during discovery." [p. 33]

9.1 Common Law Right of Access. The *Commentary* says that the common law right of public access to court records starts with a presumption in favor of public access. [p. 33] The common law right to access predates the U.S. Constitution, and applies to both criminal and civil proceedings. The right is not absolute, and the court has discretion in the matter. The *Commentary* says: "Because every court has inherent, supervisory power over its own records and files, even where a right of public access exists, a court may deny access where it determines that the court-filed documents may be used for improper purposes. Examples include the use of records 'to gratify private spite or promote public scandal' or to circulate libelous statements or release trade secrets." [p. 34, footnote omitted]

9.2 First Amendment Right of Access. The *Commentary* says that the U.S. Supreme Court has declared the public right of access to criminal trials rests in the First

Amendment. Citing an 11th Circuit case, the *Commentary* says that the right to access is more limited in scope in civil proceedings. [p. 34] Citing a 3rd Circuit case, the *Commentary* says that "there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." [p. 33] The *Commentary* continues: "A party seeking the removal of a document from the public eye bears the burden of establishing that there is good cause that disclosure will work a clearly defined and serious injury to the party seeking closure, and the injury must be shown with specificity."

9.3 Federal Rule 26(c). The *Commentary* says that "Federal Rule of Civil Procedure 26(c) permits a court upon a motion of a party to enter into a protective order to shield a party from 'annoyance, embarrassment, undue oppression, or undue burden or expense.' Rule 26(c)'s procedures 'replace[] the need to litigate the claim to protection document by document,' and instead 'postpones the necessary showing of "good cause" required for entry of a protective order until the confidential designation is challenged.' The trial court has complete discretion over the entry of document protective orders." [p. 35] The *Commentary* goes on to note that a party wishing to obtain a protective order over information produced in discovery must show that "good cause" exists for a protective order. Good cause means a "showing that disclosure will work a clearly defined and serious injury to the party seeking closure; the injury must be shown with specificity." [p. 35, footnote omitted] The *Commentary* says: "Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement, requiring courts to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential." [p. 35, footnote omitted] The *Commentary* notes that a protective order at the discovery stage does not typically protect information from being filed as a public record, as that public filing is a separate determination. [p. 35]

9.4 Overview of Circuit Case Law. The *Commentary* discussed the decisions by the various Federal Courts of Appeals regarding the public's right to access to court records. [pp. 36-50] These standards are summarized on pp. 51-54.

POSSIBLE DISCUSSION POINTS FOR THE SCAC

1. The Sedona Conference did not propose a standard for sealing. Possible standards include "particularized need," "good cause," "clear and compelling reasons," "legally protected interest," "no less restrictive alternatives." TRCP 76a.1(a) permits sealing only upon a showing of:

(a) a specific, serious, and substantial interest which clearly outweighs (i) the presumption of openness and (ii) any probably adverse effect that sealing will have upon the public general health or safety; and

(b) no less restrictive means than sealing will adequately and effectively protect the specific interest asserted.

2. The *Commentary* does not include case law discussing the common law and constitutional right to privacy, which are often to be balanced against public disclosure. That case law should be presented to achieve better balance.

3. Under the proposed Rule, the parties cannot seal a court record by agreement and without meeting the requirements of the proposed Rule and obtaining court approval Proposed Rule 3.0(A). [p. 5].

4. The Local Rules of the Western and Eastern Districts of Arkansas have a similar procedure requiring the parties first to consult, then the filing party must file an application for leave to file under seal, after which the designating party has four days to file a declaration in support of sealing, showing good cause or compelling reasons why the strong presumption of public access in civil cases should be overcome, with citations to the applicable legal standard. The Eastern District of California provides for a request to seal documents, but it is framed for a party seeking to file its own confidential information under seal, not the opposing party's information. The Northern District of California provides for a party wishing to file information designated by the opposing party or a non-party to file an "administrative motion to file under seal," and to give notice to the party or non-party in question, and that party or non-party has four days to file a response.

5. TRCP 76a does not give a non-filing party an opportunity to request that the court seal its confidential information before the other party files it as a public record. In that situation, the party whose confidential information has been filed is trying to get the horse back in the barn. TRCP 76a.5 permits a party to seek an emergency sealing order with notice to all parties who have appeared in the case. But in a high-profile case, confidential or private information may be disseminated by the media before the court has a chance to rule on the non-filing party's request to seal the record.

6. The proposed Rule does not mention notice to the world or the participation of non-parties in the sealing or unsealing decision. TRCP 76a provides for public notice of a motion to seal or unseal, or an order sealing or unsealing. The proposed Rule does

not say that members of the public have standing to file a motion to unseal, in contrast to TRCP 76a.3 & .8 give the public standing to participate in the sealing hearing and appeal from an order. However, proposed Rule 4.0 mentions "[a]nyone seeking to unseal or unredact a Record may petition the court by motion." Anyone is pretty broad.

7. Should the content of the information affect the standard for sealing? In TRCP 76a(2)(b)(c), the Rule's procedures, presumptions, and standards apply to unfiled settlement agreements that seek to restrict disclosure of, and unfiled discovery concerning, matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of the government. Is a different standard used for sealing information that is irrelevant to the proceeding, or is embarrassing private information filed in court for malicious or other improper purpose, or to gratify private spite or promote public scandal, or to circulate libelous statements, etc.? FRCP 26(c) permits a protective order relating to depositions to protect against annoyance and embarrassment. The Federal District of Hawaii permits sealing of "confidential, restricted, or graphic" information or images. L.R 83.12(a). The Southern District of Indiana permits filing parties to redact, without prior court permission, confidential information that is "irrelevant or immaterial to the resolution of the matter at issue." But an unredacted copy must be served on other parties. L.R. 5-11(c)(2).

8. The proposed Rule treats redacting the same as sealing an entire record. The proposed Rule provides for a redacted version for the public and an unredacted version for the court and litigants. The Southern District of Alabama provides that "portions of a document cannot be filed or placed under seal - only the entire document may be sealed." L.R 5.2(a). Under the proposed Rule, redacting is preferred to sealing the entire document.

9. What is the difference in purpose under the proposed Rule between the nonconfidential memorandum in support and the nonconfidential declaration in support? [Proposed Rule 3.0(D), pp. 7-8] The Federal District Court of Arizona requires the motion to "set forth a clear statement of the facts and legal authority" that justify sealing. TRCP 76a does not provide what the motion to seal must contain.

10. Under the proposed Rule 3.0(F)(3), if the court declines to seal the record the Filing Party must file the record, unredacted and unsealed, within seven days of the order, "or take other action ordered by the court." [p. 8] It is unsaid but may go without saying that a Filing Party who is a Designating Party can elect not to file the

document containing the confidential information. The Eastern District of California requires the clerk to return the court record to the submitting party if the request to seal is denied. L.R. 141(e)(1). The Central District of Illinois provides that where a motion to seal is denied, the document remains sealed, unless the court orders it unsealed because it was filed in disregard of legal standards or because it so intricately connected to a pending matter that the interests of justice would be served by unsealing. L.R. 5.10(A)(4).

11. The Local Rules for the Northern District of California permit sealing when the proponent establishes that the document is privileged, protectable as a trade secret, or is otherwise entitled to protection under the law. L.R. 79-5.b. The proposed Rule does not mention documents that are privileged. Neither does TRCP 76a. Should evidentiary privilege be listed as a ground that automatically warrants sealing?

12. Proposed Rule 3.0(B)(7) prohibits sealing an order disposing of a motion to seal, but does not address sealing other court orders. Can other orders be sealed? Some Federal court local rules provide for the sealing of court orders. TRCP 76a.1 says that "[n]o court order or opinion issued in the adjudication of a case may be sealed." Does that include interlocutory orders, or just orders that dispose of the case? TRCP 76a.6 provides that an order sealing or unsealing court records cannot be sealed.

13. The proposed Rule does not apply to unfiled settlement agreements or unfiled discovery, while TRCP 76a does. The Local Rules for the Middle District of Delaware says that "[n]o settlement agreement shall be sealed absent extraordinary circumstances, such as preservation of national security, protection of trade secrets, or other valuable proprietary information, protection of especially vulnerable persons including minors and persons with disabilities, or the protection of non-parties without either the opportunity or the ability to protect themselves." LR 1.09(a).

14. The proposed Rule's mechanism does not work if the confidential information is obtained outside the discovery process, and no party or non-party has the opportunity to designate the information as confidential.

15. The proposed Rule contains no requirement that a sealing order contain particularized findings, or a clear statement of the facts and legal authority, etc. The annotation to the rule explains that this was because "district courts have widely differing standards on the substantive requirements that must be met for a court to justify removing a document, or a portion of a document, from public view." [p. 29] Some Federal court local rules require specific findings or recitals in an order

granting or denying a sealing request. TRCP 76a.6 requires an order sealing or unsealing to state "the specific reasons for finding and concluding whether the standard for sealing has been met."

16. The proposed Rule does not address the transmittal of sealed or redacted records from trial to appellate court, nor the procedures for filing in the appellate court.

17. The proposed Rule does not limit the duration of a sealing order after the case is closed. Rule 4.0 [p. 8] However, "anyone seeking to unseal or unredact" may petition the court by motion, which must be served upon all parties and any Designating Party that is a non-party. [pp. 8-9] The Local Rules for the Northern District of California says that any sealed record will be opened upon request made ten year or more after the case was closed. L.R. 79-5(g). The Southern District of California provides for the clerk to return all sealed documents to the filing party, upon entry of final judgment or termination of the appeal. L.R. 79.2. The Middle District of Delaware limits the duration of a sealing order to one year, subject to renewal. L.R 1.09(c). The Northern District of Illinois provides that, after the case is concluded, the party filing a sealed document must retrieve it within 30 days of notice from the clerk, failing which the sealed record is destroyed. L.R. 26.2(h). The Northern District of Iowa's clerk may destroy sealed records one year after the judgment became final, unless someone files an objection within one year. L.R. 5.c. TRCP 76a.7 has no automatic termination date, but allows any person to intervene after judgment to seal or unseal records. If the party already lost a sealing hearing, s/he must show changed circumstances. Even when a motion to unseal is filed, the burden remains on the party seeking to maintain sealing to justify continued sealing. TRCP 76a.7.

END

Tab J

Stephen Yelenosky's **09/20/2022** Proposed Revision
Compared to Subcommittee's 8-16-22 Proposed Revision of 76a

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed, except as provided below. Information in other court records is presumed to be open to the general public and may be sealed only if there is a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records are:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents to which access is otherwise restricted by law;

(3) a court order required, or permitted, to be sealed by statute;

(4) a court order changing the name of a person ~~to protect that person from a well-founded fear of violence~~ who has been granted a protective order due to family violence.

(5) documents filed in an action originally arising under the Family Code;

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

3. **Presumption and Process for Trade Secrets**. The presumption regarding trade secrets is governed by the Texas Uniform Trade Secrets Act. The process required by this rule applies to trade secrets.

~~3. **Information Presumed to meet the Standard of Sealing.**~~

~~(a) It is presumed that the following information within a court record meets the standard for sealing as prescribed in Paragraph 1:~~

~~(1) trade secrets or other proprietary information of a party or non-party;~~

~~(2) information that is confidential under a constitution, statute, or rule;~~

~~(3) information subject to a confidentiality agreement or protective order;~~

~~(4) information subject to a pre-suit non-disclosure agreement with a non-party; and~~

~~(5) an order changing the name of a person to protect that person from a well-founded fear of violence.~~

~~(b) After fourteen days from the date of the notice required under Paragraph 5, the information shall be ordered sealed unless a hearing has been requested or the judge determines that the information does not meet the requirements of this Paragraph. If a hearing is requested, the information shall be ordered sealed unless a person objecting to sealing or moving to unseal the information shows that sealing, or failure to unseal, would have a probable adverse effect upon the general public health or safety or unless the judge determines that the information does not meet the requirements of this Paragraph~~

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information ~~described in Paragraph 3 without requesting that it be sealed must give notice to all parties, to any third party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest in the confidentiality of the information is otherwise known.~~ that the party knows has been kept confidential by another party or by a nonparty must not file it unsealed without giving notice to the parties and to any such nonparty. The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal pursuant to this rule.

5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices ~~(https://topics.txcourts.gov/)~~ for at least 14 days before any judge may enter a final order sealing the records.

5b. Information Provided to the Judge: Upon filing the motion to seal and providing the required notice, a movant must provide the judge with a copy of the information the movant is asking the judge to seal. The information provided to the judge solely for the purpose of deciding the motion to seal is not "filed" as that term is used in paragraph 2. If the court denies the motion, the movant may file the information with the clerk unsealed or may choose not to file

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it. If the movant chooses not to file the information with the clerk, it must not be considered by the court for any purpose.

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6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices ~~(https://topics.txcourts.gov/)~~ for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery and who the party knows has kept the information confidential. ~~to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest is otherwise known.~~

7. **Hearing.** A hearing on a motion to seal or unseal is not required unless requested. If a hearing is requested within 14 days of the public notice, it shall be held in open court and open to the public as soon as practicable, but not less than fourteen days after the request for the hearing. Any party to the case, any non-party who filed a motion to seal or unseal, and any person who requested the hearing may participate in the hearing in a manner determined by the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. **Temporary Sealing Order**. A temporary sealing order may issue only if there is a showing of a compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant to immediately give the public notice required by Paragraph 5. A temporary sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration

9. **Order.** An order sealing or unsealing a court record must be filed and open to the public. It must state the specific reasons for finding and concluding whether the showing required by Paragraph 1 has been made. An order that seals a court record must also reference the specific portions of court records which are to be sealed by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state the time period for which the sealed portions of the court records are to be sealed, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

10. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. If a court has previously ruled on a request to seal or unseal filed documents, the movant who seeks to seal or unseal the filed documents at a later time must show a material and substantial change in circumstances affecting the prior ruling since the time of the prior ruling. Such circumstances need not be related to the case in which the

order was issued. Upon a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents pursuant to this rule.

11. **Appeal**. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and participated in it. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

12**. Application**. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

13. **Sanctions**. Non-compliance with this rule is subject to sanctions~~ pursuant to rule 13 and Chapters 9 or 10 of the Texas Civil Practice and Remedies Code~~. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

~~Comment: Paragraph 3(a) resolves the conflict between the rule's prohibition on sealing court orders and legal requirements that an order be sealed or that some information within an order be concealed. For example, Chapter 82 of the CPRC gives the plaintiff the option of concealing her identity by using a pseudonym. Though not otherwise required by law, Paragraph 3(a)(5) permitting certain name change orders to be sealed, like Chapter 82, is intended to protect a person from violence.~~

Comment to Paragraph 3: The presumption and procedure for sealing trade secrets was decided by the Texas Supreme Court in HouseCanary, Inc. v. Title Source In., 622 S.W.3rd 254 (Tex. 2021).

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Tab K

Stephen Yelenosky's 9-20-22 Proposed Revision Compared to 76a

1. **Standard for Sealing Court Records.** Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed~~. Other~~, except as provided below. Information in other court records~~, as defined in this rule, are~~ is presumed to be open to the general public and may be sealed only ~~upon~~if there is a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records ~~means~~are:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents ~~in court files~~ to which access is otherwise restricted by law;

(3) a court order required, or permitted, to be sealed by statute;

(4) a court order changing the name of a person who has been granted a protective order due to family violence.

(5) documents filed in an action originally arising under the Family Code;

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government

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~~(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.~~

3. **Presumption and Process for Trade Secrets**. The presumption regarding trade secrets is governed by the Texas Uniform Trade Secrets Act. The process required by this rule applies to trade secrets.

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information that the party knows has been kept confidential by another party or by a nonparty must not file it unsealed without giving notice to the parties and to any such nonparty. The information may not be filed unsealed for 14 days from date of the notice, and the notice must state that the recipient has until then to file the recipient has until then to file a motion to seal pursuant to this rule.

5. Motion to Seal and Notice: ~~Court records may be sealed only upon a party's written motion, which shall be open to public inspection~~. A request for a final sealing order is made by filing a stand-alone motion with the clerk. ~~The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating that a hearing will be held in open court on a motion to seal court records in the specific case:~~ A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed~~; that any person may intervene and be heard concerning the sealing of court records; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.~~ and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices for at least 14 days before any judge may enter a final order sealing the records.

5b. Information Provided to the Judge: Upon filing the motion to seal and providing the required notice, a movant must provide the judge with a copy of the information the movant is asking the judge to seal. The information provided to the judge solely for the purpose of deciding the motion to seal is not "filed" as that term is used in paragraph 2. If the court denies the motion, the movant may file the information with the clerk unsealed or may choose not to file it. If the movant chooses not to file the information with the clerk, it must not be considered by the court for any purpose.

6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document

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containing the information, and to those whose probable interest is otherwise known. If a hearing is requested within 14 days of the public notice, a judge may not sign an order unsealing the records until the hearing has been held.

7. **Hearing.** A hearing~~, open to the public,~~ on a motion to seal ~~court records~~or unseal is not required unless requested. If a hearing is requested within 14 days of the public notice, it shall be held in open court and open to the public as soon as practicable, but not less than fourteen days after the ~~motion is filed and notice is posted. Any party~~ request for the hearing. Any party to the case, any non-party who filed a motion to seal or unseal, and any person who requested the hearing may participate in the hearing~~. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a~~ in a manner determined by the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. **Temporary Sealing Order.** A temporary sealing order may issue ~~upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon~~only if there is a showing of a compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant ~~before notice can be posted and a hearing held as otherwise provided herein.~~. The temporary order shall ~~set the time for the hearing required by paragraph 4 and shall~~ direct ~~that~~ the movant to immediately give the public notice required by ~~paragraph 3. The court may modify or withdraw any~~Paragraph 5. A temporary ~~order upon motion by any party or intervenor, notice to the parties, and hearing conducted~~sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as ~~practicable. Issuance~~the clerk becomes aware of ~~a temporary order shall not reduce in any way~~ the ~~burden of proof of a party requesting sealing at the hearing requir~~require~~ed by paragraph 4.~~its expiration

9. **Order ~~on Motion to Seal Court Records.~~** ~~A motion relating to~~. An order sealing or unsealing a court ~~records shall~~ record must be ~~decided by written order,~~ filed and open to the public~~, which shall~~. It must state~~: the style and number of the case;~~ the specific reasons for finding and concluding whether the showing required by ~~paragraph~~Paragraph 1 has been made. An order that seals a court record must also reference the specific portions of court records which are to be sealed~~; and~~ by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state the time period for which the sealed portions of the court records are to be sealed, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

10. **Continuing Jurisdiction.** Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. ~~An order sealing or unsealing~~If a court ~~records~~

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~~shall not be reconsidered~~has previously ruled on ~~motion of any party or intervenor~~a request to seal or unseal filed documents, the movant who ~~had actual notice of the hearing preceding issuance of~~seeks to seal or unseal the ~~order, without first showing changed~~ filed documents at a later time must show a material and substantial change in circumstances ~~materially~~ affecting the ~~order.~~prior ruling since the time of the prior ruling. Such circumstances need not be related to the case in which the order was issued. ~~However, the burden of making the showing required by paragraph 1, shall always be on~~Upon a showing of material and substantial change in circumstances, the ~~party seeking to seal records.~~court must then consider the request to seal or unseal the filed documents pursuant to this rule.

11. **Appeal.** Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party ~~or intervenor~~, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and participated in ~~the hearing preceding issuance of such order~~it. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

12. **Application.** Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

13. **Sanctions**. Non-compliance with this rule is subject to sanctions. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

Comment to Paragraph 3: The presumption and procedure for sealing trade secrets was decided by the Texas Supreme Court in HouseCanary, Inc. v. Title Source In., 622 S.W.3rd 254 (Tex. 2021).

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Clean Version of Stephen Yelenosky's **09/20/2022** Proposed Revision

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed, except as provided below. Information in other court records is presumed to be open to the general public and may be sealed only if there is a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records are:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents to which access is otherwise restricted by law;

(3) a court order required, or permitted, to be sealed by statute;

(4) a court order changing the name of a person who has been granted a protective order due to family violence.

(5) documents filed in an action originally arising under the Family Code;

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.3. **Presumption and Process for Trade Secrets**. The presumption regarding trade secrets is governed by the Texas Uniform Trade Secrets Act. The process required by this rule applies to trade secrets.

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information that the party knows has been kept confidential by another party or by a nonparty must not file it unsealed without giving notice to the parties and to any such nonparty.

The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal pursuant to this rule.

5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices for at least 14 days before any judge may enter a final order sealing the records.

5b. Information Provided to the Judge: Upon filing the motion to seal and providing the required notice, a movant must provide the judge with a copy of the information the movant is asking the judge to seal. The information provided to the judge solely for the purpose of deciding the motion to seal is not "filed" as that term is used in paragraph 2. If the court denies the motion, the movant may file the information with the clerk unsealed or may choose not to file it. If the movant chooses not to file the information, it must not be considered by the court for any purpose.

6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery and who the party knows has kept the information confidential.

7. **Hearing.** A hearing on a motion to seal or unseal is not required unless requested. If a hearing is requested within 14 days of the public notice, it shall be held in open court and open to the public as soon as practicable, but not less than fourteen days after the request for the hearing. Any party to the case, any non-party who filed a motion to seal or unseal, and any person who requested the hearing may participate in the hearing in a manner determined by the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. **Temporary Sealing Order**. A temporary sealing order may issue only if there is a showing of a compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant to immediately give the public notice required by Paragraph 5. A temporary sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration

9. **Order.** An order sealing or unsealing a court record must be filed and open to the public. It must state the specific reasons for finding and concluding whether the showing required by Paragraph 1 has been made. An order that seals a court record must also reference the specific portions of court records which are to be sealed by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state

the time period for which the sealed portions of the court records are to be sealed, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

10. Continuing Jurisdiction. Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. If a court has previously ruled on a request to seal or unseal filed documents, the movant who seeks to seal or unseal the filed documents at a later time must show a material and substantial change in circumstances affecting the prior ruling since the time of the prior ruling. Such circumstances need not be related to the case in which the order was issued. Upon a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents pursuant to this rule.

11. **Appeal**. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and participated in it. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

12**. Application**. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

13. **Sanctions**. Non-compliance with this rule is subject to sanctions. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

Comment to Paragraph 3: The presumption and procedure for sealing trade secrets was decided by the Texas Supreme Court in HouseCanary, Inc. v. Title Source In., 622 S.W.3rd 254 (Tex. 2021).

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December 14, 2021

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Remote Proceedings Rules. In the attached report, the Remote Proceedings Task Force proposes new Rules of Civil Procedure 21d, 500.2(g), and 500.10; amendments to Rules of Civil Procedure 18c, 21, 176, and 500.8; amendments to Rules of Appellate Procedure 14, 39, and 59; and amendments to Rule of Judicial Administration 12. The Committee should review and make recommendations.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

November 17, 2021

Chief Justice Nathan Hecht
(sent via email)

Re: Remote Proceedings Task Force Report of November 17, 2021

Dear Chief Justice Hecht,

Pursuant to the Supreme Court's Remote Proceedings Rules Plan, our task force split into three subcommittees to review our civil rules. Our goal was to propose rules that will accommodate remote proceedings in the future. Our Task Force received numerous emails in support of continued remote proceedings and met with other interested stakeholders. We had input from members of the State Bar Rules Committee as well.

Subcommittee 1, chaired by Lisa Hobbs, reviewed the Rules of Judicial Administration, the Rules of Appellate Procedure, and Texas Rule of Civil Procedure 18c, concerning recording and broadcasting of court proceedings. The committee has proposed a substantially revised rule 18c, changes to various appellate rules and to administrative rule12. The report is attached as Exhibit A.

Subcommittee 2, chaired by Kennon Wooten, has proposed a new rule of civil procedure for notice of hearings and for remote appearances at court proceedings. The subcommittee also worked with the Justice Court Working Group to similarly revise those rules. The report is attached as Exhibit B

Subcommittee 3, chaired by Quentin Smith, discussed and prepared changes to Rule 176 to accommodate subpoenas to remote depositions or hearings and a few other minor rule changes. The report is attached as Exhibit C.

We have enjoyed working on the preliminary drafting assignments and stand ready to assist the court in any further review or drafting.

Sincerely, Tracy Christopher
Tracy Christopher

November 9, 2021

To: Remote Proceedings Task Force

From: Lisa Hobbs, chair, Subcommittee 1

Re: Subcommittee 1's Report and Recommendations

Subcommittee one met on the following dates:
September 29, 2021
October 12, 2021
November 3, 2021

Our proposed new and amended rules are attached as Exh. A.

Task 1: Recording and Broadcasting Rules

One of the most difficult of our subcommittee's tasks was to review and recommend amendments to the Texas rules governing the recording and broadcasting of court proceedings in light of the trend towards remote proceedings via Zoom, YouTube, etc. The subcommittee reviewed two rules. *See* TEX. R. CIV. P. 18c; TEX. R. APP. P 14 (copies of current rules attached as Exh. B).

In addition to the current rules, the subcommittee also reviewed and relied on two other documents. First, the Office of Court Administration has created a document entitled *Background and Legal Standards – Public Right to Access Remote Hearings During Covid-19 Pandemic*. (See Exh. C.)[1] Second, in the early nineties, the Texas Supreme Court studied and finalized uniform rules for the coverage of court proceedings, which served as a template for many counties who have adopted a local rule on broadcasting. *See, e.g.*, Misc. Docket No. 92-0068 (attached as Exh. D).

The subcommittee observed the differences in approaches to the various rules and standards. Most notably, current Rule 18c appears to require consent of participants before a proceeding can be recorded or broadcast. *See also In re BP Products North America Inc.*, 263 S.W.3d 117 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding)

[1] OCA provided trial courts a wealth of information on remote proceedings during the pandemic, which can be accessed here: TJB | Court Coronavirus Information | Electronic Hearings (Zoom) (txcourts.gov)

(conditionally issuing writ of mandamus in a case where a Galveston trial court allowed the "gavel to gavel" broadcast of a trial over one party's objection). Rule 18c is alone in this approach. The other rules and guidelines, including TRAP 14, leave the decision to record or broadcast to the trial or appellate court, presumably even over an objection by a party or participant.

The variance left a lot for the subcommittee to discuss. Some discussions were more philosophical; some discussions were more practical:

- When these rules were originally drafted, they contemplated a television camera in a physical courthouse to air on an evening newscast. Technology, and thus an individual's expectation of access and to information, has increased dramatically. There is room to completely re-write the rules with those expectations and technological advances in mind.
- Any "right to access" the courthouse is not an unfettered right. Live broadcasts during the pandemic were not an entitlement; they were a practical necessity for the participants and so the judicial process did not grind to a halt. As we get back to "normal," courthouses are and will be physically opened. There is no established "right" for the public to watch a proceeding from the comfort of their own homes.
- When sensitive and protected information is presented in a courtroom, rather than in person or remotely, that information must be protected. Any new rules should address that issue (particularly the issue of trade secrets) directly.
- A definition of "remote proceeding" might be helpful. A remote proceeding is not any proceeding in which any participant is participating remotely. A remote proceeding is one in which the judge is not in the courtroom, *i.e.*, there is no physical courtroom to "open" to the public.
- What is the nature of the public's right to access? What are the parameters of that right? The current rules, though philosophically different, already adopt the basic principle that the public's right to access is not unfettered and is subject to reasonable restrictions. (*See In re M-I L.L.C.*, 505 S.W.3d 569, 577-78 (Tex. 2016) ("To the extent the open-courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests.")). We need not start from a blank slate. We should consider the limitations and restrictions already considered in Texas in past studies.
- With the publication of proceedings on a site like YouTube, there is the potential for misuse that was less of a concern under the traditional context of a media

entity recording portions of a proceeding for news broadcast purposes. These readily available, unedited recordings may pose security risks for the participants. They are also easy to manipulate and to be used for nefarious purposes—particularly in a state like Texas that elects judges. The potential for misuse raises practical questions, *e.g.*, should there be time limits for how long footage is stored/accessible?

- Should the procedures and standards for recording or broadcasting be different whether the medium is traditional media versus a court-controlled medium (like You-Tube)? Courts that regularly livestream their docket do not want an unwieldly process that might encourage objections to what is now seen as routine. This philosophy may create tension with business litigants who prefer a more defined procedure to guide a trial court when proprietary or trade secret information is at issue in a lawsuit.
- How detailed should the rule be?
    - Should it be a broad rule, leaving the issue in the trial court's sole discretion?
    - Should it provide time limitations or broader concepts like "reasonableness"/ "opportunity to be heard"?
    - Should the rule be permissive ("may… under these limitations…") or prohibitive ("cannot . . . unless")?
    - Who has the burden? What is the showing? Should findings be required?
    - Should there be an avenue for appellate review? If so, what is the standard of review?
    - Should a local jurisdiction be able to expand or restrict access inconsistent with any new rule?
- A final concern that did not get incorporated in the draft due to time constraints: some subcommittee member would expressly state that the ruling on an objection to recording/broadcasting must be made prior to a proceeding being recorded/broadcast, whether as a matter of good procedure or so that a party would have an express ruling for mandamus purposes. Others felt the ruling would be implicit in the trial court's action to record/broadcast (or not).

Task 2: TRAP recommendations

The subcommittee also reviewed the Texas Rules of Appellate Procedure to consider whether any rules needed to be amended to account for any new rules regarding remote proceedings that are recorded or broadcast.

As a result of its review, the subcommittee proposes amendments to the Texas Rules of Appellate Procedure to (1) conform TRAP 14 with new proposed TRCP 18c; and (2) expressly authorize remote oral argument in all cases. In making these recommendations, the subcommittee reviewed the relevant provisions of Chapter 22 of the Government Code and makes a few observations.

First, the Government Code authorizes any appellate court to "order that oral argument be presented through the use of teleconferencing technology." TEX. GOV'T CODE §22.302.[2] The Government Code also authorizes the two high courts to record and post online their arguments. TEX. GOV'T CODE §22.303 ("If appropriated funds or donations are available in the amount necessary to cover the cost, the supreme court and the court of criminal appeals shall make a video recording or other electronic visual and audio recording of each oral argument and public meeting of the court and post the recording on the court's Internet website."). The Government Code does not appear to authorize livestreaming for any appellate court and, more importantly, does not appear to authorize the intermediate appellate courts to even record and post online their oral arguments. Proposed amendments to TRAP 14 expressly provide that authority for all appellate courts.

Second, generally speaking, transferred cases must be heard in the originating appellate district unless all parties agree otherwise. TEX. GOV'T CODE §73.003. Likewise, some courts of appeals must hold argument in certain cases in a specific city or county. *See* TEX. GOV'T CODE TEX. GOV'T CODE §22.204 (Third CA must hold argument in Travis County in Travis County); §22.205 (Fourth CA must hold argument in Bexar County appeals in Bexar County); §22.207 (Sixth CA must hold argument in Bowie County appeals in Texarkana); §22.209 (Eighth CA must hold argument in El Paso appeals in El Paso county); §22.213 (Twelfth CA must hold argument in Smith County appeals in Tyler); TEX. GOV'T CODE §22.214 (Thirteenth CA must hold argument in Nueces County cases in Nueces County and cases from Cameron, Hidalgo, or Willacy County shall be heard and transacted in Cameron, Hidalgo, or Willacy counties). *See also* Roger Hughes, *The Fixed Locale Requirements for Appellate Court Proceedings: The Importance of Being Somewhere if You're Not Anywhere*, 22 APP. ADVOC. 122 (Winter 2009) (discussing in greater detail "fixed locale requirements" for Texas appellate courts and their history).

[2] There is also a specific authorization for remote proceedings in election proceedings. TEX. GOV'T CODE §22.305(b) (entitled "PRIORITY OF CERTAIN ELECTION PROCEEDINGS," and providing "[i]f granted, oral argument for a proceeding described by Subsection (a) may be given in person or through electronic means"). This is probably unnecessary given the general authorization in Section 22.302.

Even in these situations, however, it appears that appellate courts can hold argument remotely in lieu of in-person argument at a specific location. *See, e.g.*, TEX. GOV'T CODE §73.003(e) (allowing the chief justice of an appellate court to elect to "hear oral argument through the use of teleconferencing technology" in transferred cases); §22.302 (more generally authorizing an appellate "court and the parties or their attorneys [to] participate in oral argument from any location through the use of teleconferencing technology." Nevertheless, the subcommittee recommends adding a provision in proposed amendments to TRAP 39.8 to make clear that the general authority to hear a case remotely applies even when a particular case, by statute, must be heard in a particular location.

The additional notice requirements were added as good policy and to conform with existing practice.

The subcommittee recognized that having a recording of a proceeding, in addition to a transcribed record of the proceeding, may create confusion concerning the "official record" of a proceeding for purposes of appeal. The subcommittee unanimously agreed that the "official record" of a proceeding for purposes of appeal is only the transcribed record. The broadcast/recording is not the official record and should not be made a part of the appellate record. Moreover, any disputes about the "official record," whether prompted by a recording or otherwise, should be resolved by the trial court, not an appellate court. The subcommittee ultimately decided to include in proposed Rule 18c a notation about this issue. A similar provision could be added to TRAP 13.2 (duties of "official recorders").

Task 3: Rule of Judicial Administration 12

Rule of Judicial Administration 12 provides public access to "judicial records." The Rule is essentially the judiciary's version of the Public Information Act. The rule defines "judicial record" to expressly exclude records "pertaining to [a court's] adjudicative function, regardless of whether that function relates to a specific case." TEX. R. JUD. ADMIN. 12.2(d). "A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record." *Id.* Thus, under the current version of the rule, a "Zoom" recording of a hearing or proceeding is not a "judicial record" subject to Rule 12. *See, e.g.*, Rule 12 Decision, Appeal No. 21-009 (May 24, 2021) (available online at 21-009.pdf (txcourts.gov)).

Nevertheless, courts continue to receive requests for recordings of case-specific hearings and proceedings. The subcommittee recommends amending Rule 12 to make the current law more express as it relates to recordings of court proceedings.

EXHIBIT A

New Texas Rule of Civil Procedure 18c:

Recording and Broadcasting of Court Proceedings

18c.1. Recording and Broadcasting Permitted

A trial court may permit courtroom proceedings to be recorded or broadcast in accordance with this rule and any standards adopted by the Texas Supreme Court. This rule does not apply to an investiture, or other ceremonial proceedings, which may be broadcast or recorded at the trial court's sole discretion, with or without guidance from these rules.

18c.2. Recording and Broadcasting as a Matter of Course

A trial court may record or broadcast courtroom proceedings over which the trial court presides via a court-controlled medium. If a trial court elects to broadcast the proceeding, the trial court must give reasonable notice to the parties. Reasonable notice may include posting on the trial court's official webpage a general notice stating the types of proceedings recorded and broadcasted as a matter of course and the medium of broadcasting. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

18c.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding*. A person wishing to cover a court proceeding by broadcasting, recording, or otherwise disseminating the audio, video, or images of a court proceeding must file with the court clerk a request to do so. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing);
(E) the type and extent of equipment to be used; and
(F) that all parties were notified of the request.

(b) *Response*. Any party may file a response to the request. If a party objects to coverage of a hearing, the objections must not be conclusory and must state the specific and demonstrable injury alleged to result from coverage.

(c) *Hearing*. The requestor or any party may request a hearing on objections to broadcasting or recording a proceeding, which may be granted so long as the hearing will not substantially delay the proceeding or cause undue prejudice to any party or participant.

18c.4. Decision of the Court

In making the decision to record or broadcast court proceedings, the court may consider all relevant factors, including but not limited to:

(1) the importance of maintaining public trust and confidence in the judicial system;
(2) the importance of promoting public access to the judicial system;
(3) whether public access to the proceeding is available absent the broadcast or recording of the proceeding;
(4) the type of case involved;
(5) the importance of, and degree of public interest in, the court proceeding;
(6) whether the coverage would harm any participants;
(7) whether trade secrets or other proprietary information will be unduly disseminated;
(8) whether the coverage would interfere with the fair administration of justice, provision of a fair trial, or the rights of the parties;
(9) whether the coverage would interfere with any law enforcement activity;
(10) the objections of any of the parties, prospective witnesses, victims, or other
(11) participants in the proceeding of which coverage is sought;
(12) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;
(13) the extent to which the coverage would be barred by law in the judicial proceeding;
(14) undue administrative or financial burden to the court or participants; and
(15) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.[1]

18c.5 Official Record

Video or audio reproductions of a proceeding pursuant to these rules shall not be considered as part of the official court record.

18c.6 Violations of Rule

Any person who records, broadcasts, or otherwise disseminates the audio, video, or imagery of a court proceeding without approval in accordance with this rule may be subject to disciplinary action by court, up to and including contempt.

[1] Some subcommittee members would remove the phrase "to which fact the court shall give great weight" because it may cause more confusion than clarity. This phrase comes from the factors the supreme court adopted in Misc. Docket No. 92-0068.

Proposed Revisions to Texas Rules of Appellate Procedure 14:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Recording and Broadcasting as a Matter of Course

An appellate court may record or broadcast courtroom proceedings over which the court presides via a court-controlled medium upon reasonable notice to the parties. Reasonable notice may include posting a general notice on the court's official webpage. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

14.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing); and
(E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time*. The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court*. In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

Proposed Revisions to Texas Rules of Appellate Procedure 39:

Rule 39. Oral Argument; Decision Without Argument

****

39.8. Remote Argument

An appellate court may hold oral argument with participants physically present in the courtroom or remotely by audio, video, or other technological means. An oral argument held remotely complies with statutory provisions requiring argument be held in a specific location regardless of where the justices and participants are located at the time of argument.

39.9 Clerk's Notice

The clerk must send to the parties—at least 21 days before the date the case is set for argument or submission without argument—a notice telling the parties:

(a) whether the court will allow oral argument or will submit the case without argument;

(b) the date of argument or submission without argument;

(c) if argument is allowed, the time allotted for argument; ~~and~~

(d) the names of the members of the panel to which the case will be argued or submitted, subject to change by the court; and

(e) if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.

Proposed Revisions to Texas Rules of Appellate Procedure 59:

Rule 59. Submission and Argument

59.2. Submission With Argument

If the Supreme Court decides that oral argument would aid the Court, the Court will set the case for argument. The clerk will notify all parties of the submission date, location, and, if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

12.3 Applicability. This rule does not apply to:

(a) records or information to which access is controlled by:

(1) a state or federal court rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

(2) a state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct;

(4) Chapter 552, Government Code, or another statute or provision of law;

(b) records or information to which Chapter 552, Government Code, is made inapplicable by statute, rule, or other provision of law, other than Section 552.003(1)(B);

(c) records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by:

(1) a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure, or evidence; or

(2) common law, court order, judicial decision, or another provision of law

(d) elected officials other than judges~~.~~; or

(e) recordings of a remote proceeding made pursuant to Rule 18c.

EXHIBIT B

Texas Rules of Civil Procedure 18c provides:

Recording and Broadcasting of Court Proceedings

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

Texas Rules of Appellate Procedure 14 provides:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Procedure

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing); and
(E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time.* The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court.* In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

EXHIBIT C

BACKGROUND AND LEGAL STANDARDS – PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC[1]

On March 13, 2020, the Supreme Court of Texas and Court of Criminal Appeals issued the First Emergency Order Regarding the COVID-19 State of Disaster and authorized all courts in Texas in any case – civil or criminal – without a participant's consent to: 1) conduct any hearing or court proceeding remotely through teleconferencing, videoconferencing, or other means; and 2) conduct proceedings away from the court's usual location *with reasonable notice and access to the participants and the public*.[2] This emergency order's recognition of the public's right to reasonable notice and access to court proceedings, both civil and criminal, is consistent with traditional practice in Texas state courts and with federal and state precedent as discussed below.

The 6th Amendment of the Constitution of the United States affords defendants the right to a public trial, including all phases of criminal cases. Texas extends that right through the 14th Amendment to juvenile justice cases brought under Chapter 54 of the Texas Family Code.[3]

The Supreme Court has also held that the press and public have a similar, independent right under the 1st Amendment to attend all criminal proceedings in both federal and state courts.[4] Although the Supreme Court has never specifically held that the public has a First Amendment right of access to *civil* proceedings,[5] federal and state courts that have considered the issue have overwhelmingly held

[1] The Office of Court Administration wishes to thank District Judge Roy Ferguson (394th) for primary authorship on this document.

[2] The Third Emergency Order Regarding the COVID-19 State of Disaster amended the First Emergency Order to remove the requirement that the court conduct the proceedings in the count of venue.

[3] Texas courts have recognized the juvenile's right to public proceedings in quasi-criminal juvenile justice cases under the 14th Amendment and Section 54.08 of the Texas Family Code. Article 1, Section 13 of the Texas Constitution states that "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law." Courts construing this provision interpret it to prohibit the erection of barriers to the redress of grievances in the court system. So, the phrase "open courts" in Section 13 does not appear to mean "public trial."

[4] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing that the 1st Amendment to the United States Constitution guarantees the public a right of access to judicial proceedings).

[5] Although the holding is specific to the criminal case, the constitutional analysis in *Richmond Newspapers* applies similarly to civil cases. As Chief Justice Burger in the majority opinion opined, "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id*. at 576. In his concurrence, Justice Stevens wrote, "[T[he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the judicial branch[.]" Justice Brennan added, "Even more significantly for our present purpose, […] open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power[.]'" *Id.* And Justice Stewart specifically addressed the issue of civil cases, saying, "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599.

that there is a public right to access in civil cases under the 1st Amendment.[6] Courts must ensure and accommodate public attendance at court hearings.[7] However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, ensuring a fair trial, or protecting a child from emotional harm.[8] Such cases are rare, however, as the presumption of openness adopted by the Supreme Court must be overcome in order to close hearings to the public.[9] In some instances, improper or unjustified closure of court proceedings constitutes structural error, requiring "automatic reversal and the grant of a new trial."[10]

The Texas Family Code expressly authorizes the limiting of public access by agreement in contested hearings involving SAPCR claims and rights.[11] If supported by appropriate findings made on the record, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court.[12] But because the constitutional right at issue belongs to the public rather than the parties, all closures or restrictions of public access to such hearings must satisfy the same heightened standards handed down by the Supreme Court in *Waller* regarding criminal cases – even when agreed to by the parties. Thus, while the court may consider the parties' agreement while evaluating a request for closure, that agreement alone is not sufficient to warrant closure. The 1st Amendment right belongs to the public – not to the parties; the parties cannot waive it by agreement.

It is the court's affirmative burden to ensure meaningful and unfettered access to court proceedings. In fulfilling this burden, the court must take all reasonable measures necessary to ensure public access.[13] Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), is enough to mandate reversal and a new trial. At this time, the movement of the general public is limited by the executive branch through the governor and various county judges. Shelter-in-place orders and prohibitions on non-essential travel prevent members of the general public from viewing hearings in the courthouse. While hearings in courthouses are no longer mandatory under the First Emergency Order Regarding the COVID-19 State of Disaster, the emergency order requires "reasonable notice and access to the participants and the public." Even if a judge is physically in a courtroom for the virtual hearing, it is the court's burden to ensure public access to each hearing and take reasonable measures to remove barriers thereto. There is no reasonable access to the public for a hearing, whether remote or physically located in a courthouse, when emergency measures are in place that would require the public to commit a jailable criminal offense to attend the hearing in person in a courtroom.[14] For the duration of this crisis and while these emergency orders are in effect, courts must find a practical and effective way to enable public access to virtual court proceedings. Choosing not to provide reasonable and meaningful public access to remote court proceedings at this time may equate to constitutional error and mandate reversal.

[6] *See Doe v. Santa Fe Indep. School Dist.*, 933 F. Supp. 647, 648-50 (S.D. Tex. 1996) (discussing 3rd, 6th and 7th Circuit decisions and concluding that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law).
[7] *See Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012).
[8] *See United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995).
[9] *See In re A.J.S.*, 442 S.W.3d 562 (Tex. App.—El Paso 2014, no pet.)(discussing open courts in juvenile cases).
[10] Id. (citing *Steadman v. State*, 360 S.W.3d 499, 510 (Tex.Crim.App. 2012)(violation of 6th Amendment right)).
[11] Tex. Fam. Code § 105.003(b).
[12] Tex. Fam. Code. § 105.003.
[13] *See Lilly*, 365 S.W.3d at 331.
[14] *See* Executive Order GA-14 (March 31, 2020) and Tex. Gov't Code § 418.173.

Under the standards established by the United States Supreme Court, the protective measures employed must be limited to those necessary to protect an overriding interest and no broader. The trial court must consider all reasonable alternatives to closing the proceeding and make findings in open court on the record adequate to support the closure.[15] The court must weigh the totality of the circumstances in making these fact specific findings. For this reason, no standing order or global rule for closure of specific categories of hearings may be preemptively issued by a court without running afoul of the requirement to provide the public with access to court proceedings.

The court should not close the entirety of a hearing from public view in order to protect a single witness or topic of testimony. Because the court must apply only the least restrictive measures to protect the overriding interest, only specific portions of a hearing or trial that meet this exacting burden may be conducted outside of the public view, and that only in rare cases. Appellate courts have reversed judgments when a single less-restrictive solution existed but was not considered on the record.[16]

Courts should strongly consider employing protective measures short of interrupting or terminating the live stream. Federal courts, including the Fifth Circuit, have held that a partial closure of a proceeding – limiting access rather than excluding the public – does not raise the same constitutional concerns as a complete closure from public access.[17] To employ a less-restrictive measure (for example, temporarily obscuring video but not audio, or not displaying exhibits through screen share,[18] providing a phone number for the public to access the audio of the proceeding only, or providing a link that permits certain members of the public only to view the hearing either through a YouTube private link or a link to the Zoom meeting), the court need only find a "substantial reason" for the limitation and employ a restriction that does not exceed justifiable limits.[19] Terminating or interrupting the livestream without an alternative means for the public to view the hearing – even temporarily – would constitute a complete closure, and the higher burden would apply.

It bears mentioning that this is not a new issue created by video hearings or public livestreaming. Sensitive and embarrassing testimony is entered in every contested family law hearing yet rarely merits closure or clearing of courtrooms. Child protection cases categorically involve evidence that is or may be damaging or embarrassing to the child. Commercial disputes commonly involve protected internal corporate operations. Rarely – if ever – have such trials been closed to the public. Such testimony should not now be evaluated differently simply because more people may exercise their constitutional right to view court proceedings than ever before. Public exercise of a constitutional right does not change the court's evaluation of whether that right should be protected. Nor should courts erect barriers or hurdles to public attendance at hearings to discourage public exercise of that right. On the contrary, courts are required to take whatever steps are reasonably calculated to accommodate public attendance. Closure of courtrooms is constitutionally suspect and risky and should be a last resort.

[15] *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).
[16] *See Cameron v. State*, 535 S.W.3d 574, 578 (Tex.App.—San Antonio 2017, no pet.)
[17] *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Circ. 1995).
[18] The Supreme Court has ruled that the media does not have a First Amendment right to copy exhibits. *Nixon v. Warner Communications*, 435 U.S. 589 (1978).
[19] *A.J.S.*, 442 S.W.3d at 567 (citing *Osborne*, 68 F.3d at 94, and applying the 6th Amendment *Waller* and "substantial reason" standards to 14th Amendment public rights).

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 92-0068

ADOPTION OF RULES FOR RECORDING AND BROADCASTING COURT PROCEEDINGS IN CERTAIN CIVIL COURTS OF TRAVIS COUNTY

ORDERED:

At the request of the civil district courts, county courts at law, and probate court of Travis County, the attached rules are adopted governing the recording and broadcasting of civil proceedings in those courts. TEX. R. CIV. P. 18c; TEX. R. APP. P. 21.

This Order shall be effective for each such court when it has recorded the Order in its minutes and complied with Texas Rule of Civil Procedure 3a(4).

SIGNED AND ENTERED this 11th day of March, 1992.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

RULES GOVERNING THE RECORDING AND BROADCASTING OF COURT PROCEEDINGS IN CERTAIN CIVIL COURTS OF TRAVIS COUNTY

Pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the following rules govern the recording and broadcasting of court proceedings before the civil district courts, county courts at law, and probate court of Travis County, and their masters and referees.

1. Policy. The policy of these rules is to allow media coverage of public civil court proceedings to facilitate the free flow of information to the public concerning the judicial system, to foster better public understanding about the administration of justice, and to encourage continuing legal education and professionalism by lawyers. These rules are to be construed to provide the greatest access possible while at the same time maintaining the dignity, decorum and impartiality of the court proceeding.

2. Definitions. Certain terms are defined for purposes of these rules as follows.

2.1. "Court" means the particular court, master or referee in which the proceeding will be held.

2.2. "Media coverage" means any visual or audio coverage of court proceedings by a media agency.

2.3. "Media" or "media agency" means any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, in-house publication, professional journal, or other news reporting or news gathering agency.

2.4. "Visual coverage" means coverage by equipment which has the capacity to reproduce or telecast an image, and includes still and moving picture photographic equipment and video equipment.

2.5. "Audio coverage" is coverage by equipment which has the capacity to reproduce or broadcast sounds, and includes tape and cassette sound recorders, and radio and video equipment.

3. Media coverage permitted.

3.1. Media coverage is allowed in the courtroom only as permitted by Rule 18c of the Texas Rules of Civil Procedure and these rules.

3.2. If media coverage is of investiture or ceremonial proceedings as allowed by Rule 18c(c) of the Texas Rules of Civil Procedure, permission for, and the manner of such

coverage, are determined solely by the court, with or without guidance from these rules. If media coverage is for other than investiture or ceremonial proceedings, that is, under Rule 18c(a) or (b) of the Texas Rules of Civil Procedure, the provisions of these rules shall govern.

3.3. Media coverage under Rule 18c(a) and (b) of the Texas Rules of Civil Procedure is permitted only on written order of the court. A request for an order shall be made on the form included in these rules. The following procedure shall be followed, except in extraordinary circumstances and only if there is a finding by the court that good cause justifies a different procedure: (i) the request should be filed with the district clerk or county clerk, depending upon the court in which the proceeding is pending, with a copy delivered to the court, court administrator, all counsel of record and, where possible, all parties not represented by attorneys, and (ii) such request shall be made in time to afford the attorneys and parties sufficient time to confer, to contact their witnesses and to be fully heard by the court on the questions of whether media coverage should be allowed and, if so, what conditions, if any, should be imposed on such coverage. Whether or not consent of the parties or witnesses is obtained, the court may in its discretion deny, limit or terminate media coverage. In exercising such discretion the court shall consider all relevant factors, including but not limited to those listed in rule 3.5 below.

3.4. If media coverage is sought with consent as provided in Rule 18c(b) of the Texas Rules of Civil Procedure, consent forms adopted by the court shall be used to evidence the consent of the parties and witnesses. Original signed consent forms of the parties shall be attached to and filed with the request for order. Consent forms of the witnesses shall be obtained in the manner directed by the court. No witness or party shall give consent to media coverage in exchange for payment or other consideration, of any kind or character, either directly or indirectly. No media agency shall pay or offer to pay any consideration in exchange for such consent.

3.5. If media coverage is sought without consent, pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the decision to allow such coverage is discretionary and will be made by the court on a case by case basis. Objections to media coverage should not be conclusory but should state the specific and demonstrable injury alleged to result from media coverage. If the court denies coverage, it shall set forth in its order the findings upon which such denial is based. In determining an application for coverage, the court shall consider all relevant factors, including but not limited to:

(a) the type of case involved;

(b) whether the coverage would cause harm to any participants;

(c) whether the coverage would interfere with the fair administration of justice, advancement of a fair trial, or the rights of the parties;

(d) whether the coverage would interfere with any law enforcement activity;

(e) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought;

(f) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;

(g) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought; and

(h) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.

4. Media coverage prohibited

4.1. Media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Audio coverage and closeup video coverage of conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench is prohibited.

4.2. Visual coverage of potential jurors and jurors in the courthouse is prohibited except when in the courtroom the physical layout of the courtroom makes it impossible to conduct visual coverage of the proceeding without including the jury, and the court so finds. In such cases visual coverage is allowed only if the jury is in the background of a picture of some other subject and only if individual jurors are not identifiable.

5. Equipment and personnel. The court may require media personnel to demonstrate that proposed equipment complies with these rules. The court may specify the placement of media personnel and equipment to permit reasonable coverage without disruption to the proceedings. Unless the court in its discretion and for good cause orders otherwise, the following standards apply.

5.1. One television camera and one still photographer, with not more than two cameras and four lenses, are permitted.

5.2. Equipment shall not produce distracting sound or light. Signal lights or devices which show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden lighting changes shall not be used.

5.3. Existing courtroom sound and lighting systems shall be used without modification. An order granting permission to modify existing systems is deemed to require that the modifications be installed, maintained, and removed without public expense. Microphones and wiring shall be unobtrusively located in places approved by the court and shall be operated by one person.

5.4. Operators shall not move equipment or enter or leave the courtroom while the court is in session, or otherwise cause a distraction. All equipment shall be in place in advance of the proceeding or session.

5.5. Identifying marks, call letters, words and symbols shall be concealed on all equipment. Media personnel shall not display any identifying insignia on their clothing.

6. Delay of proceedings. No proceeding or session shall be delayed or continued for the sole purpose of allowing media coverage, whether because of installation of equipment, obtaining witness consents, conduct or hearings related to the media coverage or other media coverage questions. To assist media agencies to prepare in advance for media coverage, and when requested to do so: (i) the court will attempt to make the courtroom available when not in use for the purpose of installing equipment; (ii) counsel (to the extent they deem their client's rights will not be jeopardized) should make available to the media witness lists; (iii) and the court administrator will inform the media agencies of settings or proceedings.

7. Pooling. If more than one media agency of one type wish to cover a proceeding or session, they shall make pool arrangements. If they are unable to agree, the court may deny media coverage by that type of media agency.

8. Official record. Films, videotapes, photographs or audio reproductions made in the proceeding pursuant to these rules shall not be considered as part of the official court record.

P.O. BOX 12248 AUSTIN, TEXAS 78711
TEL: (512) 463-1312
FAX: (512) 463-1365

September 22, 1992

Ms. Amalia Mendoza
District Clerk
Post Office Box 1748
Austin, Texas 78767

Dear Ms. Mendoza,

Enclosed, please find a **corrected** copy of the order of this Court of March 11, 1992 that approved local rules for recording and broadcasting court proceedings in certain civil courts of Travis County. Please destroy previous versions of this order.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

cc:
Hon. B. B. Schraub
3rd Admin Judicial Rgn

Hon. Joseph H. Hart
126th District Court

County Clerk

Mr. Ray Judice
Office of Court Admin

State Law Library

Chmn Supreme Ct Adv Committee

JOSEPH H. HART
DISTRICT JUDGE
126TH JUDICIAL DISTRICT COURT

P. O. BOX 1748
AUSTIN, TEXAS 78767

April 17, 1992

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Thank you for forwarding to me a copy of the Order recently issued by the Supreme Court adopting rules for recording and broadcasting court proceedings in civil courts in Travis County. A few omissions and errors have been brought to my attenion that the Court may wish to change.

There is some inconsistency between the first paragraph of the rules and paragraph 2.1. The opening paragraph does not include district court masters and referees, while paragraph 2.1 does. Paragraph 2.1 does not include county courts at law and the probate court of Travis County, while the opening paragraph does. I believe we intended to have all of the courts covered by the rules, and they all should be included in both the opening paragraph and paragraph 2.1.

In paragraph 3.5(c) the conjunction "and" was probably included inadvertently and is not necessary.

The last sentence of paragraph 4.2 reads in part as follows: "In such cases visual coverage is allowed only of the jury is in the background of a picture ...." The "of" should be changed to "if" so that the sentence begins as follows: "In such cases visual coverage is allowed only if the jury is in the background of a picture ...."

Paragraph 5.1 reads in part as follows: "One television camera and one still photographers ..." The word should be "photographer," singular, rather than "photographers," plural.

Thank you, the Court and your staff for working with us on these rules. If there is a problem in making the corrections, please let me know.

Very truly yours,

JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/bjv

MEMORANDUM

TO: Chief Justice Tracy Christopher – Chair of Remote Proceedings Task Force

FROM: Subcommittee 2 of Task Force & Members of Justice Court Working Group

IN RE: Proposals Relating to Remote Hearings

DATE: November 8, 2021

I. Background Information

In a letter to you dated September 2, 2021, Chief Justice Nathan Hecht conveyed the Supreme Court of Texas's request that the Remote Proceedings Task Force (the "Task Force") "begin drafting rule amendments to remove impediments to and support the use of remote proceedings, starting with the Texas Rules of Civil Procedure." **Ex. 1**. He recognized that this is "a sizeable project that must be informed by many perspectives and experiences, as well as vision." *Id.* He then proposed a division of labor among many groups, including the Task Force and the Justice Court Working Group (the "Working Group"), but he noted that "the Task Force has the laboring oar." *Id.* Finally, he enclosed with his letter an outline of an envisioned work flow. *See id.* (enclosure).

In a memo dated September 9, 2021, you asked Subcommittee 2 of the Task Force to analyze hearings. You addressed the possibility of a global rule about hearings and suggested consideration of codification of submission-docket procedures. **Ex. 2**. You also stated that Subcommittee 2's proposal should cover witnesses appearing by remote means in a hearing or trial. You suggested generation of a draft in 60 days, if possible. *Id.*

After receiving your letter, the Chair of Subcommittee 2 (Kennon Wooten) and the Chair of the Working Group (Judge Nicholas Chu) decided that collaborative discussions among members of their respective groups would be beneficial to the rule-drafting process. Accordingly, they formed a team comprised of the following members: Ms. Wooten, Judge Chu, Judge Robert Hofmann, Judge Emily Miskel, Judge Larry Phillips, Nelson Mock, Judge Amy Tarno, Judge Kyle Hartmann, Trish McAllister, Briana Stone, Amber Myers, and Craig Noack (collectively referred to herein as the "Combined Team").[1] Subsequently, the Chair of the State Bar of Texas Court Rules Committee (Cynthia Timms) met with you and chairs of the Task Force's subcommittees to offer the Court Rules Committee's assistance with the drafting process. That discussion led to the addition of Chad Baruch as a member of the Combined Team.

The Combined Team met twice—on September 29 and October 18. In addition, a subset of the Combined Team met twice—on October 7 and October 15—to work on developing proposed rule language for consideration by the full Combined Team. Judge Miskel, Judge Chu, and Ms. Wooten also worked on drafting proposed rule language between meetings, in order to make meetings more efficient. All meetings occurred remotely, via Zoom. The Rules Attorney, Jaclyn Daumerie, joined meetings to the extent possible. She also provided guidance between meetings as to what the Supreme Court of Texas may want to see in rules relating to remote proceedings. Her guidance, combined with guidance set forth in Exhibits 1 and 2, shaped the Combined Team's discussions.

The Combined Team's proposal for rules of practice in district and county courts was finalized on October 18. That proposal is set forth in **Exhibit 3**. The Working Group, in turn, considered that proposal when developing a comparable proposal for rules of practice in justice courts. The Working Group's proposal is set forth in **Exhibit 4** and tracks the Combined Team's proposal, with some modifications needed for justice-court proceedings.

[1] Judge Chu and Nelson Mock are members of Subcommittee 2 and of the Working Group.

II. Explanation of Considerations and Proposals

A. Judicial Discretion

The Combined Team had a robust discussion about whether to require or allow remote proceedings and, relatedly, whether to give parties the ability to opt out of remote proceedings in favor of in-person proceedings. Some members believed that judges should have the discretion to decide how to conduct court proceedings. Reasons in favor of judicial discretion included the following: (1) if allowed to opt in, some parties may not consent to remote participation, even when it is more efficient and cost-effective than in-person participation; and (2) the availability of remote proceedings during the pandemic has revealed that they increase party participation (over the baseline measured before the pandemic), which suggests that they increase access to justice. Members in favor of allowing parties to opt in to remote proceedings focused primarily on the following considerations: (1) some people do not have the technology needed to participate remotely; (2) some people have disabilities that preclude them from participating remotely; and (3) some proceedings are not well-suited for remote participation.

Considering the aforementioned guidance and the need to increase access to justice, among other factors, the Combined Team decided to let courts require or allow participants to appear at a court proceeding in person or remotely. Rather than trying to define the concept of "a remote proceeding," the Combined Team addressed what it means to appear in person or remotely.[2] Mindful that courts may feel restricted by statutes requiring in-person participation, the Combined Team included the following provision in proposed Rule 21d: "A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances." Otherwise, the Combined Team was intentionally neutral, in relation to in-person versus remote participation, understanding there is not a one-size-fits-all approach for court proceedings, courts, or participants.

B. Objection Procedure and Standard

Although the Combined Team decided to give courts the discretion to decide whether participants appear in person or remotely, the Combined Team also decided to give parties the ability to object to a designated method of appearance, regardless of whether the method was chosen initially by another party or by the court itself. The Combined Team discussed whether to impose a particular deadline for asserting an objection, but decided against that approach, understanding that the need for an objection may not arise until the day of the proceeding at hand. That said, the Combined Team also wanted to guard against the possibility of a party sitting on an objection, which could lead to unnecessary delay or postponement of proceedings. In an effort to strike the right balance, the Combined Team decided to require a party to make an objection within a reasonable time after the party identifies the need for the objection. The Combined Team also decided to require the court to rule on any objection asserted, but to allow the objection to be decided on submission rather than requiring a hearing for resolution.

Under proposed Rule 21d, an objection to a method of appearance must be supported by good cause. Rather than simply allowing the concept of "good cause" to develop through case law over time, the Combined Team provided a non-exhaustive list of examples of good cause in a draft comment for the proposed rule. This approach is not novel; it is modeled after the approach taken for comment 3 regarding the 2013 adoption of the

[2] The language addressing remote participation is phrased broadly to withstand the test of time. It states that an individual can participate remotely "by audio, video, or other technological means." When the Supreme Court of Texas is deciding which standard to use here, it should consider whether there is a need to revisit and modify the current standards for remote depositions. *See* Tex. R. Civ. P. 199.1(b) ("A party may take an oral deposition *by telephone or other remote electronic means* if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken *by telephone or other remote electronic means* is considered as having been taken in the district and at the place where the witness is located when answering the questions.") (emphasis added); Tex. R. Civ. P. 199.5(a)(2) ("If a deposition is taken *by telephone or other remote electronic means*, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear *by telephone or other remote electronic means* if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition.") (emphasis added).

expedited-actions process set forth in Rule 169 of the Texas Rules of Civil Procedure. What is novel, however, are the good-cause examples provided in the comment for proposed Rule 21d. The Combined Team strived to ensure that courts have guidance that will help them to be sufficiently sensitive to participants' abilities and needs. Of note, representatives of the Texas Access to Justice Commission were instrumental in drafting this comment.

C. Notice Requirements

Existing Rule 21(b) addresses the service of notice for a hearing. Considering that proposed Rule 21d addresses court proceedings generally, the Combined Team changed the term "hearing" to "court proceeding" or "proceeding" throughout. Retained in Rule 21(b), however, is the provision recognizing that the period of notice may be modified by the court or, for particular types of proceedings, by other Texas Rules of Civil Procedure.

A lot of discussion was dedicated to the content of a notice. Several questions arose. Should the content vary depending on whether the notice is coming from a party or from the court? Should the notice include a phone number for the court, so that participants can contact the court readily if the need to do so arises? How much technological detail should the notice include when remote participation is required? Should instructions for submitting evidence be in a notice for remote participation only, or for remote *and* in-person participation?

Ultimately, the Combined Team decided to require any notice of proceeding to "contain all information needed to participate in the proceeding" and provided a non-exhaustive explanation of notice content: "the location of the proceeding or instructions for joining the proceeding remotely, the court's designated contact information, and instructions for submitting evidence to be considered in the proceeding." The Combined Team also included a comment recommending that a court "post or otherwise provide the information needed for notices of its proceeding." This approach will enable each court to dictate the information participants receive for its proceedings. Such flexibility reflects the reality that systems and abilities vary among courts in the 254 counties. Ideally, there will be more uniformity over time. But we are not there yet and must meet courts where they are.

D. Unique Standards for Rules of Practice in Justice Courts

The Working Group's proposal set forth in Exhibit 4 mirrors language in the Combined Team's proposal set forth in Exhibit 3 while also maintaining unique aspects of the rules in Part V of the Texas Rules of Civil Procedure, which applies to justice-court proceedings. With some exceptions, other Texas Rules of Civil Procedure (in parts other than Part V) do not apply to justice-court proceedings. *See* Tex. R. Civ. P. 500.1(e).

The Working Group's proposal adds a definition of "court proceeding" as a new Rule 500.2(g), in line with Part V's approach of defining terms of art to make Part V more accessible to self-represented litigants.

The Working Group's proposal also adds new Rule 500.10, which largely tracks new Rule 21d in Exhibit 3, with three changes. First, in Rule 500.10(b), the Working Group added the phrase "and timely communicate the ruling to the parties" after the provision mandating the court to rule on an objection to the designated method of appearance. This addition stems from the Working Group's concern that, without a requirement of timely communication, a participant might not have enough time to make arrangements to appear as ordered by the court. Second, Rule 500.10(c) incorporates the proposed changes to Rule 21(b), but focuses solely on notices generated by the justice court. This modification is based on the fact that, in justice-court proceedings, only the court can generate a notice of a setting. A party may not give notice to any other participant of a justice-court setting.

Lastly, the Working Group thought it was necessary to supplement the Combined Team's proposed comment by adding that the court's contact information in a notice should be specific enough to enable people to use that information to contact the court about an issue regarding participating in a proceeding and that people should expect a reasonably timely response from the court. In justice courts, many participants in proceedings are interacting with a court for the first time in their lives. Some people may not be familiar with the justice court, or may confuse the justice court with another court or clerk's office if left to research a way to contact the court.

Ensuring the expectation that using the court's designated contact information will result in a prompt response is designed to allow participants to troubleshoot issues with appearances quickly and, therefore, to ensure access to justice in proceedings when a participant may be new or unfamiliar with remote-proceeding technology.

E. Content Excluded From Proposed Rules

Technology standards (e.g., for remote attendance and remote submission of evidence) are excluded from the proposed rules. These standards will evolve over time, sometimes rapidly, and are better-suited for placement outside rules and development by the Judicial Committee on Information Technology ("JCIT") or a similar body. For one potential home, see the Technology Standards at https://www.txcourts.gov/jcit/technology-standards/. Wherever the standards are placed, it will be critical to educate courts and participants about them. If they are placed outside the Texas Rules of Civil Procedure, they should be referenced in comments to the amended rules. The Combined Team also suggests the creation of training videos, for courts and participants, and the placement of such videos on publicly available websites, such as Texas Law Help (at https://www.texaslawhelp.org/).

Submission-docket procedures are also excluded from the proposed rules. The approaches to and perceptions of submission dockets vary from court to court in Texas. The courts have been handling submission dockets without statewide rules for years. There does not appear to be a compelling need to regulate them.

EXHIBIT 1

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

Chambers of
THE CHIEF JUSTICE

September 2, 2021

Hon. Tracy Christopher
Chief Justice
Court of Appeals for the
Fourteenth District of Texas
Houston, TX

via email

Re: Remote Proceedings

Dear Chief Justice Christopher:

Thank you for your leadership as Chair of the Remote Proceeding Task Force and for the truly superb job that you and the Task Force members did on your reports submitted this spring. I know it was a Herculean task in a short amount of time.

The Court requests the Task Force to begin drafting rule amendments to remove impediments to and support the use of remote proceedings, starting with the Texas Rules of Civil Procedure. This is obviously a sizeable project that must be informed by many perspectives and experiences, as well as vision. We propose to divide the work among several groups—the Task Force, the Supreme Court Advisory Committee, the Justice Court Working Group, the Municipal Courts Education Center, and the Texas Judicial Council—though the Task Force has the laboring oar. The enclosure outlines the workflow we envision, but we encourage your feedback.

You are welcome to contact me or the Court's rules attorney, Jackie Daumerie, at any time. As always, thank you for your expert work and wise counsel.

Cordially,

Nathan L. Hecht
Chief Justice

Remote Proceedings Rules Plan

Preliminary Drafting Assignments

Rule	Group	Notes
Rules of Judicial Administration		
RJA 7	SCAC	Referred June 2021
Updates to other existing rules	Remote Proceedings TF	RPTF Access Subcommittee report suggests updates to RJA 12
Draft any necessary rules to preserve remote proceedings in criminal cases	TMCEC JP Working Group	
Rules of Civil Procedure		
TRCP 3a	Court	Already under consideration at Court.
TRCP 216-236	SCAC	
TRCP Part V	JP Working Group	
Draft any necessary rules for civil municipal court cases	TMCEC	TMCEC/MC judges are already working on civil rules more generally, and we can ask that they specifically think about remote proceeding needs.
Updates to other existing rules, including TRCP 18c, and drafting of any necessary rules	Remote Proceedings TF	RPTF Access Subcommittee report suggests updates to TRCP 176. RPTF Civil Subcommittee report has long list of other potential updates.

		Over the course of the pandemic, we've received consistent feedback that we need to (1) update the broadcasting rule and provide more guidance on public access; (2) implement procedures for requesting remote proceedings and objecting to and ruling on those requests; (3) add requirements, like citation and notice requirements, to inform SRLs and others about remote proceedings; and (4) draft rules about the exchange of evidence.
Rules of Appellate Procedure	Remote Proceedings TF	RPTF Civil Subcommittee report has list of potential updates.
Rules of Evidence	SBOT AREC	RPTF Civil Subcommittee report has list of potential updates. Over the course of the pandemic, we've received consistent feedback that we need to provide more guidance on Rule 614 (exclusion of witnesses) in the context of remote proceedings.
Best Practices/Mechanical "How To" Guides	Judicial Council	

Workflow

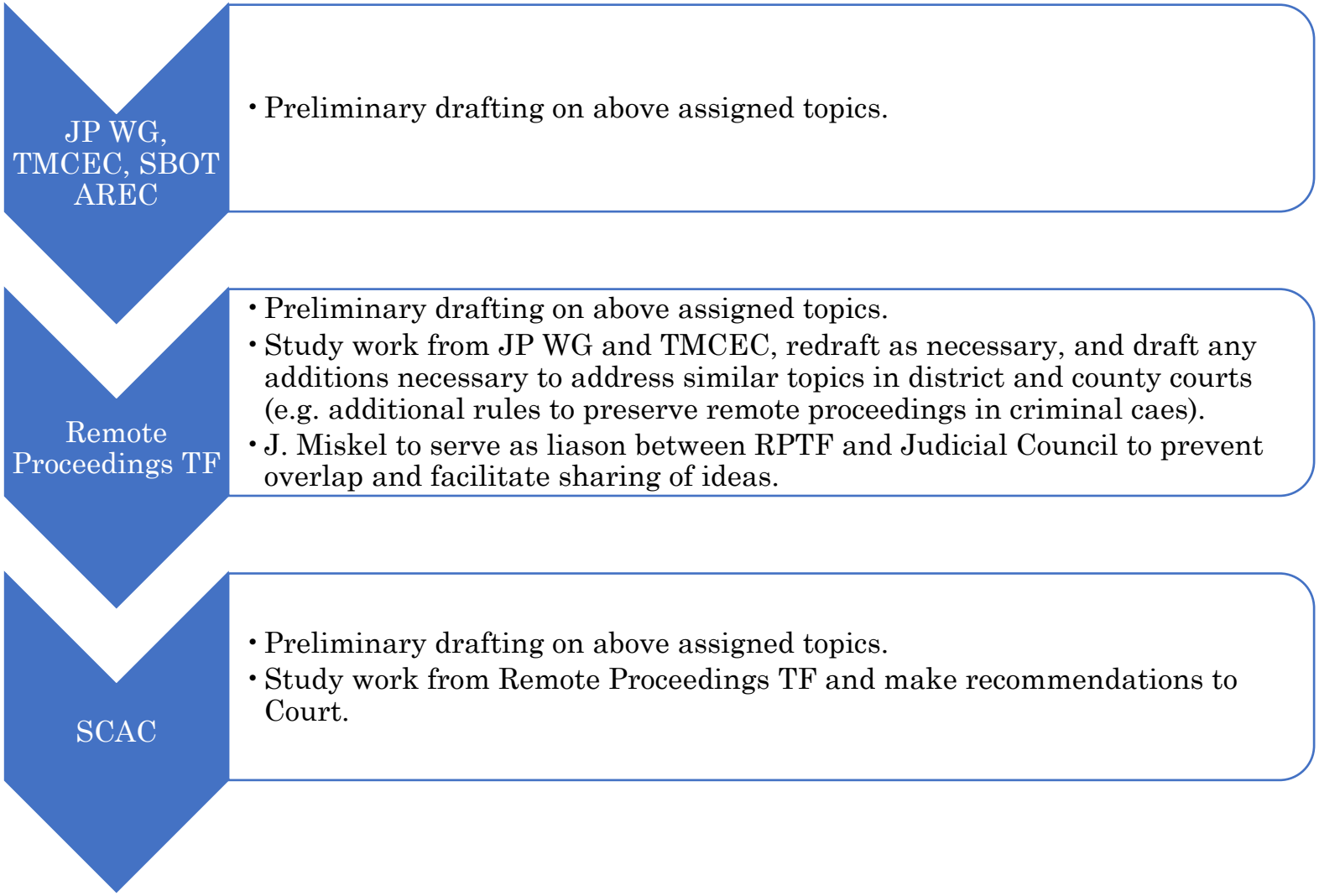
JP WG, TMCEC, SBOT AREC
• Preliminary drafting on above assigned topics.
Remote Proceedings TF
• Preliminary drafting on above assigned topics.
• Study work from JP WG and TMCEC, redraft as necessary, and draft any additions necessary to address similar topics in district and county courts (e.g. additional rules to preserve remote proceedings in criminal caes).
• J. Miskel to serve as liason between RPTF and Judicial Council to prevent overlap and facilitate sharing of ideas.
SCAC
• Preliminary drafting on above assigned topics.
• Study work from Remote Proceedings TF and make recommendations to Court.

EXHIBIT 2

Memorandum

To: Remote Proceedings Task Force

From: Tracy Christopher

Date: September 9, 2021

Re: September 2021 referral from Chief Justice Hecht

I have decided to combine committees 1 and 2 and I have switched out the chairs for all subcommittees. I have asked CJ Hecht for a timeline but he did not have one in mind. I suggest a draft in 60 days if possible.

Subcommittee 1

Rules of Judicial Administration–12 (any others? 7 is revised)

TRCP 18c (consider best practices for sensitive information and broadcasting)

Rules of Appellate Procedure (coordinate on the broadcasting rules with subcommittee one)

Members:
Lisa Hobbs–chair
Judge Roy Ferguson
Chief Justice Rebecca Martinez
John Browning
Courtney Perez
Chris Prine
Marcy Greer

Subcommittee 2

Hearings–this would potentially be a global rule about hearings. Surprisingly when you look through TRCP, how and when a court has a hearing is not well defined–other than the 3 day notice rule. As many civil and family courts in the state now use a submission docket (by local rule) I suggest considering a codification of that process too. 2 supreme court cases on the submission docket. *Martin v. Martin, Martin & Richards, Inc*., 989 S.W.2d 357, 359 (Tex. 1998) (per

curiam) (motion for summary judgment hearing). *Contra Gulf Coast Inv. Corp. Nasa 1 Business Center*, 754 S.W.2d 152 (Tex. 1988) (per curiam) (language of rule 165a requires an oral hearing rather than submission).

It should also cover witnesses appearing by remote means in a hearing or trial.

Members:
Kennon Wooten–chair
Judge Robert Hofmann
Judge Emily Miskel
Judge Larry Phillips
Nicholas Chu
Nelson Mock

Subcommittee 3

TRCP 176–subpoenas

Members:
Quentin Smith-chair
Teri Workman
Judge Mollee Westfall
Dean Stanzione
Chief Justice Tracy Christopher

EXHIBIT 3

Proposed Rule Language
Draft Date: October 18, 2021

Proposed Amended Rule 21. Filing and Serving Pleadings and Motions

(a) *Filing and Service Required.* Every pleading, plea, motion, or application to the court for an order, whether in the form of a motion, plea, or other form of request, unless presented during a hearing or trial, must be filed with the clerk of the court in writing, must state the grounds therefor, must set forth the relief or order sought, and at the same time a true copy must be served on all other parties, and must be noted on the docket.

(b) *Service of Notice of Court Proceeding.* An application to the court for an order and notice of any court proceeding thereon, not presented during a proceeding, must be served upon all other parties not less than three days before the time specified for the proceeding, unless otherwise provided by these rules or shortened by the court. A notice must contain all information needed to participate in the proceeding, including the location of the proceeding or instructions for joining the proceeding remotely, the court's designated contact information, and instructions for submitting evidence to be considered in the proceeding.

. . . .

Comment to 2021 Change: The Rule 21(b) amendments clarify requirements for notices. A court should post or otherwise provide the information needed for notices of its proceedings.

Proposed New Rule 21d. Appearances at Court Proceedings

(a) *Method.* A court may allow or require a participant to appear at a court proceeding in person—by being physically present in the courtroom—or remotely by audio, video, or other technological means. A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances.

(b) *Objection.* An objection to a method of appearance must be made within a reasonable time after a party identifies the need for the objection. The court must rule on the objection. The court is not required to hold a hearing on the objection before ruling and may grant the objection if it was timely filed and is supported by good cause.

Comment to 2021 Change: Rule 21d clarifies procedures for appearances at court proceedings. Subpart (b) addresses good-cause objections to a method of appearance. Examples of good cause include (1) an inability to appear remotely due to a lack of access to the needed technology or a lack of proficiency in technology that would prevent meaningful participation in a proceeding; (2) an inability to appear in person without compromising one's health or safety; and (3) the inability of the court to provide language access services for a person with limited English proficiency or to provide a reasonable accommodation for a person with a disability to participate in a proceeding.

EXHIBIT 4

Proposed New Rule 500.2(g)

(g) "Court proceeding" is an appearance before the court, such as a hearing or a trial.

[Note: Subsequent subparts or Rule 500.2 will be relettered, starting with subpart (h).]

Proposed New Rule 500.10 Appearances at Court Proceedings

(a) *Method.* A court may allow or require a participant to appear at a court proceeding in person—by being physically present in the courtroom—or remotely by audio, video, or other technological means. A remote appearance satisfies any statutory requirement to appear in person unless the statute expressly prohibits remote appearances.

(b) *Objection.* An objection to a method of appearance must be made within a reasonable time after a party identifies the need for the objection. The court must rule on the objection and timely communicate the ruling to the parties. The court is not required to hold a hearing on the objection before ruling and may grant the objection if it was timely filed and is supported by good cause.

(c) *Notice.* Any notice for a court proceeding must contain all information needed to participate in the proceeding, including the location of the proceeding or instructions for joining the proceeding remotely, the court's designated contact information, and instructions for submitting evidence to be considered in the proceeding.

Comment to 2021 Change: New Rule 500.10 clarifies procedures for appearances at court proceedings. Subpart (b) addresses good-cause objections to a method of appearance. Examples of good cause include (1) an inability to appear remotely due to a lack of access to the needed technology or a lack of proficiency in technology that would prevent meaningful participation in a proceeding; (2) an inability to appear in person without compromising one's health or safety; and (3) the inability of the court to provide language access services for a person with limited English proficiency or to provide a reasonable accommodation for a person with a disability to participate in a proceeding. Subpart (c) requires the court's contact information to be included in a notice of a court proceeding. A participant should be able to use that information to receive a reasonably timely response regarding any issues concerning participating by being physically present in the courtroom or remotely.

Memorandum

Date: October 28, 2021

To: Remote Proceedings Task Force

From: **Subcommittee on Subpoenas**
Chief Justice Tracy Christopher
Mr. Quentin Smith – Chair
Hon. Mollee B. Westfall
Ms. Teri Workman

Re:

The Remote Proceedings Task Force asked our subcommittee to analyze how to make discovery from third parties by subpoenas more amenable to a remote environment, and, in doing so, address rules or obstacles that may be altered to promote that goal. In conducting our review, we primarily analyzed Texas Rules of Civil Procedure 176, 199, 205, and 500.8. We also analyzed Texas Civil Practice & Remedies Code Section 22.002.

This memorandum addresses our findings and attaches as Appendix A, proposed alterations to certain rules in the Texas Rules of Civil Procedure to make discovery from third parties by subpoenas more amenable to remote proceedings. After our discussions, our subcommittee identified four main areas that we needed to consider in this undertaking: (1) the 150-mile limitation on subpoenas; (2) the notice and appearance requirements at depositions, hearings, and trials; document production at a remote deposition; (3) document production in connection with a remote proceeding subpoena; and (4) enforcing compliance of remote proceeding subpoenas and electronic service.

1. The 150-Mile Limitation on Subpoenas

Allowing subpoenas for remote proceedings to be effective beyond 150 miles of the court would help promote the use of remote proceedings. Given that a remote proceeding should not require any party to travel (or at least travel less than 150 miles), there is not an undue burden placed on the person subject to a subpoena for a remote proceeding. Allowing parties to subpoena people more than 150 miles away would require a modification of Rule 176.3. Our proposed change is to carve out remote proceedings from the 150-mile limitation by stipulating that the place for compliance is in the county where the subpoenaed

person resides.[1] We propose limiting the applicability of subpoenas for remote proceedings to those persons who are in the State of Texas at the time of service.

2. The Notice and Appearance requirements at Depositions, Hearings, and Trials

Rule 176.2 does not prohibit subpoenas for remote proceedings or expressly state that attendance must be in person. Nonetheless, for the sake of clarity, we suggested a modification to Rule 176.2(a) to expressly allow for remote depositions and, if a court permits, remote appearances at a hearing or trial.

3. Document Production and Remote Proceedings

One of the key issues that arose is the production of documents at a virtual deposition. After discussing several ways to address this by rule, we realized that there is no perfect solution. Instead, we decided not to propose an alteration to any rule to specifically address documents at a virtual deposition, despite potential problems, because this is currently an issue that parties appear to be addressing without additional clarity in the rules. Our rationale in reaching this conclusion is that it is difficult to address the production of electronic documents at an in-person deposition under the current rules and people have been having virtual depositions throughout the COVID-19 pandemic seemingly without a rule addressing document production. Moreover, production of electronic documents is also an issue at in-person depositions and no rule addresses that dilemma. Therefore, our recommendation would be to stay silent and allow the parties to work together to reach a solution. To the extent the parties are unable to resolve a particular issue, trial court judges are more than capable of providing a solution for the parties.

4. Remote Subpoena Enforceability and Electronic Service

Two open items that remain in making subpoenas more amenable to remote proceedings relate to service of subpoenas. Rule 176.5 requires in-person service. Therefore, it does not allow for electronic service of subpoenas or service by certified mail. To make this possible, we would need to modify Rule 176.5 to be consistent with the recently amended rules that allow service of a petition by electronic mail and social media. We have not currently made this suggested revision because it is unclear whether it would be good policy to allow litigants to serve subpoenas on third parties by electronic means. Nonetheless, even if electronic service is not adopted, we do believe that parties should be allowed to serve subpoenas by certified mail.

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[1] We also note that Tex. Civ. Prac. & Rem. Code § 22.002 references the 150-mile limitation; however, the language of that statute is more permissive rather than limiting. *See id.* ("A witness who is represented to reside 150 miles or less from a county in which a suit is pending or who may be found within that distance at the time of trial on the suit may be subpoenaed in the suit.").

Related to service is the requirement that a party pay a subpoenaed person $10 with the subpoena to make it enforceable. If a party does not pay $10 to the subpoenaed person at the time of service, then the serving party cannot enforce the subpoena under Rule 1786.8(b). Even if the rules change to permit electronic service or service by certified mail, we believe that the rules addressing the payment of the fee for enforcement should remain unchanged. Our view is that it is best to let entrepreneurial litigants figure out how to solve that particular compliance issue rather than alter existing rules, which may create other unintended consequences. Additionally, altering the payment requirement could potentially require a change to a statute, Section 22.001 of the Texas Civil Practice & Remedies Code.[2]

[2] Tex. Civ. Prac. & Rem. Code § 22.001(a) ("Except as provided by Section 22.002, a witness is entitled to 10 dollars for each day the witness attends court. This fee includes the entitlement for travel and the witness is not entitled to any reimbursement for mileage traveled."); Tex. Civ. Prac. & Rem. Code § 22.001(b) ("The party who summons the witness shall pay that witness's fee for one day, as provided by this section, at the time the subpoena is served on the witness.").

Appendix A

RULE 176

176.1 Form.

Every subpoena must be issued in the name of "The State of Texas" and must:

(a) state the style of the suit and its cause number;

(b) state the court in which the suit is pending;

(c) state the date on which the subpoena is issued;

(d) identify the person to whom the subpoena is directed;

(e) state the time, place, and nature of the action required by the person to whom the subpoena is directed, as provided in Rule 176.2;

(f) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;

(g) state the text of Rule 176.8(a); and

(h) be signed by the person issuing the subpoena.

176.2 Required Actions.

A subpoena must command the person to whom it is directed to do either or both of the following:

(a) attend and give testimony at a deposition, hearing, or trial, which attendance may be in person, by telephone, or by other remote means at a deposition and, with court permission, at a hearing or trial;

(b) produce and permit inspection and copying of designated documents or tangible things in the possession, custody, or control of that person.

176.3 Limitations.

(a) Range. A person may not be required by subpoena to appear or produce documents or other things in a county that is more than 150 miles from where the person resides or is served. However, a person whose appearance or production at a deposition may be compelled by notice alone under Rules 199.3 or 200.2 may be required to appear and produce documents or other things at any location permitted under Rules 199.2(b)(2). Notwithstanding anything else in this Rule, a person required to appear by telephone or other remote means is deemed to be appearing in the county where the subpoenaed person resides.

(b) Use for discovery. A subpoena may not be used for discovery to an extent, in a manner, or at a time other than as provided by the rules governing discovery.

176.4 Who May Issue.

A subpoena may be issued by:

(a) the clerk of the appropriate district, county, or justice court, who must provide the party requesting the subpoena with an original and a copy for each witness to be completed by the party;

(b) an attorney authorized to practice in the State of Texas, as an officer of the court; or

(c) an officer authorized to take depositions in this State, who must issue the subpoena immediately on a request accompanied by a notice to take a deposition under Rules 199 or 200, or a notice under Rule 205.3, and who may also serve the notice with the subpoena.

176.5 Service.

(a) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record.

(b) Proof of service. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

176.6 Response.

(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at the ~~place of~~ deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) Organizations. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena - before the time specified for compliance - written objections to producing any or all of the designated materials. A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

176.5 Service.

(a) Manner of service. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record.

(b) Proof of service. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

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(a) Compliance required. Except as provided in this subdivision, a person served with a subpoena must comply with the command stated therein unless discharged by the court or by the party summoning such witness. A person commanded to appear and give testimony must remain at in ~~the place of~~ deposition, hearing, or trial from day to day until discharged by the court or by the party summoning the witness.

(b) Organizations. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(c) Production of documents or tangible things. A person commanded to produce documents or tangible things need not appear in person at the time and place of production unless the person is also commanded to attend and give testimony, either in the same subpoena or a separate one. A person must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the demand. A person may withhold material or information claimed to be privileged but must comply with Rule 193.3. A nonparty's production of a document authenticates the document for use against the nonparty to the same extent as a party's production of a document is authenticated for use against the party under Rule 193.7.

(d) Objections. A person commanded to produce and permit inspection or copying of designated documents and things may serve on the party requesting issuance of the subpoena - before the time specified for compliance - written objections to producing any or all of the designated materials.

Commented [TC1]: During the pandemic people did not want to open the door to a person serving a subpoena.
Should we consider an alternative to personal service?
We can now serve lawsuits by email–why not a subpoena?
Future discussion?

A person need not comply with the part of a subpoena to which objection is made as provided in this paragraph unless ordered to do so by the court. The party requesting the subpoena may move for such an order at any time after an objection is made.

(e) Protective orders. A person commanded to appear at a deposition, hearing, or trial, or to produce and permit inspection and copying of designated documents and things, and any other person affected by the subpoena, may move for a protective order under Rule 192.6(b)--before the time specified for compliance--either in the court in which the action is pending or in a district court in the county where the subpoena was served. The person must serve the motion on all parties in accordance with Rule 21a. A person need not comply with the part of a subpoena from which protection is sought under this paragraph unless ordered to do so by the court. The party requesting the subpoena may seek such an order at any time after the motion for protection is filed.

(f) Trial subpoenas. A person commanded to attend and give testimony, or to produce documents or things, at a hearing or trial, may object or move for protective order before the court at the time and place specified for compliance, rather than under paragraphs (d) and (e).

176.7 Protection of Person from Undue Burden and Expense.

A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

176.8 Enforcement of Subpoena.

(a) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both.

(b) Proof of payment of fees required for fine or attachment. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

RULE 199. DEPOSITIONS UPON ORAL EXAMINATION

199.1 Oral Examination; Alternative Methods of Conducting or Recording.

(a) Generally. A party may take the testimony of any person or entity by deposition on oral examination before any officer authorized by law to take depositions. The testimony, objections, and any other statements during the deposition must be recorded at the time they are given or made.

(b) Depositions by telephone or other remote electronic means. A party may take an oral deposition by telephone or other remote electronic means if the party gives reasonable prior written notice of intent to do so. For the purposes of these rules, an oral deposition taken by telephone or other remote electronic means is considered as having been taken in the district and at the place where the witness is located when answering the questions.

(c) Non-stenographic recording. Any party may cause a deposition upon oral examination to be recorded by other than stenographic means, including videotape recording. The party requesting the non-stenographic recording will be responsible for obtaining a person authorized by law to administer the oath and for assuring that the recording will be intelligible, accurate, and trustworthy. At least five days prior to the deposition, the party must serve on the witness and all parties a notice, either in the notice of deposition or separately, that the deposition will be recorded by other than stenographic means. This notice must state the method of non-stenographic recording to be used and whether the deposition will also be recorded stenographically. Any other party may then serve written notice designating another method of recording in addition to the method specified, at the expense of such other party unless the court orders otherwise.

199.2 Procedure for Noticing Oral Depositions.

(a) Time to notice deposition. A notice of intent to take an oral deposition must be served on the witness and all parties a reasonable time before the deposition is taken. An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court.

(b) Content of notice.

(1) Identity of witness; organizations. The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must - a reasonable time before the deposition - designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

(2) Time and place. The notice must state a reasonable time and place for the oral deposition. The place may be in:

(A) the county of the witness's residence;

(B) the county where the witness is employed or regularly transacts business in person;

(C) the county of suit, if the witness is a party or a person designated by a party under Rule 199.2(b)(1);

(D) the county where the witness was served with the subpoena, or within 150 miles of the place of service, if the witness is not a resident of Texas or is a transient person; or

(E) subject to the foregoing, at any other convenient place directed by the court in which the cause is pending.

(3) Alternative means of conducting and recording. The notice must state whether the deposition is to be taken by telephone or other remote electronic means and identify the means. If the deposition is to be recorded by nonstenographic means, the notice may include the notice required by Rule 199.1(c).

(4) Additional attendees. The notice may include the notice concerning additional attendees required by Rule 199.5(a)(3).

(5) Request for production of documents. A notice may include a request that the witness produce at the deposition documents or tangible things within the scope of discovery and within the witness's possession, custody, or control. If the witness is a nonparty, the request must comply with Rule 205 and the designation of materials required to be identified in the subpoena must be attached to, or included in, the notice. The nonparty's response to the request is governed by Rules 176 and 205. When the witness is a party or subject to the control of a party, document requests under this subdivision are governed by Rules 193 and 196.

199.3 Compelling Witness to Attend.

A party may compel the witness to attend the oral deposition by serving the witness with a subpoena under Rule 176. If the witness is a party or is retained by, employed by, or otherwise subject to the control of a party, however, service of the notice of oral deposition upon the party's attorney has the same effect as a subpoena served on the witness.

199.4 Objections to Time and Place of Oral Deposition.

A party or witness may object to the time and place designated for an oral deposition by motion for protective order or by motion to quash the notice of deposition. If the motion is filed by the third business day after service of the notice of deposition, an objection to the time and place of a deposition stays the oral deposition until the motion can be determined.

199.5 Examination, Objection, and Conduct During Oral Depositions.

(a) Attendance.

(1) Witness. The witness must remain in attendance from day to day until the deposition is begun and completed.

(2) Attendance by party. A party may attend an oral deposition in person, even if the deposition is taken by telephone or other remote electronic means. If a deposition is taken by telephone or other remote electronic means, the party noticing the deposition must make arrangements for all persons to attend by the same means. If the party noticing the deposition appears in person, any other party may appear by telephone or other remote electronic means if that party makes the necessary arrangements with the deposition officer and the party noticing the deposition.

(3) Other attendees. If any party intends to have in attendance any persons other than the witness, parties, spouses of parties, counsel, employees of counsel, and the officer taking the oral deposition, that party must give reasonable notice to all parties, either in the notice of deposition or separately, of the identity of the other persons.

(b) Oath; examination. Every person whose deposition is taken by oral examination must first be placed under oath. The parties may examine and cross-examine the witness. Any party, in lieu of participating in the examination, may serve written questions in a sealed envelope on the party noticing the oral deposition, who must deliver them to the deposition officer, who must open the envelope and propound them to the witness.

(c) Time limitation. No side may examine or cross-examine an individual witness for more than six hours. Breaks during depositions do not count against this limitation.

(d) Conduct during the oral deposition; conferences. The oral deposition must be conducted in the same manner as if the testimony were being obtained in court during trial. Counsel should cooperate with and be courteous to each other and to the witness. The witness should not be evasive and should not unduly delay the examination. Private conferences between the witness and the witness's attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.

(e) Objections. Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the oral deposition are limited to "Objection, non-responsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the oral deposition to be later raised with the court. The objecting party must give a clear and concise explanation of an objection if requested by the party taking the oral deposition, or the objection is waived. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. The officer taking the oral deposition will not rule on objections but must record them for ruling by the court. The officer taking the oral deposition must not fail to record testimony because an objection has been made.

(f) Instructions not to answer. An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling pursuant to paragraph (g). The attorney instructing the witness not to answer

must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.

(g) Suspending the deposition. If the time limitations for the deposition have expired or the deposition is being conducted or defended in violation of these rules, a party or witness may suspend the oral deposition for the time necessary to obtain a ruling.

(h) Good faith required. An attorney must not ask a question at an oral deposition solely to harass or mislead the witness, for any other improper purpose, or without a good faith legal basis at the time. An attorney must not object to a question at an oral deposition, instruct the witness not to answer a question, or suspend the deposition unless there is a good faith factual and legal basis for doing so at the time.

199.6 Hearing on Objections.

Any party may, at any reasonable time, request a hearing on an objection or privilege asserted by an instruction not to answer or suspension of the deposition; provided the failure of a party to obtain a ruling prior to trial does not waive any objection or privilege. The party seeking to avoid discovery must present any evidence necessary to support the objection or privilege either by testimony at the hearing or by affidavits served on opposing parties at least seven days before the hearing. If the court determines that an in camera review of some or all of the requested discovery is necessary to rule, answers to the deposition questions may be made in camera, to be transcribed and sealed in the event the privilege is sustained, or made in an affidavit produced to the court in a sealed wrapper.

RULE 205

205.1 Forms of Discovery; Subpoena Requirement.

A party may compel discovery from a nonparty--that is, a person who is not a party or subject to a party's control--only by obtaining a court order under Rules 196.7, 202, or 204, or by serving a subpoena compelling:

(a) an oral deposition;

(b) a deposition on written questions;

(c) a request for production of documents or tangible things, pursuant to Rule 199.2(b)(5) or Rule 200.1(b), served with a notice of deposition on oral examination or written questions; and

(d) a request for production of documents and tangible things under this rule.

205.2 Notice.

A party seeking discovery by subpoena from a nonparty must serve, on the nonparty and all parties, a copy of the form of notice required under the rules governing the applicable form of discovery.

A notice of oral or written deposition must be served before or at the same time that a subpoena compelling attendance or production under the notice is served. A notice to produce documents or tangible things under Rule 205.3 must be served at least 10 days before the subpoena compelling production is served.

205.3 Production of Documents and Tangible Things Without Deposition.

(a) Notice; subpoena. A party may compel production of documents and tangible things from a nonparty by serving - reasonable time before the response is due but no later than 30 days before the end of any applicable discovery period - the notice required in Rule 205.2 and a subpoena compelling production or inspection of documents or tangible things.

(b) Contents of notice. The notice must state:

(1) the name of the person from whom production or inspection is sought to be compelled;

(2) a reasonable time and place for the production or inspection; and

(3) the items to be produced or inspected, either by individual item or by category, describing each item and category with reasonable particularity, and, if applicable, describing the desired testing and sampling with sufficient specificity to inform the nonparty of the means, manner, and procedure for testing or sampling.

(c) Requests for production of medical or mental health records of other non-parties. If a party requests a nonparty to produce medical or mental health records of another nonparty, the requesting party must serve the nonparty whose records are sought with the notice required under this rule. This requirement does not apply under the circumstances set forth in Rule 196.1(c)(2).

(d) Response. The nonparty must respond to the notice and subpoena in accordance with Rule 176.6.

(e) Custody, inspection and copying. The party obtaining the production must make all materials produced available for inspection by any other party on reasonable notice, and must furnish copies to any party who requests at that party's expense.

(f) Cost of production. A party requiring production of documents by a nonparty must reimburse the nonparty's reasonable costs of production.

RULE 500.8. SUBPOENAS

(a) Use. A subpoena may be used by a party or the judge to command a person or entity to attend and give testimony at a hearing or trial. A person may not be required by subpoena to appear in person in a county that is more than 150 miles from where the person resides or is served.

(b) Who Can Issue. A subpoena may be issued by the clerk of the justice court or an attorney authorized to practice in the State of Texas, as an officer of the court.

(c) Form. Every subpoena must be issued in the name of the “State of Texas” and must:

(1) state the style of the suit and its case number;

(2) state the court in which the suit is pending;

(3) state the date on which the subpoena is issued;

(4) identify the person to whom the subpoena is directed;

(5) state the date, time, place, and nature of the action required by the person to whom the subpoena is directed;

(6) identify the party at whose instance the subpoena is issued, and the party's attorney of record, if any;

(7) state that "Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena is issued and may be punished by fine or confinement, or both"; and

(8) be signed by the person issuing the subpoena.

(d) Service: Where, By Whom, How. A subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or by any person who is not a party and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness and tendering to that person any fees required by law. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney of record. Proof of service must be made by filing either:

(1) the witness's signed written memorandum attached to the subpoena showing that the witness accepted the subpoena; or

(2) a statement by the person who made the service stating the date, time, and manner of service, and the name of the person served.

(e) Compliance Required. A person commanded by subpoena to appear and give testimony must remain at the hearing or trial from day to day until discharged by the court or by the party summoning the witness. If a subpoena commanding testimony is directed to a corporation, partnership, association, governmental agency, or other organization, and the matters on which examination is requested are described with reasonable particularity, the organization must designate one or more persons to testify on its behalf as to matters known or reasonably available to the organization.

(f) Objection. A person commanded to attend and give testimony at a hearing or trial may object or move for a protective order before the court at or before the time and place specified for compliance. A party causing a subpoena to issue must take reasonable steps to avoid imposing undue burden or expense on the person served. In ruling on objections or motions for protection, the court must provide a person served with a subpoena an adequate time for compliance and protection from undue burden or expense. The court may impose reasonable conditions on compliance with a subpoena, including compensating the witness for undue hardship.

(g) Enforcement. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena is issued or of a district court in the county in which the subpoena is served, and may be punished by fine or confinement, or both. A fine may not be imposed, nor a person served with a subpoena attached, for failure to comply with a subpoena without proof of service and proof by affidavit of the party requesting the subpoena or the party's attorney of record that all fees due the witness by law were paid or tendered.

Tab N

November 9, 2021

To: Remote Proceedings Task Force

From: Lisa Hobbs, chair, Subcommittee 1

Re: Subcommittee 1's Report and Recommendations

Subcommittee one met on the following dates:
September 29, 2021
October 12, 2021
November 3, 2021

Our proposed new and amended rules are attached as Exh. A.

Task 1: Recording and Broadcasting Rules

One of the most difficult of our subcommittee's tasks was to review and recommend amendments to the Texas rules governing the recording and broadcasting of court proceedings in light of the trend towards remote proceedings via Zoom, YouTube, etc. The subcommittee reviewed two rules. *See* TEX. R. CIV. P. 18c; TEX. R. APP. P 14 (copies of current rules attached as Exh. B).

In addition to the current rules, the subcommittee also reviewed and relied on two other documents. First, the Office of Court Administration has created a document entitled *Background and Legal Standards – Public Right to Access Remote Hearings During Covid-19 Pandemic*. (See Exh. C.)[1] Second, in the early nineties, the Texas Supreme Court studied and finalized uniform rules for the coverage of court proceedings, which served as a template for many counties who have adopted a local rule on broadcasting. *See, e.g.*, Misc. Docket No. 92-0068 (attached as Exh. D).

The subcommittee observed the differences in approaches to the various rules and standards. Most notably, current Rule 18c appears to require consent of participants before a proceeding can be recorded or broadcast. *See also In re BP Products North America Inc.*, 263 S.W.3d 117 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding)

[1] OCA provided trial courts a wealth of information on remote proceedings during the pandemic, which can be accessed here: TJB | Court Coronavirus Information | Electronic Hearings (Zoom) (txcourts.gov)

(conditionally issuing writ of mandamus in a case where a Galveston trial court allowed the "gavel to gavel" broadcast of a trial over one party's objection). Rule 18c is alone in this approach. The other rules and guidelines, including TRAP 14, leave the decision to record or broadcast to the trial or appellate court, presumably even over an objection by a party or participant.

The variance left a lot for the subcommittee to discuss. Some discussions were more philosophical; some discussions were more practical:

- When these rules were originally drafted, they contemplated a television camera in a physical courthouse to air on an evening newscast. Technology, and thus an individual's expectation of access and to information, has increased dramatically. There is room to completely re-write the rules with those expectations and technological advances in mind.
- Any "right to access" the courthouse is not an unfettered right. Live broadcasts during the pandemic were not an entitlement; they were a practical necessity for the participants and so the judicial process did not grind to a halt. As we get back to "normal," courthouses are and will be physically opened. There is no established "right" for the public to watch a proceeding from the comfort of their own homes.
- When sensitive and protected information is presented in a courtroom, rather than in person or remotely, that information must be protected. Any new rules should address that issue (particularly the issue of trade secrets) directly.
- A definition of "remote proceeding" might be helpful. A remote proceeding is not any proceeding in which any participant is participating remotely. A remote proceeding is one in which the judge is not in the courtroom, *i.e.*, there is no physical courtroom to "open" to the public.
- What is the nature of the public's right to access? What are the parameters of that right? The current rules, though philosophically different, already adopt the basic principle that the public's right to access is not unfettered and is subject to reasonable restrictions. (*See In re M-I L.L.C.*, 505 S.W.3d 569, 577-78 (Tex. 2016) ("To the extent the open-courts provision might confer a right of public access, this right clearly would not be absolute, but instead would be subject to reasonable limitations imposed to protect countervailing interests.")). We need not start from a blank slate. We should consider the limitations and restrictions already considered in Texas in past studies.
- With the publication of proceedings on a site like YouTube, there is the potential for misuse that was less of a concern under the traditional context of a media

entity recording portions of a proceeding for news broadcast purposes. These readily available, unedited recordings may pose security risks for the participants. They are also easy to manipulate and to be used for nefarious purposes—particularly in a state like Texas that elects judges. The potential for misuse raises practical questions, *e.g.*, should there be time limits for how long footage is stored/accessible?

- Should the procedures and standards for recording or broadcasting be different whether the medium is traditional media versus a court-controlled medium (like You-Tube)? Courts that regularly livestream their docket do not want an unwieldly process that might encourage objections to what is now seen as routine. This philosophy may create tension with business litigants who prefer a more defined procedure to guide a trial court when proprietary or trade secret information is at issue in a lawsuit.
- How detailed should the rule be?
    - Should it be a broad rule, leaving the issue in the trial court's sole discretion?
    - Should it provide time limitations or broader concepts like "reasonableness"/ "opportunity to be heard"?
    - Should the rule be permissive ("may… under these limitations…") or prohibitive ("cannot . . . unless")?
    - Who has the burden? What is the showing? Should findings be required?
    - Should there be an avenue for appellate review? If so, what is the standard of review?
    - Should a local jurisdiction be able to expand or restrict access inconsistent with any new rule?
- A final concern that did not get incorporated in the draft due to time constraints: some subcommittee member would expressly state that the ruling on an objection to recording/broadcasting must be made prior to a proceeding being recorded/broadcast, whether as a matter of good procedure or so that a party would have an express ruling for mandamus purposes. Others felt the ruling would be implicit in the trial court's action to record/broadcast (or not).

Task 2: TRAP recommendations

The subcommittee also reviewed the Texas Rules of Appellate Procedure to consider whether any rules needed to be amended to account for any new rules regarding remote proceedings that are recorded or broadcast.

As a result of its review, the subcommittee proposes amendments to the Texas Rules of Appellate Procedure to (1) conform TRAP 14 with new proposed TRCP 18c; and (2) expressly authorize remote oral argument in all cases. In making these recommendations, the subcommittee reviewed the relevant provisions of Chapter 22 of the Government Code and makes a few observations.

First, the Government Code authorizes any appellate court to "order that oral argument be presented through the use of teleconferencing technology." TEX. GOV'T CODE §22.302.[2] The Government Code also authorizes the two high courts to record and post online their arguments. TEX. GOV'T CODE §22.303 ("If appropriated funds or donations are available in the amount necessary to cover the cost, the supreme court and the court of criminal appeals shall make a video recording or other electronic visual and audio recording of each oral argument and public meeting of the court and post the recording on the court's Internet website."). The Government Code does not appear to authorize livestreaming for any appellate court and, more importantly, does not appear to authorize the intermediate appellate courts to even record and post online their oral arguments. Proposed amendments to TRAP 14 expressly provide that authority for all appellate courts.

Second, generally speaking, transferred cases must be heard in the originating appellate district unless all parties agree otherwise. TEX. GOV'T CODE §73.003. Likewise, some courts of appeals must hold argument in certain cases in a specific city or county. *See* TEX. GOV'T CODE TEX. GOV'T CODE §22.204 (Third CA must hold argument in Travis County in Travis County); §22.205 (Fourth CA must hold argument in Bexar County appeals in Bexar County); §22.207 (Sixth CA must hold argument in Bowie County appeals in Texarkana); §22.209 (Eighth CA must hold argument in El Paso appeals in El Paso county); §22.213 (Twelfth CA must hold argument in Smith County appeals in Tyler); TEX. GOV'T CODE §22.214 (Thirteenth CA must hold argument in Nueces County cases in Nueces County and cases from Cameron, Hidalgo, or Willacy County shall be heard and transacted in Cameron, Hidalgo, or Willacy counties). *See also* Roger Hughes, *The Fixed Locale Requirements for Appellate Court Proceedings: The Importance of Being Somewhere if You're Not Anywhere*, 22 APP. ADVOC. 122 (Winter 2009) (discussing in greater detail "fixed locale requirements" for Texas appellate courts and their history).

[2] There is also a specific authorization for remote proceedings in election proceedings. TEX. GOV'T CODE §22.305(b) (entitled "PRIORITY OF CERTAIN ELECTION PROCEEDINGS," and providing "[i]f granted, oral argument for a proceeding described by Subsection (a) may be given in person or through electronic means"). This is probably unnecessary given the general authorization in Section 22.302.

Even in these situations, however, it appears that appellate courts can hold argument remotely in lieu of in-person argument at a specific location. *See, e.g.*, TEX. GOV'T CODE §73.003(e) (allowing the chief justice of an appellate court to elect to "hear oral argument through the use of teleconferencing technology" in transferred cases); §22.302 (more generally authorizing an appellate "court and the parties or their attorneys [to] participate in oral argument from any location through the use of teleconferencing technology." Nevertheless, the subcommittee recommends adding a provision in proposed amendments to TRAP 39.8 to make clear that the general authority to hear a case remotely applies even when a particular case, by statute, must be heard in a particular location.

The additional notice requirements were added as good policy and to conform with existing practice.

The subcommittee recognized that having a recording of a proceeding, in addition to a transcribed record of the proceeding, may create confusion concerning the "official record" of a proceeding for purposes of appeal. The subcommittee unanimously agreed that the "official record" of a proceeding for purposes of appeal is only the transcribed record. The broadcast/recording is not the official record and should not be made a part of the appellate record. Moreover, any disputes about the "official record," whether prompted by a recording or otherwise, should be resolved by the trial court, not an appellate court. The subcommittee ultimately decided to include in proposed Rule 18c a notation about this issue. A similar provision could be added to TRAP 13.2 (duties of "official recorders").

Task 3: Rule of Judicial Administration 12

Rule of Judicial Administration 12 provides public access to "judicial records." The Rule is essentially the judiciary's version of the Public Information Act. The rule defines "judicial record" to expressly exclude records "pertaining to [a court's] adjudicative function, regardless of whether that function relates to a specific case." TEX. R. JUD. ADMIN. 12.2(d). "A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record." *Id.* Thus, under the current version of the rule, a "Zoom" recording of a hearing or proceeding is not a "judicial record" subject to Rule 12. *See, e.g.*, Rule 12 Decision, Appeal No. 21-009 (May 24, 2021) (available online at 21-009.pdf (txcourts.gov)).

Nevertheless, courts continue to receive requests for recordings of case-specific hearings and proceedings. The subcommittee recommends amending Rule 12 to make the current law more express as it relates to recordings of court proceedings.

EXHIBIT A

New Texas Rule of Civil Procedure 18c:

Recording and Broadcasting of Court Proceedings

18c.1. Recording and Broadcasting Permitted

A trial court may permit courtroom proceedings to be recorded or broadcast in accordance with this rule and any standards adopted by the Texas Supreme Court. This rule does not apply to an investiture, or other ceremonial proceedings, which may be broadcast or recorded at the trial court's sole discretion, with or without guidance from these rules.

18c.2. Recording and Broadcasting as a Matter of Course

A trial court may record or broadcast courtroom proceedings over which the trial court presides via a court-controlled medium. If a trial court elects to broadcast the proceeding, the trial court must give reasonable notice to the parties. Reasonable notice may include posting on the trial court's official webpage a general notice stating the types of proceedings recorded and broadcasted as a matter of course and the medium of broadcasting. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

18c.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding*. A person wishing to cover a court proceeding by broadcasting, recording, or otherwise disseminating the audio, video, or images of a court proceeding must file with the court clerk a request to do so. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing);
(E) the type and extent of equipment to be used; and
(F) that all parties were notified of the request.

(b) *Response*. Any party may file a response to the request. If a party objects to coverage of a hearing, the objections must not be conclusory and must state the specific and demonstrable injury alleged to result from coverage.

(c) *Hearing*. The requestor or any party may request a hearing on objections to broadcasting or recording a proceeding, which may be granted so long as the hearing will not substantially delay the proceeding or cause undue prejudice to any party or participant.

18c.4. Decision of the Court

In making the decision to record or broadcast court proceedings, the court may consider all relevant factors, including but not limited to:

(1) the importance of maintaining public trust and confidence in the judicial system;
(2) the importance of promoting public access to the judicial system;
(3) whether public access to the proceeding is available absent the broadcast or recording of the proceeding;
(4) the type of case involved;
(5) the importance of, and degree of public interest in, the court proceeding;
(6) whether the coverage would harm any participants;
(7) whether trade secrets or other proprietary information will be unduly disseminated;
(8) whether the coverage would interfere with the fair administration of justice, provision of a fair trial, or the rights of the parties;
(9) whether the coverage would interfere with any law enforcement activity;
(10) the objections of any of the parties, prospective witnesses, victims, or other
(11) participants in the proceeding of which coverage is sought;
(12) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;
(13) the extent to which the coverage would be barred by law in the judicial proceeding;
(14) undue administrative or financial burden to the court or participants; and
(15) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.[1]

18c.5 Official Record

Video or audio reproductions of a proceeding pursuant to these rules shall not be considered as part of the official court record.

18c.6 Violations of Rule

Any person who records, broadcasts, or otherwise disseminates the audio, video, or imagery of a court proceeding without approval in accordance with this rule may be subject to disciplinary action by court, up to and including contempt.

[1] Some subcommittee members would remove the phrase "to which fact the court shall give great weight" because it may cause more confusion than clarity. This phrase comes from the factors the supreme court adopted in Misc. Docket No. 92-0068.

Proposed Revisions to Texas Rules of Appellate Procedure 14:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Recording and Broadcasting as a Matter of Course

An appellate court may record or broadcast courtroom proceedings over which the court presides via a court-controlled medium upon reasonable notice to the parties. Reasonable notice may include posting a general notice on the court's official webpage. Parties may object to a proceeding being recorded or broadcast by following the procedures and standards set forth in this rule.

14.3 Procedure Upon Request

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing); and
(E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time*. The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court*. In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

Proposed Revisions to Texas Rules of Appellate Procedure 39:

Rule 39. Oral Argument; Decision Without Argument

****

39.8. Remote Argument

An appellate court may hold oral argument with participants physically present in the courtroom or remotely by audio, video, or other technological means. An oral argument held remotely complies with statutory provisions requiring argument be held in a specific location regardless of where the justices and participants are located at the time of argument.

39.9 Clerk's Notice

The clerk must send to the parties—at least 21 days before the date the case is set for argument or submission without argument—a notice telling the parties:

(a) whether the court will allow oral argument or will submit the case without argument;

(b) the date of argument or submission without argument;

(c) if argument is allowed, the time allotted for argument; ~~and~~

(d) the names of the members of the panel to which the case will be argued or submitted, subject to change by the court; and

(e) if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

A party's failure to receive the notice does not prevent a case's argument or submission on the scheduled date.

Proposed Revisions to Texas Rules of Appellate Procedure 59:

Rule 59. Submission and Argument

59.2. Submission With Argument

If the Supreme Court decides that oral argument would aid the Court, the Court will set the case for argument. The clerk will notify all parties of the submission date, location, and, if a remote argument, whether the argument will be recorded or broadcast pursuant to Rule 14.2.

12.3 Applicability. This rule does not apply to:

(a) records or information to which access is controlled by:

(1) a state or federal court rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

(2) a state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct;

(4) Chapter 552, Government Code, or another statute or provision of law;

(b) records or information to which Chapter 552, Government Code, is made inapplicable by statute, rule, or other provision of law, other than Section 552.003(1)(B);

(c) records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by:

(1) a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure, or evidence; or

(2) common law, court order, judicial decision, or another provision of law

(d) elected officials other than judges~~.~~; or

(e) recordings of a remote proceeding made pursuant to Rule 18c.

EXHIBIT B

Texas Rules of Civil Procedure 18c provides:

Recording and Broadcasting of Court Proceedings

A trial court may permit broadcasting, televising, recording, or photographing of proceedings in the courtroom only in the following circumstances:

(a) in accordance with guidelines promulgated by the Supreme Court for civil cases, or

(b) when broadcasting, televising, recording, or photographing will not unduly distract participants or impair the dignity of the proceedings and the parties have consented, and consent to being depicted or recorded is obtained from each witness whose testimony will be broadcast, televised, or photographed, or

(c) the broadcasting, televising, recording, or photographing of investiture, or ceremonial proceedings.

Texas Rules of Appellate Procedure 14 provides:

Rule 14. Recording and Broadcasting Court Proceedings

14.1. Recording and Broadcasting Permitted

An appellate court may permit courtroom proceedings to be broadcast, televised, recorded, or photographed in accordance with this rule.

14.2. Procedure

(a) *Request to Cover Court Proceeding.*

(1) A person wishing to broadcast, televise, record, or photograph a court proceeding must file with the court clerk a request to cover the proceeding. The request must state:

(A) the case style and number;
(B) the date and time when the proceeding is to begin;
(C) the name of the requesting person or organization;
(D) the type of coverage requested (for example, televising or photographing); and
(E) the type and extent of equipment to be used.

(2) A request to cover argument of a case must be filed no later than five days before the date the case is set for argument and must be served on all parties to the case. A request to cover any other proceeding must be filed no later than two days before the date when the proceeding is to begin.

(b) *Response.* Any party may file a response to the request. If the request is to cover argument, the response must be filed no later than two days before the date set for argument. If a party objects to coverage of the argument, the response should state the injury that will allegedly result from coverage.

(c) *Court May Shorten Time.* The court may, in the interest of justice, shorten the time for filing a document under this rule if no party or interested person would be unduly prejudiced.

(d) *Decision of Court.* In deciding whether to allow coverage, the court may consider information known ex parte to the court. The court may allow, deny, limit, or terminate coverage for any reason the court considers necessary or appropriate, such as protecting the parties' rights or the dignity of the court and ensuring the orderly conduct of the proceedings.

EXHIBIT C

BACKGROUND AND LEGAL STANDARDS – PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC[1]

On March 13, 2020, the Supreme Court of Texas and Court of Criminal Appeals issued the First Emergency Order Regarding the COVID-19 State of Disaster and authorized all courts in Texas in any case – civil or criminal – without a participant's consent to: 1) conduct any hearing or court proceeding remotely through teleconferencing, videoconferencing, or other means; and 2) conduct proceedings away from the court's usual location *with reasonable notice and access to the participants and the public*.[2] This emergency order's recognition of the public's right to reasonable notice and access to court proceedings, both civil and criminal, is consistent with traditional practice in Texas state courts and with federal and state precedent as discussed below.

The 6th Amendment of the Constitution of the United States affords defendants the right to a public trial, including all phases of criminal cases. Texas extends that right through the 14th Amendment to juvenile justice cases brought under Chapter 54 of the Texas Family Code.[3]

The Supreme Court has also held that the press and public have a similar, independent right under the 1st Amendment to attend all criminal proceedings in both federal and state courts.[4] Although the Supreme Court has never specifically held that the public has a First Amendment right of access to *civil* proceedings,[5] federal and state courts that have considered the issue have overwhelmingly held

[1] The Office of Court Administration wishes to thank District Judge Roy Ferguson (394th) for primary authorship on this document.

[2] The Third Emergency Order Regarding the COVID-19 State of Disaster amended the First Emergency Order to remove the requirement that the court conduct the proceedings in the count of venue.

[3] Texas courts have recognized the juvenile's right to public proceedings in quasi-criminal juvenile justice cases under the 14th Amendment and Section 54.08 of the Texas Family Code. Article 1, Section 13 of the Texas Constitution states that "All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law." Courts construing this provision interpret it to prohibit the erection of barriers to the redress of grievances in the court system. So, the phrase "open courts" in Section 13 does not appear to mean "public trial."

[4] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (establishing that the 1st Amendment to the United States Constitution guarantees the public a right of access to judicial proceedings).

[5] Although the holding is specific to the criminal case, the constitutional analysis in *Richmond Newspapers* applies similarly to civil cases. As Chief Justice Burger in the majority opinion opined, "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." *Id*. at 576. In his concurrence, Justice Stevens wrote, "[T[he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the judicial branch[.]" Justice Brennan added, "Even more significantly for our present purpose, […] open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power[.]'" *Id.* And Justice Stewart specifically addressed the issue of civil cases, saying, "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." *Id.* at 599.

that there is a public right to access in civil cases under the 1st Amendment.[6] Courts must ensure and accommodate public attendance at court hearings.[7] However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, ensuring a fair trial, or protecting a child from emotional harm.[8] Such cases are rare, however, as the presumption of openness adopted by the Supreme Court must be overcome in order to close hearings to the public.[9] In some instances, improper or unjustified closure of court proceedings constitutes structural error, requiring "automatic reversal and the grant of a new trial."[10]

The Texas Family Code expressly authorizes the limiting of public access by agreement in contested hearings involving SAPCR claims and rights.[11] If supported by appropriate findings made on the record, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court.[12] But because the constitutional right at issue belongs to the public rather than the parties, all closures or restrictions of public access to such hearings must satisfy the same heightened standards handed down by the Supreme Court in *Waller* regarding criminal cases – even when agreed to by the parties. Thus, while the court may consider the parties' agreement while evaluating a request for closure, that agreement alone is not sufficient to warrant closure. The 1st Amendment right belongs to the public – not to the parties; the parties cannot waive it by agreement.

It is the court's affirmative burden to ensure meaningful and unfettered access to court proceedings. In fulfilling this burden, the court must take all reasonable measures necessary to ensure public access.[13] Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), is enough to mandate reversal and a new trial. At this time, the movement of the general public is limited by the executive branch through the governor and various county judges. Shelter-in-place orders and prohibitions on non-essential travel prevent members of the general public from viewing hearings in the courthouse. While hearings in courthouses are no longer mandatory under the First Emergency Order Regarding the COVID-19 State of Disaster, the emergency order requires "reasonable notice and access to the participants and the public." Even if a judge is physically in a courtroom for the virtual hearing, it is the court's burden to ensure public access to each hearing and take reasonable measures to remove barriers thereto. There is no reasonable access to the public for a hearing, whether remote or physically located in a courthouse, when emergency measures are in place that would require the public to commit a jailable criminal offense to attend the hearing in person in a courtroom.[14] For the duration of this crisis and while these emergency orders are in effect, courts must find a practical and effective way to enable public access to virtual court proceedings. Choosing not to provide reasonable and meaningful public access to remote court proceedings at this time may equate to constitutional error and mandate reversal.

[6] *See Doe v. Santa Fe Indep. School Dist.*, 933 F. Supp. 647, 648-50 (S.D. Tex. 1996) (discussing 3rd, 6th and 7th Circuit decisions and concluding that the right of the public to attend civil trials is grounded in the First Amendment as well as the common law).
[7] *See Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012).
[8] *See United States v. Osborne*, 68 F.3d 94, 98-99 (5th Cir. 1995).
[9] *See In re A.J.S.*, 442 S.W.3d 562 (Tex. App.—El Paso 2014, no pet.)(discussing open courts in juvenile cases).
[10] Id. (citing *Steadman v. State*, 360 S.W.3d 499, 510 (Tex.Crim.App. 2012)(violation of 6th Amendment right)).
[11] Tex. Fam. Code § 105.003(b).
[12] Tex. Fam. Code. § 105.003.
[13] *See Lilly*, 365 S.W.3d at 331.
[14] *See* Executive Order GA-14 (March 31, 2020) and Tex. Gov't Code § 418.173.

Under the standards established by the United States Supreme Court, the protective measures employed must be limited to those necessary to protect an overriding interest and no broader. The trial court must consider all reasonable alternatives to closing the proceeding and make findings in open court on the record adequate to support the closure.[15] The court must weigh the totality of the circumstances in making these fact specific findings. For this reason, no standing order or global rule for closure of specific categories of hearings may be preemptively issued by a court without running afoul of the requirement to provide the public with access to court proceedings.

The court should not close the entirety of a hearing from public view in order to protect a single witness or topic of testimony. Because the court must apply only the least restrictive measures to protect the overriding interest, only specific portions of a hearing or trial that meet this exacting burden may be conducted outside of the public view, and that only in rare cases. Appellate courts have reversed judgments when a single less-restrictive solution existed but was not considered on the record.[16]

Courts should strongly consider employing protective measures short of interrupting or terminating the live stream. Federal courts, including the Fifth Circuit, have held that a partial closure of a proceeding – limiting access rather than excluding the public – does not raise the same constitutional concerns as a complete closure from public access.[17] To employ a less-restrictive measure (for example, temporarily obscuring video but not audio, or not displaying exhibits through screen share,[18] providing a phone number for the public to access the audio of the proceeding only, or providing a link that permits certain members of the public only to view the hearing either through a YouTube private link or a link to the Zoom meeting), the court need only find a "substantial reason" for the limitation and employ a restriction that does not exceed justifiable limits.[19] Terminating or interrupting the livestream without an alternative means for the public to view the hearing – even temporarily – would constitute a complete closure, and the higher burden would apply.

It bears mentioning that this is not a new issue created by video hearings or public livestreaming. Sensitive and embarrassing testimony is entered in every contested family law hearing yet rarely merits closure or clearing of courtrooms. Child protection cases categorically involve evidence that is or may be damaging or embarrassing to the child. Commercial disputes commonly involve protected internal corporate operations. Rarely – if ever – have such trials been closed to the public. Such testimony should not now be evaluated differently simply because more people may exercise their constitutional right to view court proceedings than ever before. Public exercise of a constitutional right does not change the court's evaluation of whether that right should be protected. Nor should courts erect barriers or hurdles to public attendance at hearings to discourage public exercise of that right. On the contrary, courts are required to take whatever steps are reasonably calculated to accommodate public attendance. Closure of courtrooms is constitutionally suspect and risky and should be a last resort.

[15] *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).
[16] *See Cameron v. State*, 535 S.W.3d 574, 578 (Tex.App.—San Antonio 2017, no pet.)
[17] *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Circ. 1995).
[18] The Supreme Court has ruled that the media does not have a First Amendment right to copy exhibits. *Nixon v. Warner Communications*, 435 U.S. 589 (1978).
[19] *A.J.S.*, 442 S.W.3d at 567 (citing *Osborne*, 68 F.3d at 94, and applying the 6th Amendment *Waller* and "substantial reason" standards to 14th Amendment public rights).

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 92-0068

ADOPTION OF RULES FOR RECORDING AND BROADCASTING COURT PROCEEDINGS IN CERTAIN CIVIL COURTS OF TRAVIS COUNTY

ORDERED:

At the request of the civil district courts, county courts at law, and probate court of Travis County, the attached rules are adopted governing the recording and broadcasting of civil proceedings in those courts. TEX. R. CIV. P. 18c; TEX. R. APP. P. 21.

This Order shall be effective for each such court when it has recorded the Order in its minutes and complied with Texas Rule of Civil Procedure 3a(4).

SIGNED AND ENTERED this 11th day of March, 1992.

Thomas R. Phillips, Chief Justice

Raul A. Gonzalez, Justice

Oscar H. Mauzy, Justice

Eugene A. Cook, Justice

Jack Hightower, Justice

Nathan L. Hecht, Justice

Lloyd Doggett, Justice

John Cornyn, Justice

Bob Gammage, Justice

RULES GOVERNING THE RECORDING AND BROADCASTING OF COURT PROCEEDINGS IN CERTAIN CIVIL COURTS OF TRAVIS COUNTY

Pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the following rules govern the recording and broadcasting of court proceedings before the civil district courts, county courts at law, and probate court of Travis County, and their masters and referees.

1. Policy. The policy of these rules is to allow media coverage of public civil court proceedings to facilitate the free flow of information to the public concerning the judicial system, to foster better public understanding about the administration of justice, and to encourage continuing legal education and professionalism by lawyers. These rules are to be construed to provide the greatest access possible while at the same time maintaining the dignity, decorum and impartiality of the court proceeding.

2. Definitions. Certain terms are defined for purposes of these rules as follows.

2.1. "Court" means the particular court, master or referee in which the proceeding will be held.

2.2. "Media coverage" means any visual or audio coverage of court proceedings by a media agency.

2.3. "Media" or "media agency" means any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, in-house publication, professional journal, or other news reporting or news gathering agency.

2.4. "Visual coverage" means coverage by equipment which has the capacity to reproduce or telecast an image, and includes still and moving picture photographic equipment and video equipment.

2.5. "Audio coverage" is coverage by equipment which has the capacity to reproduce or broadcast sounds, and includes tape and cassette sound recorders, and radio and video equipment.

3. Media coverage permitted.

3.1. Media coverage is allowed in the courtroom only as permitted by Rule 18c of the Texas Rules of Civil Procedure and these rules.

3.2. If media coverage is of investiture or ceremonial proceedings as allowed by Rule 18c(c) of the Texas Rules of Civil Procedure, permission for, and the manner of such

coverage, are determined solely by the court, with or without guidance from these rules. If media coverage is for other than investiture or ceremonial proceedings, that is, under Rule 18c(a) or (b) of the Texas Rules of Civil Procedure, the provisions of these rules shall govern.

3.3. Media coverage under Rule 18c(a) and (b) of the Texas Rules of Civil Procedure is permitted only on written order of the court. A request for an order shall be made on the form included in these rules. The following procedure shall be followed, except in extraordinary circumstances and only if there is a finding by the court that good cause justifies a different procedure: (i) the request should be filed with the district clerk or county clerk, depending upon the court in which the proceeding is pending, with a copy delivered to the court, court administrator, all counsel of record and, where possible, all parties not represented by attorneys, and (ii) such request shall be made in time to afford the attorneys and parties sufficient time to confer, to contact their witnesses and to be fully heard by the court on the questions of whether media coverage should be allowed and, if so, what conditions, if any, should be imposed on such coverage. Whether or not consent of the parties or witnesses is obtained, the court may in its discretion deny, limit or terminate media coverage. In exercising such discretion the court shall consider all relevant factors, including but not limited to those listed in rule 3.5 below.

3.4. If media coverage is sought with consent as provided in Rule 18c(b) of the Texas Rules of Civil Procedure, consent forms adopted by the court shall be used to evidence the consent of the parties and witnesses. Original signed consent forms of the parties shall be attached to and filed with the request for order. Consent forms of the witnesses shall be obtained in the manner directed by the court. No witness or party shall give consent to media coverage in exchange for payment or other consideration, of any kind or character, either directly or indirectly. No media agency shall pay or offer to pay any consideration in exchange for such consent.

3.5. If media coverage is sought without consent, pursuant to Rule 18c(a) of the Texas Rules of Civil Procedure, the decision to allow such coverage is discretionary and will be made by the court on a case by case basis. Objections to media coverage should not be conclusory but should state the specific and demonstrable injury alleged to result from media coverage. If the court denies coverage, it shall set forth in its order the findings upon which such denial is based. In determining an application for coverage, the court shall consider all relevant factors, including but not limited to:

(a) the type of case involved;

(b) whether the coverage would cause harm to any participants;

(c) whether the coverage would interfere with the fair administration of justice, advancement of a fair trial, or the rights of the parties;

(d) whether the coverage would interfere with any law enforcement activity;

(e) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought;

(f) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse;

(g) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought; and

(h) the fact that any party, prospective witness, victim, or other participant in the proceeding is a child, to which fact the court shall give great weight.

4. Media coverage prohibited

4.1. Media coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Audio coverage and closeup video coverage of conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the court at the bench is prohibited.

4.2. Visual coverage of potential jurors and jurors in the courthouse is prohibited except when in the courtroom the physical layout of the courtroom makes it impossible to conduct visual coverage of the proceeding without including the jury, and the court so finds. In such cases visual coverage is allowed only if the jury is in the background of a picture of some other subject and only if individual jurors are not identifiable.

5. Equipment and personnel. The court may require media personnel to demonstrate that proposed equipment complies with these rules. The court may specify the placement of media personnel and equipment to permit reasonable coverage without disruption to the proceedings. Unless the court in its discretion and for good cause orders otherwise, the following standards apply.

5.1. One television camera and one still photographer, with not more than two cameras and four lenses, are permitted.

5.2. Equipment shall not produce distracting sound or light. Signal lights or devices which show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden lighting changes shall not be used.

5.3. Existing courtroom sound and lighting systems shall be used without modification. An order granting permission to modify existing systems is deemed to require that the modifications be installed, maintained, and removed without public expense. Microphones and wiring shall be unobtrusively located in places approved by the court and shall be operated by one person.

5.4. Operators shall not move equipment or enter or leave the courtroom while the court is in session, or otherwise cause a distraction. All equipment shall be in place in advance of the proceeding or session.

5.5. Identifying marks, call letters, words and symbols shall be concealed on all equipment. Media personnel shall not display any identifying insignia on their clothing.

6. Delay of proceedings. No proceeding or session shall be delayed or continued for the sole purpose of allowing media coverage, whether because of installation of equipment, obtaining witness consents, conduct or hearings related to the media coverage or other media coverage questions. To assist media agencies to prepare in advance for media coverage, and when requested to do so: (i) the court will attempt to make the courtroom available when not in use for the purpose of installing equipment; (ii) counsel (to the extent they deem their client's rights will not be jeopardized) should make available to the media witness lists; (iii) and the court administrator will inform the media agencies of settings or proceedings.

7. Pooling. If more than one media agency of one type wish to cover a proceeding or session, they shall make pool arrangements. If they are unable to agree, the court may deny media coverage by that type of media agency.

8. Official record. Films, videotapes, photographs or audio reproductions made in the proceeding pursuant to these rules shall not be considered as part of the official court record.

September 22, 1992

Ms. Amalia Mendoza
District Clerk
Post Office Box 1748
Austin, Texas 78767

Dear Ms. Mendoza,

Enclosed, please find a **corrected** copy of the order of this Court of March 11, 1992 that approved local rules for recording and broadcasting court proceedings in certain civil courts of Travis County. Please destroy previous versions of this order.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

cc:
Hon. B. B. Schraub
3rd Admin Judicial Rgn

Hon. Joseph H. Hart
126th District Court

County Clerk

Mr. Ray Judice
Office of Court Admin

State Law Library

Chmn Supreme Ct Adv Committee

JOSEPH H. HART
DISTRICT JUDGE
126TH JUDICIAL DISTRICT COURT

P. O. BOX 1748
AUSTIN, TEXAS 78767

April 17, 1992

Justice Nathan L. Hecht
Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Thank you for forwarding to me a copy of the Order recently issued by the Supreme Court adopting rules for recording and broadcasting court proceedings in civil courts in Travis County. A few omissions and errors have been brought to my attenion that the Court may wish to change.

There is some inconsistency between the first paragraph of the rules and paragraph 2.1. The opening paragraph does not include district court masters and referees, while paragraph 2.1 does. Paragraph 2.1 does not include county courts at law and the probate court of Travis County, while the opening paragraph does. I believe we intended to have all of the courts covered by the rules, and they all should be included in both the opening paragraph and paragraph 2.1.

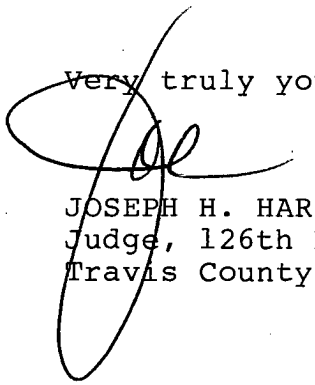
In paragraph 3.5(c) the conjunction "and" was probably included inadvertently and is not necessary.

The last sentence of paragraph 4.2 reads in part as follows: "In such cases visual coverage is allowed only of the jury is in the background of a picture ...." The "of" should be changed to "if" so that the sentence begins as follows: "In such cases visual coverage is allowed only if the jury is in the background of a picture ...."

Paragraph 5.1 reads in part as follows: "One television camera and one still photographers ..." The word should be "photographer," singular, rather than "photographers," plural.

Thank you, the Court and your staff for working with us on these rules. If there is a problem in making the corrections, please let me know.

Very truly yours,



JOSEPH H. HART
Judge, 126th District Court
Travis County, Texas

JHH/bjv

Tab O

2022 Remote Proceedings Survey

Overview

The 2022 State Bar of Texas Appellate Sections Remote Proceedings Survey was conducted electronically from July 27 to August 18. The primary purpose of the survey was to gauge the opinions and experiences of State Bar of Texas Appellate Section members with remote appellate proceedings to date.

At the time of the survey, the membership of the State Bar Appellate Section was 1,877. Excluding those who have opted out of participating in State Bar surveys, those receiving the survey included a total of 1,466 section members. A total of 465 members responded to the survey.

With 465 respondents, there is a margin of error of ± 3.8%, which means that if 40% of the respondents answered “yes” to a question, we can be 95% confident that the actual proportion of the population who would answer “yes” to the same question is 3.8 percentage points lower or higher than 40% (36% to 44%).

This report is being provided at the request of the Council of Chief Justices, which is comprised of each of the fourteen intermediate appellate court Chief Justices, and for its information. The report summarizes the responses of individual members of the Appellate Section of the State Bar of Texas, which is a voluntary association of lawyers practicing in a specialized area of law. The responses of individual members of the Appellate Section do not reflect or represent a position of the Appellate Section or of the Board of Directors, Executive Committee, or general membership of the State Bar of Texas.

Summary Findings

Demographics

Practice: A majority of respondents were civil practitioners:

77% of respondents were civil practitioners.

Years Licensed: Respondents were slightly older:

The median years licensed of respondents was 25, compared to 22 for all Appellate Section members.

Remote Oral Arguments

The number of respondents that prefer in-person arguments is double those that prefer remote (49% and 20% respectively).

Participated in Remote Oral Arguments:

Remote Oral Arguments

57%

Remote Oral Arguments Effectiveness:

Effective

70%

Responses of "Very Effective" or "Mostly Effective".

Demographics

QUESTION: Please select the option that best describes your practice:

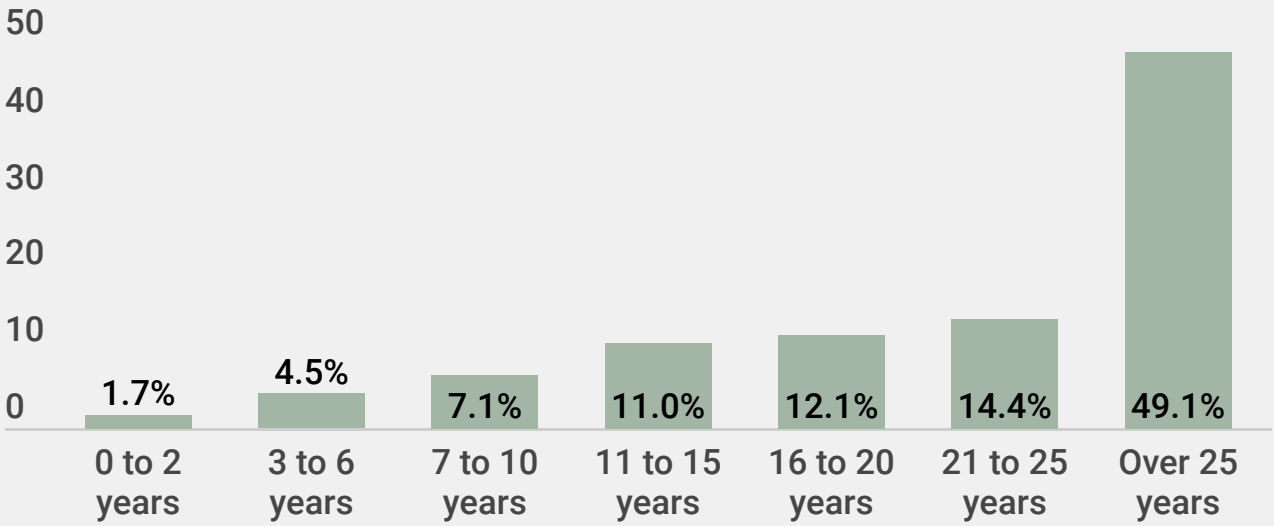
Civil Practitioner

Appellate Judge

Criminal Practitioner

Other

QUESTION: How long have you been licensed to practice law?



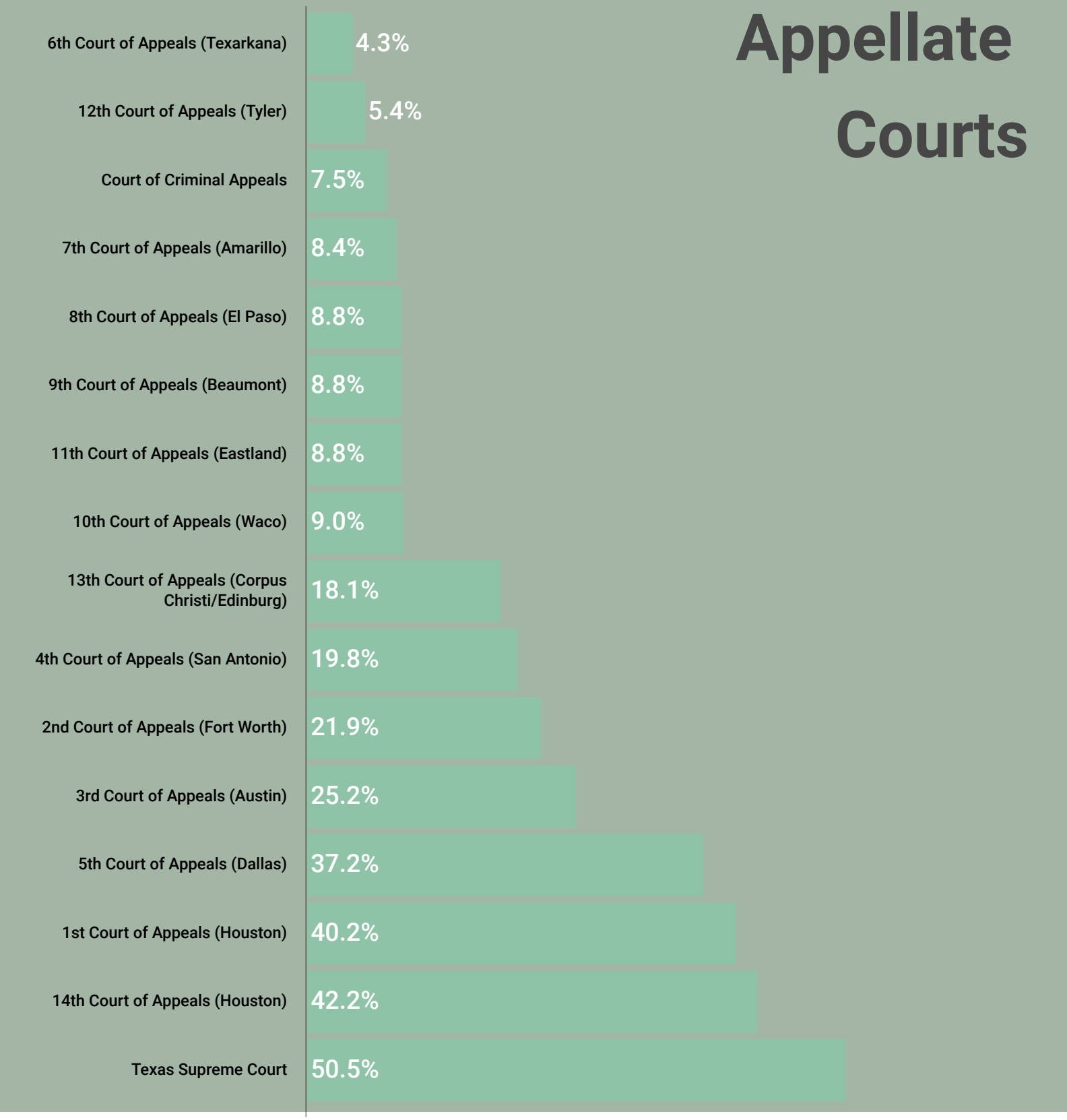
Median Years Licensed

25
Years

QUESTION: Please select the appellate court on which you currently serve as a judge or the appellate courts in which you frequently practice:

Note: Respondents were asked to select all that apply.

Appellate Courts



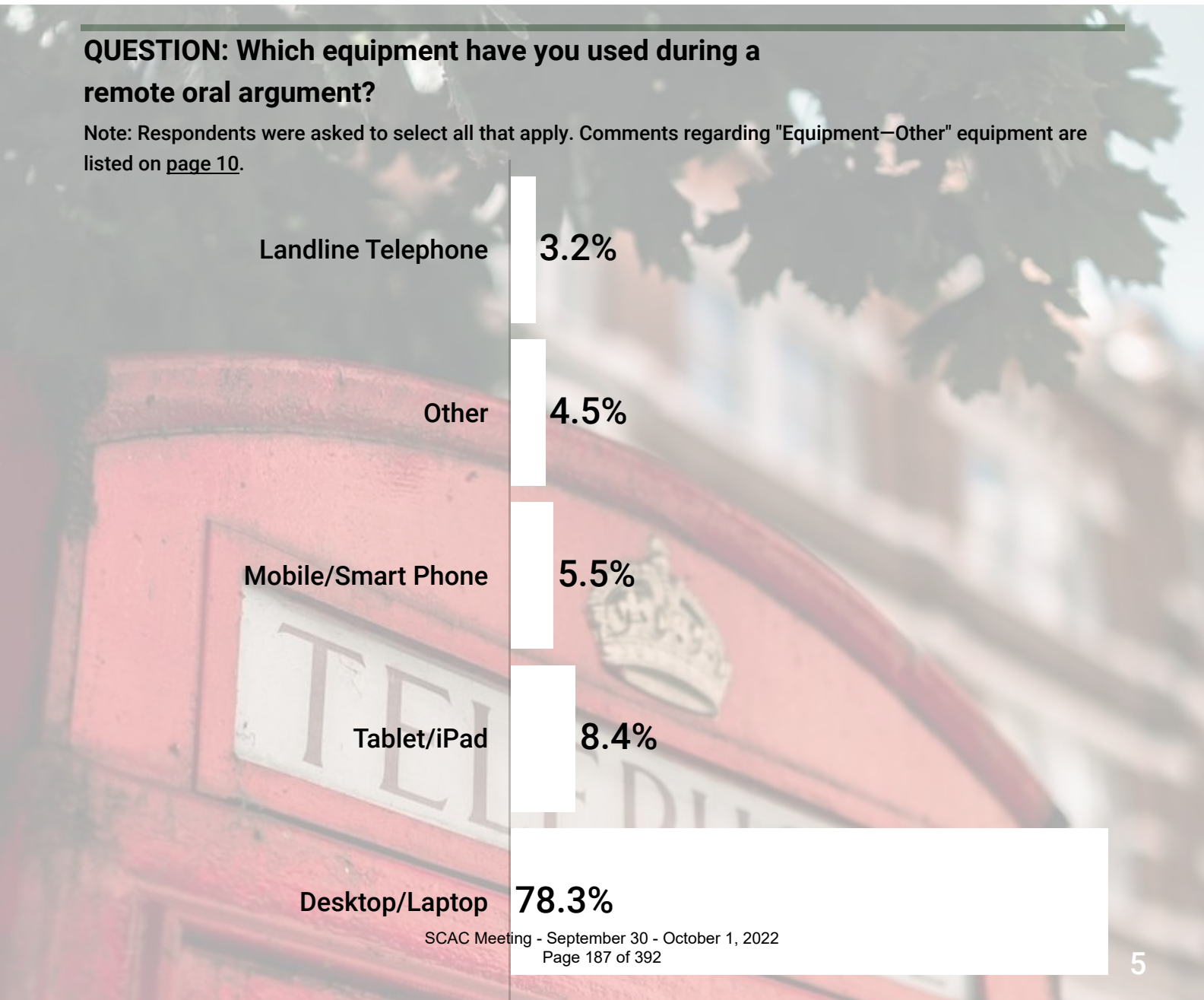
Remote Oral Arguments

QUESTION: Have you participated in remote oral arguments?

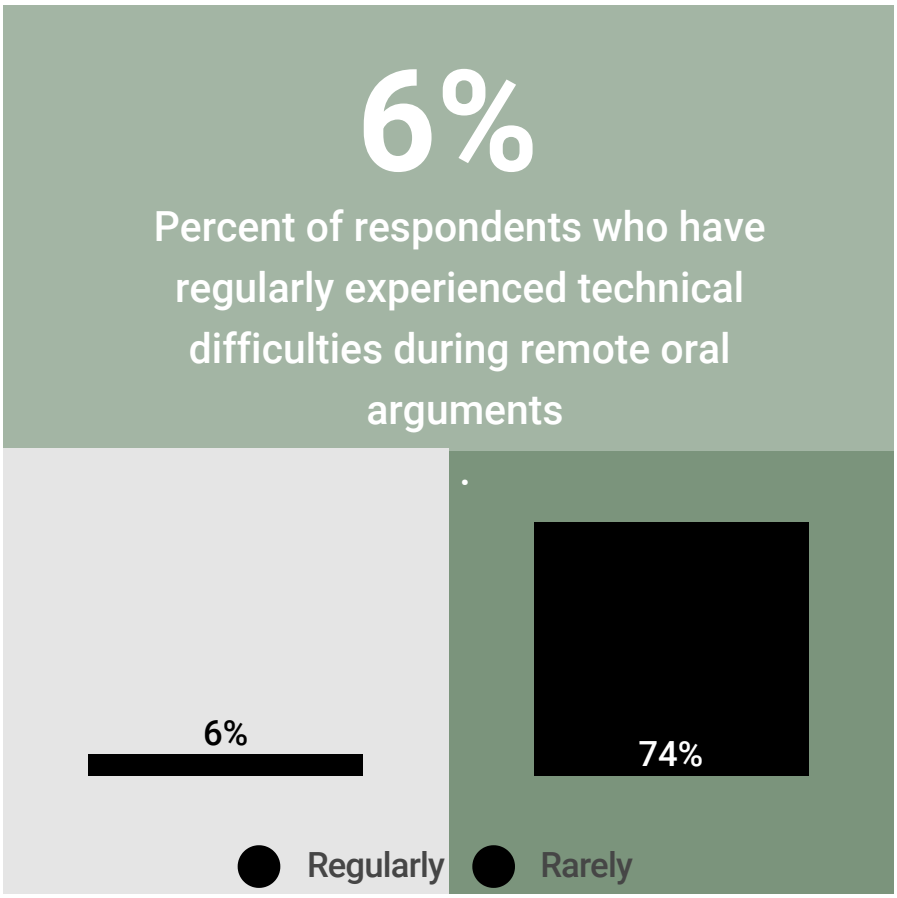
Yes	No
57%	43%

QUESTION: Which equipment have you used during a remote oral argument?

Note: Respondents were asked to select all that apply. Comments regarding "Equipment—Other" equipment are listed on page 10.

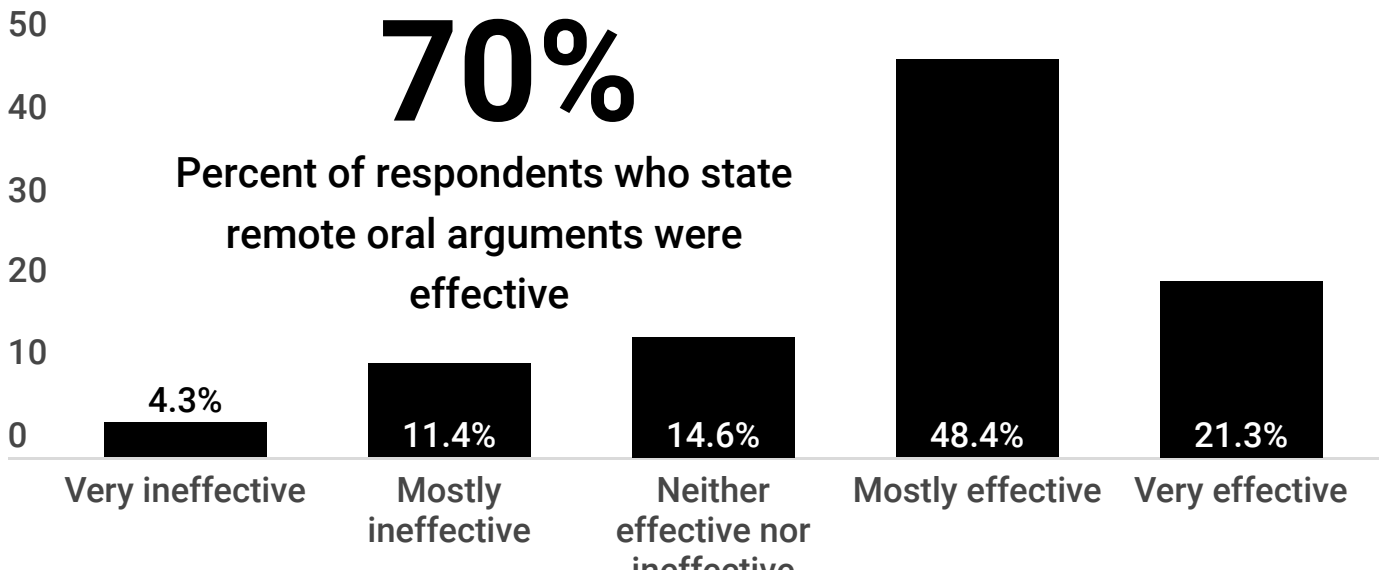


QUESTION: How often have you conducted or participated in a remote oral argument that was disrupted by a technical problem (video, audio, or both)?



Note: Regularly includes responses of "Always" or "Often".

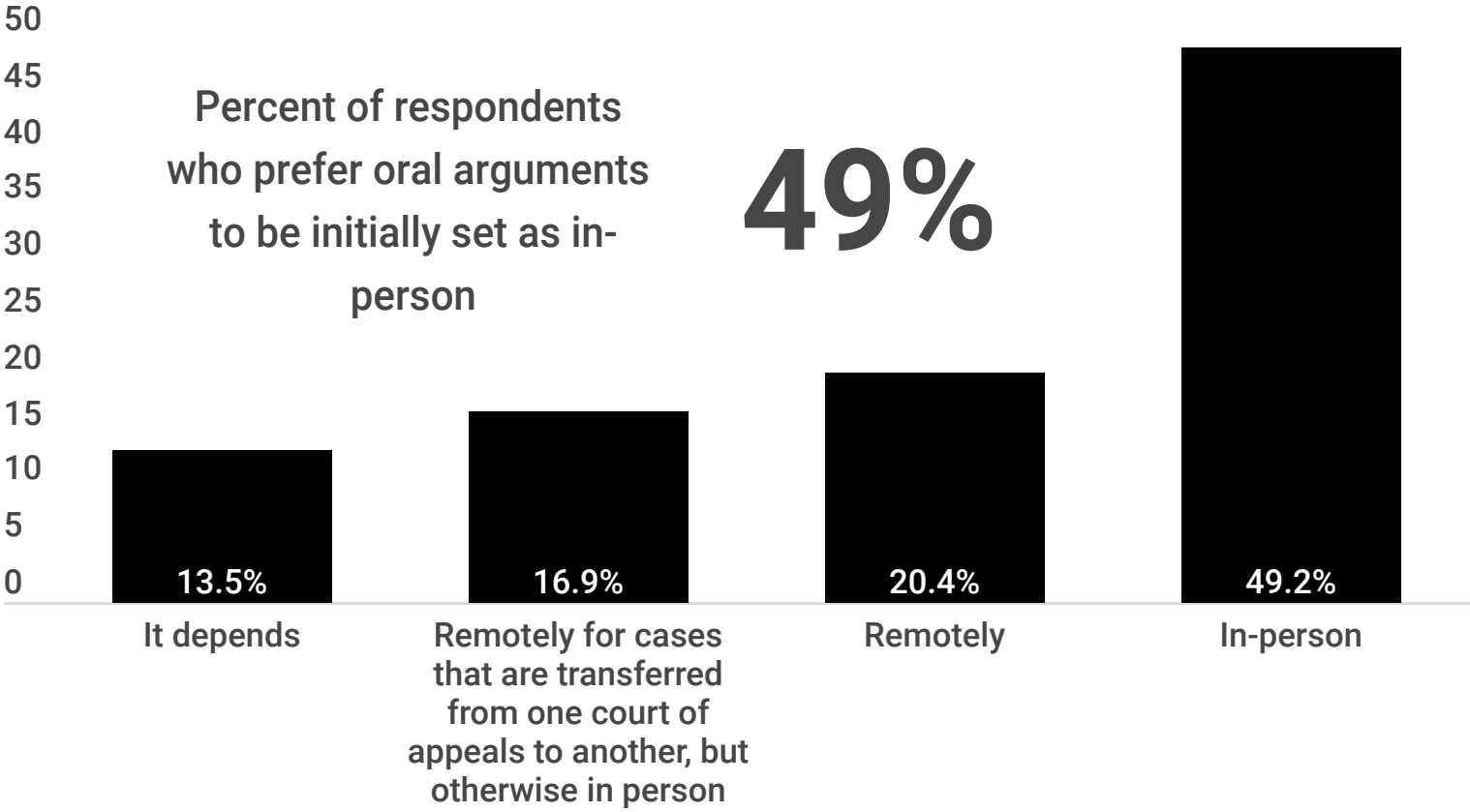
QUESTION: Based on your experience with remote oral arguments, how effective would you say that remote oral arguments are?



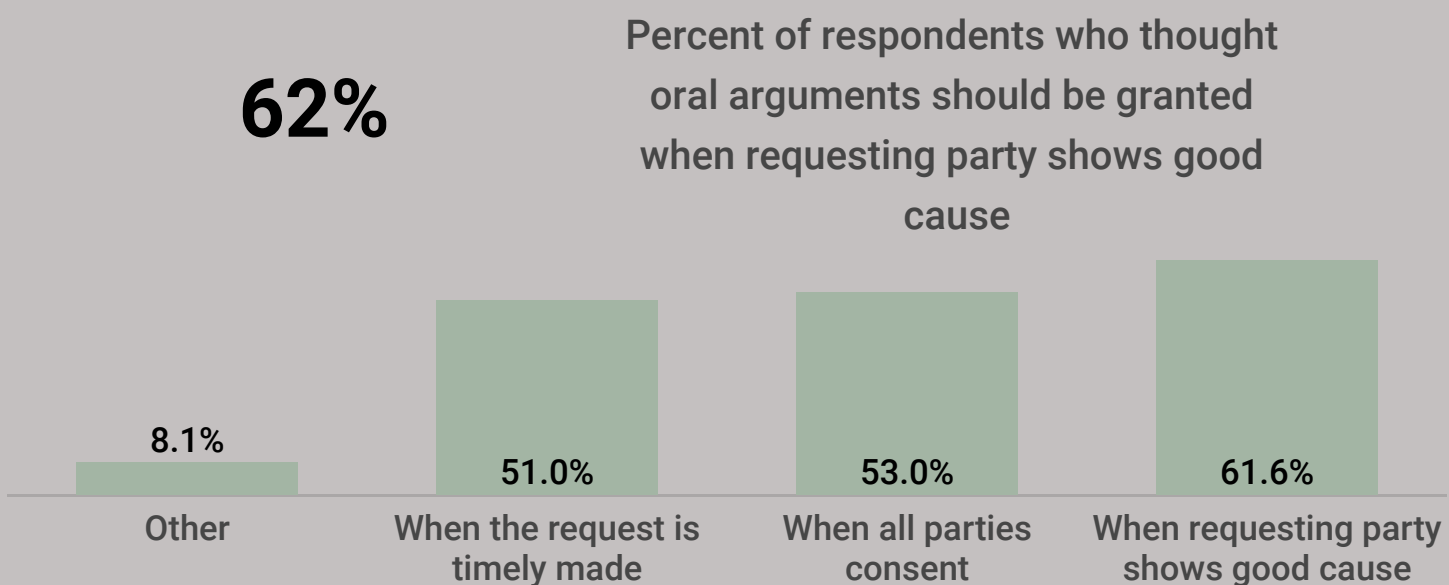
Moving Forward

QUESTION: Going forward, how would you prefer that the courts of appeals initially set most oral arguments?

Note: Comments regarding responses of "Initial Setting—It depends" are listed on page 11-13.



QUESTION: When a court of appeals sets an in-person oral argument, under what circumstances should the court generally grant a request from counsel to present argument remotely?



Note: Comments regarding responses of "Circumstances—Other" are listed on page 14-15.

QUESTION: When a court of appeals sets an in-person oral argument but grants a request from counsel to present argument remotely, what should the effect be?

62%	The other parties may elect to argue either in-person OR remotely, meaning that one attorney may argue in person while others argue remotely
35%	The court should transition to a complete remote argument, meaning that counsel for all parties in the appeal must argue remotely
2%	Other

Watch

QUESTION: How often do you watch either livestreamed or archived oral arguments?

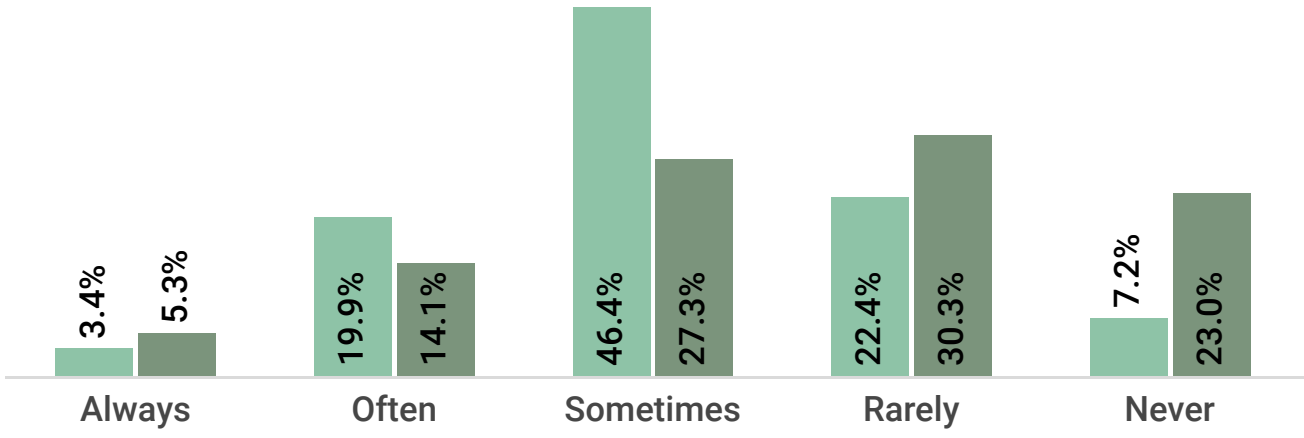
23%
Respondents

Percent of respondents who regularly watch oral arguments: (Responses of “Always” or “Often”)

QUESTION: How often do your clients watch either livestreamed or archived oral arguments?

19%
Clients

Percent of clients who regularly watch oral arguments: (Responses of “Always" or “Often”)



Equipment—Other

QUESTION: Which equipment have you used during a remote oral argument? (Comments regarding responses of "Other")

Office Teleconference Equipment
External conference speaker and webcam
Zoom screen
videoconference set-up at law firm
zoom room
No remote oral argument
legal pad and yellow No.. 2 Ticonderoga pencil
2-way HD TV setup.
none
Projection screen
Firm setup video room w/ HD camera and enhance sound and lighting
Court equipment from Houston (pre pandemic)
conference room w cameras
zoom room

Initial Setting—It Depends

QUESTION: Going forward, how would you prefer that the courts of appeals initially set most oral arguments? (Comments regarding responses of "It depends")

A Court of Appeals should assess whether it would like remote or in-person argument on a case and either select how the option it wants OR ask the litigants what option they prefer when no-tifying them that the case will be argued. Litigants should also

Allow parties to agree on remote or in-person.

Case by case; courts should offer both options or hybrid split.

Counsel should be given the option of attending either remotely or in person. Emergency matters (stay motions, for example) should be conducted remotely.

Either in-person or remotely depending on what the party requests

For example, the third court gets certain suits against the government filed all over the state. Sometimes it's most efficient for the litigants to entertain argument remotely.

Give my statewide practice, it woukd depend on the particular case and setting. It would be nice to have the option for remote appearance if necessary

I believe courts should set oral arguments in a manner they believe works best for them, and should consider remote appearance if (a) it works fine for the court, and (b) it is not inconvenient for counsel with a disability or whose client could not readi

I prefer remote presentations but I observe the will of the parties.

I think it's important to retain the capability because individual case circumstances may lend itself to remote arguments being the most efficient way of getting the arguments in. However, in person is preferred in most cases.

I think the choice should be up the the attorney, within reason.

I think the parties should have a say based on their comfort level

I would leave it to the discretion of the parties. I am happy to participate in either format.

I would like to option to select either in-person or remotely

I would prefer if the parties had some say in whether the arguments were remote or in person to account for things like a party's resources.

I would prefer to allow remote arguments in cases transferred from one court of appeals to another UNLESS the parties would prefer oral argument in person

I'd let the parties make a statement and they can argue whichever way they prefer, not entirely unlike the statements requesting OA.

If a case has been reassigned to a different court because of a docket equalization order, it adds to the expense for the client to travel to a different court. Remote arguments avoid that added expense.

If agreed by the parties, especially for transferred cases

Initial Setting—It Depends

QUESTION: Going forward, how would you prefer that the courts of appeals initially set most oral arguments? (Comments regarding responses of "It depends")

If both counsel agree to do so

If both parties agree to remote oral argument or if one party requests for good cause.

If both sides have to travel to the court, remote makes sense. Also could do hybrid remote/in person.

If counsel are in town, in person works just fine. But if counsel are from out of town, remote oral arguments are an excellent substitute for a day of travel.

If the court and parties are comfortable, I would prefer remote arguments

In person is by far the best, but remote works when the court considers submission on briefing

In person is preferable, but remote has the advantage of being recorded. I think record of in-person oral arguments should be made and transcribed and become part of the appellate record.

In -person preferred, but if there are some cases for which the court would be more likely to hold oral argument if done remotely, that would be a good way to allow more attorneys on smaller/simpler cases to obtain the oral argument experience necessary t

In person unless agreed by parties or on good cause in motion.

in person with the option to request remote appearances depending on the circumstances (ie the attorney cannot travel for personal reasons or medical reasons)

In-person for local counsel, remotely for out-of-town counsel

In-person is a strong preference. If the parties agree to remote for cost/travel reasons in a transfer case, I think that is fine. I would not prefer being forced to remote oral argument, however.

In-person unless both sides opt for remote

IRemote as backup option for bad weather

it depends on travel arrangements; strictly a cost/benefit balance

It depends upon the nature of the case presented to the court.

it should be go-to when the lawyers are from another district

It would be best for parties to request remote or in person in brief. Or for TRAPs to say default is in person but party can request remote.

Lawyers should be given the option to appear remotely or in person

let the court and parties tailor the mode to their needs. A default of remote for transferred cases makes sense.

Location and Covid Status

many criminal cases could be set remotely and some smaller civil cases could be set remotely. Also, it might be more efficient (and fair) to set transfer cases remotely. but if courts continue to limit their oral arguments, then those they do select sho

Initial Setting—It Depends

QUESTION: Going forward, how would you prefer that the courts of appeals initially set most oral arguments? (Comments regarding responses of "It depends")

Maybe based on party and court preference

On the complexity of the matter

Option to appear remote with sufficient notice or documentation

Oral argument in family-law cases should be the exception, not the rule. The courts should not grant oral argument merely because one party requested it. The people paying for family-law suits are families---normal people with tight incomes (especially in

Preference for in-person, but remote if health issues or travel would otherwise preclude oral argument

Remote is a good option if argument needs to be scheduled on expedited basis or for transferred cases or if there is a public heath issue.

Remote is great for some cases. It depends on the case.

Remotely as an option for attorneys whose principal office is located over 60 miles (or 1 hour driving distance) from the COA.

Some appeals do not have high amounts in controversy, and those should more frequently result in remote proceedings. The docketing statement is probably the best place for asking parties to state a preference and disclose pertinent information.

The court should adhere to the majority wishes of the parties. If no majority, the court should decide based on the needs of the court.

The court should offer remote for out-of-town counsel and for appeals that are transfer appeals

The nature of the case

To me it depends on whether a remote oral argument will reduce client costs and fees.

Upon request of counsel

Use remotely when court prefers and when in-person would require counsel to travel from out-of-town

Virtually if parties request

Circumstances—Other

QUESTION: When a court of appeals sets an in-person oral argument, under what circumstances should the court generally grant a request from counsel to present argument remotely? (Comments regarding responses of "Other")

"Because appearing in person (or at all) is expensive" should be a perfectly reasonable cause in family-law cases.

"Good cause" should be a stringent standard. Counsel for the parties to the appeal request oral argument with the hope of appearing before the court, and we assume the appearance preference is "in-person." If counsel does not desire to appear for oral

Any case set for oral argument should be conducted in person.

Anytime a party would prefer a remote argument

checks are or not and

Courts should provide the option to appear remotely at all oral arguments.

Either for good cause or by consent of the parties

For actual health problems that already exist, or if the court hearing the case is a long way from counsel and cost is an issue.

Good cause to me here means a good reason, like scheduling, health concerns, or client expense. Plus, other lawyer can choose to argue in person.

I think it is very important that all oral argument be in person. But I think remotely is appropriate for indigent parties who don't have a lawyer or the means to travel to the appellate court.

I'd postpone until counsel can appear in person

If any counsel is concerned about health implications, I thinkcourts should grant remote argument--no questions asked--if timely.

if one party appears in-person, it will be to the disadvantage of the other party to appear remotely

If the court feels it is necessary for the health or safety of the participants

If the request only affects the requesting counsel (and the other party may still present oral argument in person), I would not oppose any such request by opposing counsel.

In the interest of justice

Long distance travel required

never

NEVER

Never

Only when it does not affect the other party's right to argue in person.

Our court has never conducted remote arguments.

Circumstances—Other

QUESTION: When a court of appeals sets an in-person oral argument, under what circumstances should the court generally grant a request from counsel to present argument remotely? (Comments regarding responses of "Other")

Remote should be default, in person should be by request of counsel
saves time and money for everyone
should default to always remote unless all parties want in-person
Some cases might really need to be heard live, so the courts should have discretion, but generally any reasonable timely request should be granted.
Timelines should be established or included in submission notice. Not hard to switch to remote. But forcing a showing of good cause may force parties and counsel to disclose protected medical information
When case is transferred
when COVID-19 positivity is high
When holding in person argument involves elevated risk to the parties involved (i.e. a pandemic)
when it allows travel to be avoided
when one cousel is located more than an hour's drive away. This may help economically disadvantaged parties also.
When only one lawyer will have to travel a substantial distance to appear.
when the case is a transfer case
When the request is made not less than 3 working days from the date of the in-person oral argument.
When there is an emergency inability for one party to be present but not an inability to participate,.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

Not a fan. As practitioner, had appeal transferred to El Paso and counsel argued remotely. Technically okay, but hard to gauge your audience under the circumstances. Hard to see if you answered the court's question or whether you even understood the question correctly. As a district judge, I conducted telephone conferences on several occasions, with a few evidentiary hearings. A nightmare. Counsel have a hard enough time establishing predicates without the additional problem of doing so remotely, when you may not even be able to confirm that you're offering the evidence you think your offering. From the standpoint of the appellate bench, I prefer a vigorous back and forth with counsel and quite often get a different perspective on a case as a result. Remote hearings or arguments permit such exchanges, but discourage them by making it more difficult to read the person with whom you are conversing. I know that here is a thought that seeing someone on a screen makes it more likely that you can read them, but body language is non-existent remotely. Watching counsel shuffle his feet when you've asked a purposefully difficult question is quite a tell that is not available remotely.

They should only be permitted if "extreme" circumstances exist.

I prefer them, less pomp and circumstance, more substance

Our court lacks the technology to perform hybrid oral arguments where one party participates remotely and one party participates in person.

Not a fan. In-person proceedings promote a sense of gravity and seriousness that seems to be increasingly lost when judicial proceedings are conducted remotely.

if one attorney objects to remote oral argument, then the argument should be in person to avoid the perception of an advantage. If both counsel agree to remote OA it should be granted.

Now that the kinks have been worked out, remote proceedings provide a more convenient, less costly and less time-consuming way for the parties to present their arguments. Additionally, the ability for the general public to observe from anywhere allows for greater transparency and access to appellate proceedings.

They accelerate current trends away from treating judicial proceedings with utmost respect, and undercut subtle visual cues gained from in-person proceedings

I don't favor conducting oral arguments by remote means.

Appellate arguments are particularly suited for remote proceedings.

They are not effective and, in some cases, are so bad that I believe due process is affected.

While I have not participated in a remote proceeding a Texas appellate court, I have presented oral argument remotely 4 times in the Fifth Circuit and participated in a hybrid argument in the Second Circuit. In all 5 cases, in my judgment, the remote presentations were less effective and the judges were less engaged than they would typically be during an in person argument.

The ability to view the arguments online is great. For appellate arguments, it would be beneficial to be in the same room as the justices.

If counsel has a need to appear remotely it can be accommodated but personally I don’t like them and don’t want to participate remotely

Remote proceedings promotes access to justice, allow us to provide legal services to people in rural counties and allows folks to hire attys from big cities. Remote proceedings are more cost-effective for clients. Please allow remote hearings for the future!

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

By now, most courts have the experience necessary to effectively handle remote oral arguments, and should take advantage of that resource when it will enhance the efficiency and safety of the proceedings.

They are better than no argument, for sure. But they have communication glitches, are less effective generally at communication, and don't advance the legitimacy of the courts as institutions of government - remote argument makes them just another Zoom call.

A virtual option is a huge money-saver for non-local clients. The courts should accommodate counsel's request for virtual oral argument where made.

Probably because appellate oral argument is traditionally more tightly regimented, I have found that remote oral appellate arguments are much more orderly and useful than oral argument for trial court matters; the latter are almost uniformly a train wreck.

The flexibility to be able to argue remotely is valuable and inevitable (even if many old-timers don't like the idea). Plus, it may mean that courts allow more oral arguments, which is needed.

I appreciate the Court's interest in surveying the Appellate Section. Thank you!

...it strikes me that remote appellate proceedings are an efficient use of judicial resources

It would be helpful for courts to have rules about whether counsel will use a lectern in the "Zoom screen" or will just look into the camera. I do the latter, but it can be distracting when counsel do it differently.

We have the technology, so we should use it. Remote oral argument is also much more cost effective for our clients especially in family law where the cost of oral argument can literally be taking food out of the months of children. In fact, oral arguments (remote or in person) in family law should be very, very rare. Also, as an older attorney with mobility issues, remote oral argument allows me to extend my ability to practice appellate law.

I'm to the point where I don't care where or how I argue. I'm so used to Zoom and Teams and such, I'm fairly indifferent to their use as opposed to in-person use.

The only benefit is convenience. There is no connection between the court and counsel so that questions are meaningfully answered. It feels like theater, instead of a conversation. Remote appearances are for routine or procedural matters where persuasion or assistance to the Court is not the goal of the appearance.

The entire point of oral argument is to put a human face and touch into the process. While remote should be the default for the overwhelming majority of matters before trial courts (especially uncontested matters), oral arguments are the jury trial of appeals. I remain unconvinced that advocacy can or does have the same effect remotely.

I know that many people dislike remote arguments, but I do think it helps allow
people to watch oral arguments they might not otherwise see and get a better feel for what courts want during argument. The remote arguments broadcast live on YouTube have been great to watch, and I worry that once the transition back to in-person argument is complete, the public will lose that ability to see how court proceedings are conducted.

I think they are an important option.

We should keep them, but guidelines would help. For example, the default in a Tort Claims Act case should be remote argument because damages are capped. Post judgment appeals where $500K or more was claimed should presumptively result in in-person arguments.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

It should also be considered in the case of any public health emergencies or unexpected occurrences for counsel.

We have the technology and should use it. When there are witnesses and evidence involved, it makes sense to avoid remote proceedings unless absolutele necessary. However, when the proceeding is no more than a conversation between the lawyers and the judges, there is no reason that cannot be handled through a video appearance. Allowing that option will allow the parties to save significant expenses in travel time. In family law, this translates to the 'best interest of the child,' because those funds would be better spent providing for the child instead of paying lawyers to drive around Texas.

Appellate practice is well suited for remote oral hearings, but I think that predominantly in-person hearings are better for the profession.

I think they are super. I'm truly agnostic between live and remote arguments.

I am not in favor. I feel that the participants are not nearly as engaged, and the lack of personal contact leaves the process lacking in impact and effect.

Remote proceedings are a good alternative for attorneys with clients who do not want to or cannot pay for travel, and for attorneys who cannot travel for health reasons such as pregnancy or illness. Thus, remote should be liberally allowed.

in the new world of remote zoom proceedings, it is great. however, the courts should require lawyers to have fast internet and good equipment.

It worked well, but was not the same as in-person arguments, difficult to feel the same connection with the panel.

certainly excited to get back to in-person proceedings more frequently. I hope remote becomes the exception rather than the rule.

I do not favor them but will follow court's orders regarding them.

Remote video arguments are superior to telephonic arguments, or no argument at all. But as an appellate practitioner, I still greatly prefer in-person arguments because I find my connection with the panel isn't the same through a remote proceeding.

Remote proceedings are inferior to in-person proceedings, due to the reduced opportunity for non-verbal interaction between counsel and the court.

They should remain an option, but as rare as oral argument is, live arguments should be the default.

I understand the value and convenience of remote proceedings, but there is still no real substitute for in person conversations and those conversations (i.e. arguments) tend to be far more effective and useful in person.

Good survey. Easy to navigate. Did not take much time at all. Important and relative topic going forward. Thank you.

The only archived oral arguments I tend to watch are from the Texas Supreme Court.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

My experience is based on paying clients who may be more willing to pay for travel to an appellate argument than they might be for some trial court proceedings. Pro bono clients might feel differently. I don't think there is a huge difference between remote and in person, but in person is at least somewhat better. One nice aspect of remote, aside from costs, is the ability to have all of your material at your finger tips in a way that is difficult in person.

Technology, wi-fi and broad-band connections are still NOT reliable enough in my opinion. Their reliability varies considerably across the state. AND, one can never predict when it will all "blow up" and destroy the effectiveness of the entire process.

I have also argued remotely at the Fifth Circuit. They had very strong procedures and requirements; it also provided opportunity to test systems before argument happened. That was the most helpful.

I find it easier to present an effective argument because I surround the central screen with other screens that contain outlines, key language of statutes/cases, chronologies, etc. I can answer the court's questions more precisely and concisely.

My preference will always be to have In-person proceedings. However, remote proceedings can be an effective alternative if they would assist in efficiently disposing of cases and if, as a cost-saving measure, parties are given an option to choose between an in-person or remote argument, especially when cases are transferred to another appellate court.

Remote oral arguments should occur only when necessary due to extenuating circumstances. Remote arguments reward mediocre lawyers who can then read from a script. In-person arguments should always be the default setting.

Subject to standard procedures or requirements for both technology and the physical setting of counsel (e.g., no distracting backgrounds, noise, etc.), all arguments should go remote. It will save the parties and the court time and money, yet will not detract from the purpose and goals of oral argument.

While remote proceedings can be effective, I have found in-person to be preferable. It is hard to replicate the benefits of real eye contact and being in the same room.

I like remote, but if anyone's going to be live, I want to be live too

I have been disappointed that the Second Court refused to hold remote arguments the last few years.

I think they worked remarkably well, and I hope they remain an option in the future.

I think they are a good tool to keep in the courts' toolbox

Great innovation, especially in the Texas Supreme Court, combined with access to briefs.

I think remote arguments are great and have been well handled by the courts, their staff, and the justices. I greatly prefer in-person arguments, but there is no denying the effectiveness, both substantively and economically, of a remote proceeding.

I prefer in-person, but there are times remote is necessary. I appreciate courts accommodating when that need arises.

Remote argument should not be the norm, but should be permitted when there is a good reason or all parties agree.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

In person still better, but remote not terrible

The Courts should use technology to improve the access to the courts for parties and lawyers.

GREAT IDEA

I believe they are generally just as effective. However, there is just "something" about being in a courtroom with counsel and justices present that cannot be accomplished virtually. That said, the convenience (and many times cost savings for clients) of remote proceedings can't be ignored. Remote proceedings can save clients thousands of dollars in counsel travel expenses and can save counsel additional time lost in other active matters when travel is out of the equation.

Remote proceedings are needed, but absent good cause, in-person proceedings should be the rule

Very much needed.

Acceptable if warranted, but I very much prefer in person proceedings.

In person oral argument is preferred, but but remote oral argument has its place under difficult circumstances.

I think they can serve their purpose, but they do not feel as interactive as in-person arguments.

It works much better than remote trial court proceedings, but I still believe an in-person proceeding is somewhat better.

Zoom is here to stay. Great innovation!!

I'm a big supported. No need to waste time/gas to drive or fly to court; no need to further pollute our environment.

I did not like them prior to Covid; but since covid required them I am a very big fan.

Remote arguments hinder communiciation and, as a result, appear to favor appellees. Representing an appellant I would be disserving my client's interests if I did not request and appear for an in-person argument.

I generally disliked them and prefer strongly to be in-person and that all parties present in person.

Remote argument is imperfect and not as good as in person, but better than none. I lets more points get covered, but it inhibits back and forth discussion.

They should be retained as an option for both local and out-of-town counsel.

In person oral arg is the superior form of assisting the courts of appeals in their disposition of appeals. It also allows attorneys the opportunity to address the justices' questions and engage with opposing counsel's arguments. These two-fold purposes of in person oral args uniquely advance judicial economy, professionalism, and civility. Must balance these important imperatives with the public's access to justice. For good cause shown, remote oral arg saves clients money and may permit the attorney to assist the court at oral arg, whereas it might be cost-prohibitive otherwise. The availability of hybrid and flexibility is key. Thanks.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

Having the option of remote oral arguments is a positive step toward modernizing the courts, making the practice of law more accessible/sustainable for those with families, and making justice more accessible by reducing the cost of legal representation. However, it would be a shame to lose the tradition and decorum of in-person arguments in a courtroom for attorneys who are able to or wish to participate in person. THe default should be in-person arguments, but the court should state that no negative inference will be taken against an attorney who participates in argument remotely, even if his/her opposing counsel appears in person.

Thank you for requesting attorney input and considering it.

A wonderful work around at the height of the pandemic. But weaker than live and thus not a permanent solution. Much much harder to read the other justices not speaking, and to read body language. As a justice looking at 1 lawyer at a time you have not noticed these flaws, but we do. Also very hard to look a justice in the eye: instinct and 65 years of "look them in the eye" human training make it almost impossible to ignore their picture and look into a camera instead. The cost savings are wonderful, but not a good trade for doing our best. All I want every court in every case to do is let me do my best (within the rules), and remote does not let me do my best.

I see the reason they could be helpful sometimes and cost effective for clients, but I believe an in-person argument is more effective generally.

They were needed and worked pretty well during Covid pandemic and may be useful on a limited basis going forward but in-person arguments are preferable.

The preference of the Judiciary is an important element. The Justices should be gaining something from the arguments, and how they best receive the arguments is important. Thar said, some arrangements should be made to allow remote arguments when the situation calls for it.

I like them. Not only are they efficient and easy, they're also usually better than in-person arguments, because attorneys can seamlessly review/read notes and electronic authorities while speaking with the panel; and the panel can do the same.

Other than the intangible benefits associated with actually being in a courtroom, I have found that remote oral hearings are much more efficient and at least equally as effective as in person proceedings. I see no reason why, if a court permits, that some attorneys may wish to appear remotely while others appear in person.

I definitely prefer in-person, but especially in cases where cost is an issue, remote seems to be a viable alternative now that courts know how to do it. Also, assuming remote arguments allowed for more oral arguments and gave opportunities to younger attorneys, that would be beneficial in my opinion..

It is extremely useful to have this option, although I imagine most practitioners and clients will still prefer in-person where feasible. I think transferred cases should be a special consideration, especially for smaller matters, as travel costs can greatly increase costs to the client.

It is important for appellate courts to take advantage of technology for the
benefit of the parties and their counsel. Remote hearings are an effective way to do that.

As an advocate, my clients deserve my ability to deliver rhetoric in a live format.

I think appellate courts can effectively handle their business remotely. It is much different than a trial court, where the jury/judge should be able to see the demeanor of witnesses.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

While not perfect, I think remote appellate proceedings are much more effective than remote trial court proceedings. Because of that, I think the appellate courts should take full advantage of the technology in order to lower or eliminate travel expenses and attorneys fees incurred by counsel traveling to oral arguments.

While I think that remote arguments can be effective, my strong preference is for in person arguments. I think in person argument is far more effective, less distracting, and more engaging.

It's been very helpful for court staff to provide a direct-dial or text message number for technological emergencies.

If a case gets as high as an appellate court, it is important enough that it should be heard in person. Remote proceedings at the appellate level should be reserved for matters that are quick or routine or both.

Unless there's a "health reason," all oral arguments should be in person.

Remote arguments can be effective and a good alternative to submission on the briefs.

I can really see Judges facial reactions in remote oral argument that I did not notice at in-person oral arguments

IMPERSONAL REMOTE HEARINGS ARE BAD, WHETHER FOR APPEALS, OTHER SITUATIONS

Remote proceedings are OK for non-contested matters. All contested matters should be heard in the courtroom. All appeals are contested matters!

Remote works better for appellate arguments. No travel time, less expense to clients, same ability to present position.

Remote should always be offered, with no burden to get it. There just isn't a good reason any appellate argument needs to be in person. Further, most matters should be decided on the briefs, without any argument.

In person proceedings have served our profession well for hundreds of years. We should not abandon that aspect of the practice of law.

For soemthing important as an appellate argument, I would not like to see a practice of remote arguments. s.

I feel I can gage the Court better if present.

State courts have not done this, but the federal courts I've argued in remotely have held a brief test the week before arguments and again the morning of arguments to make sure everyone's equipment is working properly and there are no lag issues. I haven't had problems in the state courts, but if others have, doing a test may solve that problem.

Remote proceedings allow for increased access to justice by reducing costs for travel and aiding attorneys/parties with disabilities.

I prefer live proceedings and believe they should be the preferred method of arguement before an appellate court.

Live oral argument is preferable, it has an immediacy and intimacy that remote argument lacks. But remote argument should be readily available at the discretion of the court if the parties agree. I do not favor mixed argument, with one advocate live and the other(s) remote. That is not a level playing field.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

I think they make the practice more accessible and frankly, helps evens the playing field on intangibles like familiarity with surroundings. Also: no more worrying about sweating through your court makeup in you nicest suit because of parking.

Legitimate health concern should always justify remote participation. But in-person argument is more useful & enjoyable.

Remote proceedings diminish the dignity of Courts. When dignity is diminished, I fear loss of legitimacy soon follows..

Remote oral argument is too closely associated with the pandemic for me to endorse its routine use.

Glad you are making this inquiry, but I believe it is much more relevant at the trial court level.

Make sure the technology works very very well.

Remote proceedings are acceptable as a means of protection for parties or court staff from risks of disease, natural disaster, and unexpected events such as riots, fire etc. They should be used sparingly as nothing replaces the immediacy of in person argument, especially for the imprisoned. They deserve a chance at having someone somewhere speak directly to the justices deciding their fate..

Remote appellate proceedings should be the exception, not the general rule.

Organization and planning is essential

In my experience, remote argument is a useful tool that should be used when there is good reason to avoid in-person argument. However, overall, I believe in-person argument preferable because it allows attorney's to more effectively communicate with the appellate justices

I hate them. I've done them, won and lost cases on them. Still hate them. The in-person interaction is essential to proper argument.

In person arguments are more free from distractions, potential or otherwise.

Comments: General

QUESTION: Please provide any comments that you have regarding remote appellate proceedings:

Remote proceedings just make sense. They save time and resources. They are as effective as in-person arguments.

Remote argument has been done well enough to preserve professionalism while still providing greater flexibility and the ability to avoid illness or location based conflicts

I think it lacks the “fun” of in person OA but is as effective from the standpoint of persuasion. However it is a bit more difficult for judges and counsel who are not able to pick up on nonverbal communication.

The fact
that they are recorded is their best feature.

Remote should be a last resort. It's important that we as a society get back to normal life as soon as possible. Remote hearings for routine matters like status conferences in trial courts is one thing, but appellate argument is much rarer, and the presumption should be for in-person.

They are appreciated

In person arguments should be the default. Remote proceedings should be liberally permitted for convenience of the court and counsel when circumstances justify it,

Remote OA expands access for both participating and watching while reducing litigation costs. The only apparent caveat is for personally sensitive cases (e.g., parental rights terminations, some crimes); if it's a case for which anonymizing filings is appropriate, the argument should probably not be broadcast.

They make proceedings more accessible to law students and to the public

If appellate courts, including judges and staff, wish to have remote arguments, I think they should be allowed to. If a party wants to have a remote argument, I think it should be granted.

Great option for flexibility.

I have some concern that state courts will become more Luke federal courts where attorneys and parties rarely have face to face interaction with judges. I also have concern with appellate judges becoming more isolated and not even having face to face interactions with each other. I also have concern with the spiraling costs of litigation and I appreciate the economic benefit of remote proceedings.

It is useful and should be continued when possible. The streaming on YouTube at a minimum is valuable.

I think this is a path forward improving access to Justice for those on a limited budget and/or folks living remotely. And for anyone complaining about not getting to present oral argument, allowing the courts this efficiency could allow for a few more cases to be submitted via oral argument.

Tab P

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

May 31, 2019

Mr. Charles L. “Chip” Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters. Some require immediate attention, while others are longer-range initiatives. I have provided a complete list for the Committee’s information.

Several matters arise from legislation passed by the 86th Legislature, which, if signed by the Governor, takes effect immediately or on September 1, 2019. The Committee should conclude its work on them by its June 21, 2019 meeting. Many of the changes may be simple and straightforward. They are:

Joint Judicial Campaign Activity. The State Commission on Judicial Conduct has disciplined judges for joint campaign activities based on Canons 2B and 5(2) of the Code of Judicial Conduct. Canon 2B states in part: “A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.” Canon 5(2) states in part: “A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.” HB 3233, passed by the 86th Legislature, adds Election Code § 253.1612, which states that the “Code of Judicial Conduct may not prohibit, and a judicial candidate may not be penalized for, a joint campaign activity conducted by two or more judicial candidates.” The Committee should consider whether the text of the rules should be changed or a comment added to reference or restate the statute.

MDL Applicability. Government Code §§ 74.161-.201 create the Judicial Panel on Multidistrict Litigation, and Rule of Judicial Administration 13 governs its operation. SB 827, § 2 adds § 74.1625 to prohibit the MDL panel from transferring two types of actions: (1) DTPA actions (unless specifically allowed under the DTPA) and (2) Texas Medicaid Fraud Prevention Act actions. The amendment does not direct that Rule 13 be changed, but the Committee should consider whether the text of Rule 13.1 should be changed and a comment added to reference or restate the statute.

Expedited Actions. Rule of Civil Procedure 169 implements Government Code § 22.004(h). SB 2342 adds § 22.004(h-1), which calls for rules, "[i]n addition to the rules adopted under [s]ubsection (h), . . . to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000 . . . balanc[ing] the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions." Rules necessary to implement this change must be adopted by January 1, 2021. But the statute makes various other changes that take effect September 1, 2019. The Committee should consider whether other rules should be changed, such as Rules of Civil Procedure 47, 224, and 500.3, or comments added to reference or restate the statute by that date.

Dismissal. Rule of Civil Procedure 91a provides for the dismissal of baseless causes of action, implementing Government Code § 22.004(g). Civil Practice and Remedies Code § 30.021 mandates an award of costs and attorney fees to the prevailing party. HB 3300 amends § 30.021 to make an award discretionary and applies to cases commenced on or after September 1, 2019. The Committee should consider whether other rules should be changed or comments added to reference or restate the statute by that date.

Notice of Appeal. SB 891, § 7.02, adds Civil Practice and Remedies Code § 51.017 to require service of notice of appeal on court reporters. The Committee has already considered this change. The statute is effective September 1, 2019.

One other matter arising from legislation passed by the 86th Legislature requires rule-making by January 1, 2020:

Public Guardians. Section 24 of SB 667, passed by the 86th Legislature, adds Subchapter G-1 to Chapter 1104 of the Estates Code, which governs public guardians and directs the Court "in consultation with the Office of Court Administration . . . and the presiding judge of the statutory probate courts . . . [to] adopt rules necessary to implement this subchapter." Section 67 of the bill provides that the Court "shall adopt rules necessary to implement Subchapter G-1, . . . including rules governing the transfer of the guardianship of the person or of the estate of a ward, or both, if appropriate, to an office of public guardian established under that subchapter or a public guardian contracted under that subchapter." OCA and Judge Guy Herman will draft these rules, and the Committee should review them.

Other matters arising from legislation passed this Session set extended deadlines for rule-making:

Citation. SB 891, passed by the 86th Legislature, amends several state statutes to address citation. The bill adds Government Code § 72.034 directing the Court "by rule [to] establish procedures for the submission of public information to the public information Internet website by a person who is required to publish the information" by June 1, 2020. The bill also adds Civil Practice and Remedies Code § 17.033 requiring the Court to "adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence" by December 31, 2020. The Committee should make recommendations.

Protective Order Registry Forms. SB 325 requires the Office of Court Administration to create an online registry for family violence protective orders and applications and to permit public access to certain information about the protective orders by June 1, 2020. The bill also adds Government Code § 72.158 directing the Court to "prescribe a form for use by a person requesting a grant or removal of public access" to the information and permits the Court to prescribe related procedures. The bill does not specify a deadline for the forms. The Committee should recommend appropriate forms.

Criminal Forms. HB 51 adds Government Code § 72.0245 requiring the Office of Court Administration to create a number of forms for use in criminal actions, such as forms to waive a jury trial and enter a plea of guilty or nolo contendere, and forms for a trial court to admonish a defendant before accepting a guilty or nolo contendere plea. It also requires the Supreme Court to "by rule . . . set the date by which all courts with jurisdiction over criminal actions must adopt and use the forms created . . . ." OCA will work with Holly Taylor, the Court of Criminal Appeals' Rules Attorney, to formulate a plan to develop the forms. The Committee should review the forms when drafted. The statutory deadline is September 1, 2020.

Procedures Related to Mental Health. SB 362 directs the Supreme Court to "adopt rules to streamline and promote the efficiency of court processes under Chapter 573, Health and Safety Code" and "adopt rules or implement other measures to create consistency and increase access to the judicial branch for mental health issues." The Judicial Commission on Mental Health will draft these rules, and the Committee should review them.

CPS and Juvenile Cases. HB 2737 requires the Court and its Children's Commission to "annually . . . provide guidance to judges who preside over child protective services cases or juvenile cases," and requires the Court to "adopt the rules necessary to accomplish the purpose of this section." The statute sets no deadline. The Children's Commission is developing an implementation plan. The Committee should review any rules proposed by the Commission.

Transfer on Death Deed Forms. SB 874 requires the Court to promulgate "a form for use to create a transfer on death deed and a form for use to create an instrument for revocation of a transfer on death deed." The statute sets no deadline. The Probate Forms Task Force will develop these and other forms for the Committee's review.

Finally, there are several matters unrelated to recent legislation on which the Court requests the Committee's recommendations.

Suits Affecting the Parent-Child Relationship. In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

Out-of-Time Appeals in Parental Rights Termination Cases. A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:

- a narrow late-appeal procedure;
- an abate-and-remand procedure like the one proposed in the Phase II Report;
- a habeas- or bill-of-review-style procedure; and
- prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.

Registration of In-House Counsel. A majority of states require that an attorney employed as in-house counsel and residing in one state but licensed in another either register, obtain a limited license, or be fully licensed to practice in the state of residence. The Board of Law Examiners has approved new Rule 23 of the Rules Governing Admission to the Bar, requiring only registration of in-house counsel. The proposed rule is attached. The Committee should review the rule and make recommendations.

Civil Rules in Municipal Courts. Municipal Court Judge Ryan Henry has proposed that procedural rules be adopted for civil cases in municipal courts. The Committee should set up a process for considering Judge Henry's proposals and making recommendations.

Motions for Rehearing in the Courts of Appeals. Justice Christopher and the State Bar Court Rules Committee have each proposed amendments to Rule of Appellate Procedure 49.3, which are attached. The Committee should consider both and make recommendations.

Parental Leave Continuance Rule. In the attached memorandum, the State Bar Court Rules Committee proposes a parental leave continuance rule. The State of Florida has studied such a procedure in depth. The Committee should consider that work and the proposal and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

AN ACT

relating to judicial guidance related to child protective services cases and juvenile cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 22, Government Code, is amended by adding Section 22.0135 to read as follows:

Sec. 22.0135. JUDICIAL GUIDANCE RELATED TO CHILD PROTECTIVE SERVICES CASES AND JUVENILE CASES. (a) The supreme court, in conjunction with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, annually shall provide guidance to judges who preside over child protective services cases or juvenile cases to establish greater uniformity across the state for:

(1) in child protective services cases, issues related to:

(A) placement of children with severe mental health issues;

(B) changes in placement; and

(C) final termination of parental rights; and

(2) in juvenile cases, issues related to:

(A) placement of children with severe mental health issues;

(B) the release of children detained in juvenile detention facilities;

(C) certification of juveniles to stand trial as adults;

(D) a child's appearance before a court in a judicial proceeding, including the use of a restraint on the child and the clothing worn by the child during the proceeding; and

(E) commitment of children to the Texas Juvenile Justice Department.

(b) The supreme court shall adopt the rules necessary to accomplish the purposes of this section.

SECTION 2. This Act takes effect September 1, 2019.

President of the Senate

Speaker of the House

I certify that H.B. No. 2737 was passed by the House on May 2, 2019, by the following vote: Yeas 141, Nays 0, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2737 was passed by the Senate on May 22, 2019, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

Tab Q

Texas Supreme Court Advisory Committee

Memo

To: Texas Supreme Court Advisory Committee

From: Legislative Mandates Subcommittee

cc: Chip Babcock, Jacqueline Daumerie, Shiva Zamen

Date: September 28, 2022

Re: HB 2737; Final rule for Juvenile Proceedings re: shackling in court

---

HB 2737 (Ex. 1) passed by the 86th Texas Legislature in 2019, added Texas Government Code Section 22.0135, entitled "JUDICIAL GUIDANCE RELATED TO CHILD PROTECTIVE SERVICE CASES AND JUVENILE CASES." The section requires the supreme court "in conjunction with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families" to provide guidance to courts regarding various topics. In regard to juvenile cases, one of the issues enumerated is "(2) (D) a child 's appearance before a court in a judicial proceeding, including the use of a restraint on the child and the clothing worn by the child during the proceeding[.]"

By way of history, the subcommittee has been informed that after HB 2737's enactment the Supreme Court's Children's Commission issued guidance in the form of "circulars" regarding the other topics in HB 2737, satisfying the guidance directive of the legislature for the other four (A-C, and E) items related to juvenile proceedings. The Children's Commission also assembled a round table to discuss what rules may be necessary in response to the bill. Stakeholders only identified one topic that may need addressing by rule: juvenile restraints. The roundtable discussed what a rule might look like, and the Children's Commission studied it further and proposed the rule that is in the memo.

Attached as Exhibit 2 is a three page memo dated August 23, 2022 from Jamie Bernstein, Executive Director of the Children's Commission, a/k/a the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Family. Justice Lehrmann is Chair and Justice Huddle is Deputy Chair. The memo sets out the controlling law, short history of Texas legislative consideration, and the text of a proposed rule is at bottom of page 3 as follows:

Proposed Rule on the Use of Restraints in the Juvenile Court

(a) Restraints, such as handcuffs, chains, irons, and other similar items, must not be used on a child during a juvenile court proceeding unless the court determines that:
  (1) the use of restraints is necessary because the child presents a substantial risk of:
    (A) inflicting physical harm on the child or another person; or
    (B) flight from the courtroom; and
  (2) there is no less restrictive alternative to restraints that will prevent physical harm or flight.

(b) Any party may request a hearing on the necessity of restraints.

(c) If the court determines that restraints are necessary, the court must:
  (1) make that determination in a written order;
  (2) when feasible, issue the order before the child enters the courtroom and appears before the court;
  (3) make findings of fact in support of the order; and
  (4) order the least restrictive type of restraint necessary to prevent physical harm or flight.

(d) This rule does not apply to the use of restraints when transporting the child to or from the courtroom.

The memo with the Commission's proposed rule includes Attachment A, which is a 13-page report from an August 2020 meeting of 35 stakeholders holding a variety of positions directly involved with the parties and procedures of juvenile proceedings statewide. Exhibit B to the memo is a national survey with text of shackling rules in comparable proceedings from other states.

The subcommittee views the work as that of knowledgeable stakeholders and based on a national review of other states' practices[1]. The principal policy question, then enacted by a rule, is an attempt to balance competing and valid interests. Shackling is widely viewed as traumatic to a youth and capable of doing lasting damage to the youth's life, so as a policy matter it should be done only when and to the extent necessary. Juvenile proceedings have different policies and procedures because Texas, like all other states, recognize the status, capacity, and interests of the minor defendant are different than criminal proceedings involving Defendants of majority age. Offsetting policy concerns are protecting the safety of other people in and around the proceeding as the youth is appearing in the courtroom, as well as preventing flight or other conflicts.

Most jurisdictions nationally have by statute or rule struck a balance setting a presumption against shackling. They provide criteria and processes for deciding when and to what extent safety considerations outweigh the policy. The proposed rule starts with the preferred presumption against shackling while still striking an appropriate balance which may be achieved by the judge on a case-by-case basis, recognizing facts may vary specific to the youth, proceeding, or circumstance related to the shackling necessity.

The subcommittee supports the Court enact a rule regarding shackling along the lines of what the Commission report recommends; **however**, the subcommittee was not able to convene with Ms. Bernstein, did not disassemble the proposed rule's language given the limited time, and some members did not want to report as favorable to this specific language. The subcommittee is generally in favor of a rule consistent with the policy balance but did not vote on this specific language.

[1] As a preemptive answer to a question a member of the whole committee often asks: Yes, a search for best practices was made

One consideration of specific language to the rule is an effort to clarify that the findings of fact referenced as necessary support for an order enforcing shackling, (c)(3), should be included in the Order itself, (c)(1). So, an alternative construction of Subsection (c) would state:

(c) If the court determines that restraints are necessary, the court must:
(1) ~~make that determination in~~ issue a written order which includes findings of fact in support of its determination;
(2) when feasible, issue the order before the child enters the courtroom and appears before the court; and
(3) ~~make findings of fact in support of the order; and~~
~~(4)~~ order the least restrictive type of restraint necessary to prevent physical harm or flight.

Tab Q1

AN ACT

relating to judicial guidance related to child protective services cases and juvenile cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 22, Government Code, is amended by adding Section 22.0135 to read as follows:

Sec. 22.0135. JUDICIAL GUIDANCE RELATED TO CHILD PROTECTIVE SERVICES CASES AND JUVENILE CASES. (a) The supreme court, in conjunction with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, annually shall provide guidance to judges who preside over child protective services cases or juvenile cases to establish greater uniformity across the state for:

(1) in child protective services cases, issues related to:

(A) placement of children with severe mental health issues;

(B) changes in placement; and

(C) final termination of parental rights; and

(2) in juvenile cases, issues related to:

(A) placement of children with severe mental health issues;

(B) the release of children detained in juvenile detention facilities;

(C) certification of juveniles to stand trial as adults;

(D) a child's appearance before a court in a judicial proceeding, including the use of a restraint on the child and the clothing worn by the child during the proceeding; and

(E) commitment of children to the Texas Juvenile Justice Department.

(b) The supreme court shall adopt the rules necessary to accomplish the purposes of this section.

SECTION 2. This Act takes effect September 1, 2019.

President of the Senate

Speaker of the House

I certify that H.B. No. 2737 was passed by the House on May 2, 2019, by the following vote: Yeas 141, Nays 0, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2737 was passed by the Senate on May 22, 2019, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

Tab Q2

To: Supreme Court Advisory Committee

From: Jamie Bernstein, Children's Commission

Subject: Rule on Restraints in Juvenile Court

Date: August 23, 2022

The U.S. Supreme Court has long held that adult criminal defendants must not be restrained (or "shackled") in court unless restraints are justified by an essential state interest specific to the defendant: *Deck v. Missouri*, 544 U.S. 622 (2005); *Holbrook v. Flynn*, 475 U.S. 560 (1986); *Illinois v. Allen*, 397 U.S. 337 (1970). The Texas Court of Criminal Appeals has applied this standard in several recent cases, including non-capital cases: *Ex parte Chavez*, 560 S.W.3d 191 (Tex. Crim. App. 2018); *Bell v. State*, 415 S.W.3d 278 (Tex. Crim. App. 2013). In *Bell,* the Court of Criminal Appeals explained that the right to appear at trial unbound by visible shackles is firmly rooted in English common-law principles and "that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." 415 S.W.3d at 281. Though none of these cases involve juveniles, Texas courts have held that a juvenile has the same constitutional rights as an adult would have in criminal proceeding since a juvenile proceeding seeks to deprive the juvenile of liberty. *In the Matter of J.R.*, 907 S.W.2d 107, 109 (Tex. App.—Austin 1995, no writ).

Since *Bell*, the Texas Legislature has considered three bills to prohibit the use of indiscriminate shackling in juvenile proceedings: House Bill 679 (85th Legislature), House Bill 4267 (86th Legislature), and House Bill 488 (87th Legislature).

In addition, in 2019, the 86th Legislature passed House Bill 2737, which added Texas Government Code § 22.0135 related to restraints in juvenile court:

> The Supreme Court, in conjunction with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families [("Children's Commission")], annually shall provide guidance to judges who preside over child protective services or juvenile cases to establish greater uniformity across the state…related to…a child's appearance before a court in a judicial proceeding, including the use of a restraint on the child … during the proceeding….[T]he Supreme Court shall adopt the rules necessary to accomplish the purposes of this section.

In response to the Legislature's directive to provide annual guidance related to child protective services and juvenile cases, the Children's Commission annually releases the Child Protection Law Bench Book and in 2022 a chapter on dual involvement with the child welfare and juvenile justice systems will be added. In response to the directive to address the use of restraints in juvenile court, the Children's Commission convened a meeting on the use of restraints in juvenile court on August 6, 2020. The participants represented various stakeholder groups, including juvenile courts, probation departments, prosecutors, parent and child advocates, academics, and members of the Texas Legislature. The goals of the meeting were threefold: conduct an inventory of existing practices across Texas regarding the use of restraints in juvenile court, provide a forum for dialogue, and lay the foundation for statewide guidance on the use of restraints in juvenile court.

At the meeting, participants discussed court practices and policies regarding the use of restraints on juveniles across Texas, the types of restraints used, factors considered in determining the need for restraints, and the impact of remote participation on the use of restraints. A detailed report of the meeting is attached as **Attachment A**. The report concludes:

> Although the discussion provided a baseline for current practices throughout Texas, further efforts are needed to examine whether additional training, tools, or court rules are necessary to address the use of restraints in court. The right of a juvenile to appear in court without restraints must be balanced against the need for courtroom safety and security. To strike a balance of these interests, decisions should be made on an individualized basis, using established criteria, and should factor in whether the particular youth presents a risk of danger or risk of flight. Distinctions can also be drawn on what type of restraints, if any, are needed. The Children's Commission will continue to provide a forum for a multi-disciplinary group that reflects various jurisdictions throughout Texas to further explore the need for court rules and/or to develop guidance on the use of restraints in juvenile court.

The Children's Commission has since researched other jurisdictions' approaches to the issue. To date, thirty-one other states, including the District of Columbia, have rules, statutes, or administrative orders governing the use of restraints in juvenile court proceedings. These are attached as **Attachment B**. In sum:

- All require an individualized assessment, i.e., they prohibit indiscriminate shackling.
- About half list factors the court must consider when assessing whether the juvenile poses a risk. Some of these factors are broad (e.g. "any relevant factor") while others are more specific (e.g. past attempts to flee, a history of disruptive or aggressive behavior, threats made to self or others, seriousness of the charge, security resources in the courtroom, etc.)
- About half define the types of restraints that are prohibited/limited.

- A few expressly require that, even when restrained, juveniles must be able to write and handle documents.

- Procedures for challenging/recommending the use of restraints vary considerably. In some states, the child and their counsel must have an opportunity to speak before shackles are ordered. Other states leave the decision solely to the discretion of the judge or place the burden on the prosecution to justify the use of shackles. In some jurisdictions, courts allow the probation/detention officers to recommend the use of restraints.

The wide variance in practice across Texas creates an environment where due process protections may be applied inconsistently. As such, the Children's Commission supports a rule, adapted from those of other states, with the elements referenced below. Regarding placement of the rule, Rule 6. Time Standards for the Disposition of Cases already addresses juvenile cases and could be amended to include procedures for the review of the use of restraints in juvenile court. Supplemental commentary or guidance can address additional details (i.e., factors for courts to consider) but the rule itself should not be overly prescriptive and should give courts flexibility to establish procedures that meet the needs of the jurisdiction.

Proposed Rule on the Use of Restraints in the Juvenile Court

(a) Restraints, such as handcuffs, chains, irons, and other similar items, must not be used on a child during a juvenile court proceeding unless the court determines that:

(1) the use of restraints is necessary because the child presents a substantial risk of:

(A) inflicting physical harm on the child or another person; or

(B) flight from the courtroom; and

(2) there is no less restrictive alternative to restraints that will prevent physical harm or flight.

(b) Any party may request a hearing on the necessity of restraints.

(c) If the court determines that restraints are necessary, the court must:

(1) make that determination in a written order;

(2) when feasible, issue the order before the child enters the courtroom and appears before the court;

(3) make findings of fact in support of the order; and

(4) order the least restrictive type of restraint necessary to prevent physical harm or flight.

(d) This rule does not apply to the use of restraints when transporting the child to or from the courtroom.

Attachment A

Restraints in Juvenile Court Discussion

August 6, 2020
12:00 p.m. - 2:00 p.m.

Disclaimer: The materials in this tool kit should not be construed as an advisory or ruling by or from the Supreme Court of Texas on specific cases or legal issues. These materials are solely intended to address the improvement of the law, the legal system, and the administration of justice. The information included in this report was published in March 2021.

Facilitator

– *Hon. Gary Coley, Judge, 74th District Court*

Attendees

– *Laura Angelini, General Administrative Counsel, Bexar County Juvenile District Courts*
– *Hon. Renee Betancourt, Judge, 449th District Court*
– *Amy Bruno, Chief of Staff for Representative Gene Wu, Texas House of Representatives*
– *Hon. Darlene Byrne, Judge, 126th Civil District Court*
– *William Carter, Chief Juvenile Probation Officer, Lubbock County Juvenile Probation*
– *Louis Castillo, Director of Detention, El Paso Probation Department*
– *Cathy Cockerham, Liaison for Program Development, Texas Court Appointed Special Advocates*
– *Molly Davis, Staff Attorney, Judicial Commission on Mental Health*
– *Hector Gomez, Office of Court Administration, Court Security Director*
– *Henry Gonzales, Executive Director, Harris County Juvenile Probation Department*
– *H. Lynn Hadnot, Executive Director, Collin County Juvenile Probation Services*
– *Durrand Hill, Chief Prosecutor Juvenile Division, Dallas County District Attorney's Office*
– *Chris Hubner, General Counsel, Travis County Juvenile Probation*
– *Tarsha Jackson, Parent Advocate, Urban Community Network*
– *Hon. Lisa Jarrett, Judge, 436th District Court*
– *Karl Johnson, Deputy Chief, Bexar County Juvenile Probation*
– *Hon. Cheryll Mabray, Judge, Child Protection Court of the Hill Country*
– *Bennie Medlin, Director, Tarrant County Juvenile Services*
– *Brett Merfish, Director of Youth Justice, Texas Appleseed*
– *Chief Jay Monkerud, Chief Juvenile Probation Officer, Caldwell County Juvenile Probation*
– *Hon. Valencia Nash, Judge, Justice of the Peace 1-2, Dallas*
– *Lauren Rose, Director of Public Policy, Texas Network of Youth Services*
– *Kristina Sandoval, Training & Personnel Coordinator, Brazoria County Juvenile Justice Dept.*
– *Lou Serrano, Deputy Executive Director, Probation Services, Texas Juvenile Justice Department*
– *Hon. Leah Shapiro, Judge, 315th District Court*
– *Hon. Randy Shelton, Judge, 279th Civil District Court*
– *Dr. Sherri Simmons-Horton, Assistant Professor, University of Texas at San Antonio*
– *Kaci Singer, Deputy General Counsel for County Matters, Texas Juvenile Justice Department*
– *Matt Smith, Asst. Executive Director & Director of Mental Health Services, Williamson County Juvenile Services*
– *Stephanie Stevens, Clinical Professor, St. Mary's University School of Law*
– *Hon. Cyndi Wheless, Judge, 417th District Court*
– *Representative James White, State Representative, Texas House of Representatives*
– *Lynne Wilkerson, Chief Juvenile Probation Officer, Bexar County Juvenile Probation Department*
– *Representative Gene Wu, State Representative, Texas House of Representatives*

Children's Commission Staff

– *Jamie Bernstein, Executive Director*

I. Meeting Overview & Legislative Background

This meeting's format changed from in-person in April 2020 to fit an abbreviated, virtual format in August 2020 due to the COVID-19 pandemic.

Judge Gary Coley, Judge of the 74th District Court in McLennan County and Commissioner on the Supreme Court of Texas Children's Commission, facilitated the meeting. Judge Coley provided an overview of the goals for the meeting including:

- Conducting an inventory of practices across Texas regarding the use of restraints in juvenile court to ensure there is an accurate picture of the use of restraints;
- Creating a neutral and common space for dialogue and an opportunity for civil discourse on this complex topic; and
- Laying the foundation for developing workable, consistent statewide guidance on the use of restraints in juvenile court.

HB 2737 (86th Leg. Session) added the following provisions in Texas Government Code Section 22.0135 related to restraints in juvenile court (included in relevant part below):

- *The Supreme Court, in conjunction with the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, annually shall provide guidance to judges who preside over child protective services cases or juvenile cases to establish greater uniformity across the state for:*
    - *(2) in juvenile cases, issues related to:*
    - *(D) a child's appearance before a court in a judicial proceeding, including the use of a restraint on the child and the clothing worn by the child during the proceeding; and*
- *The supreme court shall adopt the rules necessary to accomplish the purposes of this section.*

Representative Gene Wu authored HB 2737 and noted at the meeting that the bill was intended to provide courts with the opportunity to provide guidance on this issue rather than mandating a uniform solution statewide. Representative James White added that it is important to focus on constitutional considerations and ensure fairness for the youth impacted. Representative White cited the case of *Lainey v. State, 117 S.W.3d 854 (2003),* and urged participants to extend the presumption against shackling to apply to youth.

II. Scope of the Discussion

The purpose of the meeting was to discuss the use of restraints in juvenile court. There are several fundamental terms and concepts that informed the scope of the discussion during the meeting. **Restraints** refer to both handcuffs that restrain a youth's wrists and hands, ankle restraints that limit leg movement, and body chains that connect hand and leg restraints. Another term sometimes used to describe the use of restraints is shackling. **Court** generally refers to in-person hearings and a physical appearance in the courtroom. Participants discussed virtual hearings required in response to COVID-19, however, the focus of the meeting was on the use of restraints during in-person proceedings. Although HB 2737 referenced above also contemplates guidance about the clothing worn in court, the discussion centered on the use of restraints as a threshold issue.

III. Reducing Restraints: A Local Example

Judge Leah Shapiro of the 315th District Court shared the background and history on the use of restraints in her court in Harris County. She noted that historically, juveniles in Houston were shackled indiscriminately regardless of history, offense, or age. For example, an eleven-year-old youth arrested for cell phone theft would appear in court in "all fours" meaning hands and feet in restraint connected by a chain, the same restraints used for transport.

Judge Shapiro noted that a youth's experience in restraints, or a parent's experience seeing their child in restraints, can be traumatic and it was a priority to change this practice when she took the bench in 2018. The first step was to assemble all the stakeholders involved so that the practice change would be effective. This included each of the three law enforcement entities impacted: Harris County Precinct 1, the Sherriff's Office, and the Juvenile Probation Department.

In May 2019, the court initiated an effort to stop indiscriminate shackling, which Judge Shapiro defined as the use of shackling in every case without criteria to determine whether it is appropriate under the circumstances. Rather than a standing order, Judge Shapiro began conducting individual assessments for each youth that would appear in the court every day. The court considers the following factors to make the determination about whether the youth will appear in court in restraints:

- Whether the youth is likely to escape or there is a risk of flight;
- Whether there is a danger to the youth or other individuals; or
- Whether there is a prior courtroom behavior that presents a safety concern.

The decision about whether to restrain the youth in the 315th District Court does not take into account the seriousness of the offense because there are youth in detention and youth in the community who are accused of the same offenses. As a result, the offense itself provides little insight to the judge about the need to restrain the youth in court. For example, in certification hearings, determinate stipulations, and pleas for cases as serious as murder and capital murders, youth may appear in court without restraints if the factors above are not present.

Other considerations include whether wearing the restraint would impair the mental capacity of the youth, the ability to communicate with counsel, and whether the restraint would detract from the dignity or decorum of the courtroom.

Initially, there were formal, individual findings for each youth including whether a restraint was used, what type of restraint was used (wrist, ankle, or both), and the grounds or basis for that decision. The defense bar expressed concern that those findings could be used against the youth at a later date. The Sherriff's Department, the entity responsible for courtroom safety in the 315th District Court, expressed concerns about accountability if there were to be an incident in court when the youth was not restrained. To balance these concerns, the Probation Department generates and provides a form about each detained youth to the Sherriff's Department and the Court. Judge Shapiro reviews the form and makes a determination about whether restraints are needed. The form notes any behavioral incidents including the date of the incident, the behavior presented (e.g., contraband, assaulting staff, etc.), and the consequence for the behavior. The Sherriff's Department takes that information and creates a different form with the name of the youth, the attorney for the youth, an option to circle whether or not to use restraints, a column for the type of restraint (wrist, ankle, or both), and a notes section. The form is then shared with detention staff, the attorneys, and the Bailiff.

There are also mechanisms in place for the parties to review any emerging circumstances on the day of court. If there are concerns, the attorneys can request additional review from the judge. Sample Orders as well as opportunities to go on the record are available, if necessary. If an issue escalates in court and the youth is not restrained, there will be a recess to maintain courtroom security.

Typically, there is only one Bailiff present and Probation provides an additional officer to monitor the youth in court. Also, there is no movement allowed by the youth once the hearing begins. There is only one youth present in court at a time.

Judge Shapiro indicated that safety is paramount but that to date the only restraints used were wrist restraints. One initial practical issue was that the Probation Department only had "all fours" restraints and had to acquire handcuffs.

In August 2019, the Probation Department also provided a polo and khaki pants for all youth in detention for their court appearance. Representative Wu noted that in his capacity as an attorney for youth, he noted a significant change in demeanor and experience for youth appearing in court without restraints and jumpsuits. Judge Shapiro added that there are very serious and important issues discussed in court and that it has been beneficial for youth and families to appear without restraints and in plain clothes.

IV. Identifying a Baseline

Judge Coley asked participants for feedback about current practices to create a baseline understanding about different perspectives from around the state. He noted the COVID-19 impacts on day-to-day functioning for all Texas courts and the children and families served. With that in mind, participants discussed several questions aimed at developing a baseline that documents current practices and contemplates future opportunities for improvement. Note: the information included below is only accurate as of the date of the meeting, August 6, 2020.

1. *Does your county have a written policy regarding the use of restraints on children appearing before the court in hearings under Texas Family Code Chapter 54 Judicial Proceedings?*

Judge Wheless stated that there is no such formal policy in Collin County. She noted that juveniles appear in plain clothes and without shackles before juries. In consultation with Chief Hadnot, Judge Wheless defers to Probation about which youth need to be shackled in court in non-jury cases. Judge Wheless added that the county is working toward securing clothing for all detained youth to wear in court. Chief Hadnot further explained that Collin County historically used restraints for judicial proceedings in the District Court building for security reasons. In the secure facility courtroom, juveniles appear for detention hearings before a juvenile referee normally and no restraints are used. In the facility, there is more personnel support and the flight risk is very minimal. In both the secure facility and district court settings, the default is now a presumption not to use restraints of any kind unless there is a substantiated risk or justification.

Chief Medlin noted that in Tarrant County there has been a policy for at least 15 years that allows for restraints on a discretionary basis but generally youth are not restrained unless they pose a security threat. Chief Medlin recalled only one incident of using restraints within the past 12 months. In Tarrant County, if there is a security threat, Probation relays

the information to the court and the judge makes a determination about whether to restrain the youth in court.

Judge Nash shared that there is no written policy on restraints in Dallas County. Mr. Hill indicated that in Dallas County it is very infrequent for a youth to appear in court in restraints.

Judge Byrne noted that there is no written policy in Travis County, but that the presumption is not to use restraints in court. If restraints are requested, attorneys approach the bench and explain why a restraint is needed and what the safety concerns are.

Judge Shapiro added that there is no written policy on restraints in Harris County.

Judge Betancourt indicated that in Hidalgo County although there is no written policy, youth are restrained at every appearance, but the county is considering a change in practice. Judge Betancourt further noted that criteria to make decisions about the use of restraints will be important.

In Jefferson County, Judge Shelton indicated that youth are not restrained on a regular basis unless certain circumstances exist. However, Judge Shelton also noted that detention staff have limited tools available to maintain their own safety.

Chief Wilkerson stated that Bexar County does not have a written policy concerning use of restraints in the courtrooms. The courts establish their own courtroom rules.

Mr. Castillo stated that in El Paso County all youth are restrained in court per written policy.

Mr. Smith stated that in Williamson County, juvenile court hearings occur in two locations. In the court next to the detention center, youth are not restrained unless there is a concern, and the judge will ultimately make that determination. The criteria for restraining youth are risk of flight and danger to the youth or other individuals. In the downtown courthouse, youth are transported across a parking lot and into the building and the leg restraints which are used for transport are not removed for court. Williamson County is contemplating the possibility of plain clothes for juveniles and using restraints for transport only. One concern about using plain clothing is the need for changing clothes, including the need for pat down searches. He added that these are local practices, not written policy.

Chief Monkerud emphasized that there are only 45 detention centers covering 254 counties in Texas. He noted that some courthouses are not secure and do not connect to detention centers. For example, in the past court was conducted on the second floor of a building and it would pose a great security risk to youth and other individuals in court if the youth were

not restrained. He stated that transport becomes a big challenge in smaller jurisdictions. Chief Monkerud indicated that most youth in Caldwell County remain in the same leg restraints used for transport. This is not a written policy but local practice that applies only to those youth who are detained. He further underscored that having adequate staff to maintain courtroom safety is another key consideration. Judge Mabray agreed that many rural jurisdictions do not have the facilities or personnel to adequately monitor youth without restraints.

Chief Carter added that in Lubbock County there is no written policy, and the judge sets the courtroom protocol. He further noted that if the disposition hearing is for an out-of-home placement then restraints are used. Chief Carter shared that in Lubbock, Juvenile Probation personnel utilize a restraint technique referred to as "Handle with Care." However, law enforcement personnel are trained in a different technique. If a juvenile becomes aggressive towards the judge in a threatening manner, the Bailiff can use any method at their disposal to protect the judge.

Representative White expressed concern that individuals appearing before court in death penalty cases are not shackled in the courtroom, but youth are shackled in juvenile justice cases. Represented White underscored that juveniles should not receive harsher treatment than adults and that juveniles should have the opportunity to participate in court without restraints.

2. *When youth are restrained, what type of restraints are used? Leg/Ankle, Arm/Wrist, or both?*

In addition to the comments included above, there were other practices regarding the use of restraints discussed at the meeting.

Ms. Sandoval added that in Brazoria County Probation transports all detained juveniles in ankle and wrist restraints. The detention facility is located 5 miles from the courthouse where the hearings are held. The juveniles remain in restraints at all times while outside of the detention facility.

In Caldwell and El Paso Counties, both ankle and wrist restraints are used. In the past, Collin County used both. In Lubbock, leg restraints are only used in rare circumstances.

3. *If juveniles are in detention, do they appear before the court at detention adjudication/disposition/modification hearings? In person? By video technology?*

At the time of the meeting, most Texas jurisdictions utilized virtual hearings to maintain health and safety with regard to COVID-19. Participants generally agreed that holding court

in person is preferred, but there was a desire to continue the positive aspects of utilizing technology including increased efficiencies in court proceedings and increased visitation and family engagement.

Chief Monkerud indicated that in central Texas during the COVID-19 pandemic many youth appear in person, and that the only hearings held remotely are detention hearings. He cited Texas Family Code Section 54.012 that states interactive video detention hearings are only allowed if the youth and their attorney agree. As a result, many hearings have occurred in person. One challenge for rural jurisdictions is that detention facilities refuse to accept the youth back after they appear before the court in person due to concerns related to COVID-19. In the past, detention centers did not have the technology to conduct virtual hearings, but all are equipped to do so now.

Judge Shelton indicated that access to updated technology would make it possible to utilize remote hearings moving forward. Judge Byrne responded that there may be federal emergency COVID-19 funds available to assist with the technology needed for remote hearings.

In Lubbock County, most detention hearings occur by Zoom in response to COVID-19. Juveniles appear in person during adjudication, disposition, and modification hearings.

At the time of the meeting, hearings in El Paso, Dallas, Williamson, Houston, Jefferson, and Travis Counties were all virtual. In Brazoria and Lubbock Counties, detention hearings were virtual but other hearings were conducted in person. Most of these counties utilized Zoom and this is likely to continue in the future, at least as a supplemental hearing option when in-person proceedings resume.

4. *How do virtual hearings impact decisions related to restraints in court?*

Judge Shelton shared that Zoom has diffused tension in many hearings and when youth appear they are less combative. Judge Coley added that the virtual hearings lend themselves to a more comfortable and conversational climate.

Chief Carter noted that there is a regional detention center in Lubbock that houses youth from 38 counties. As a result, some youth must be detained for transit to the non-secure area of the building where virtual court hearings are conducted. For the hearings, youth are not restrained. Chief Carter suggested that going forward, virtual hearings will assist with appearing in court without restraints for courts around the state.

5. *If a juvenile only appears before the court in restraints sometimes, what factors contribute to that decision?*

Judge Byrne indicated that in Travis County the presumption is to not use restraints, but anyone involved in the proceeding can raise the issue of the need for restraints. Typically, this decision occurs at a bench conference without the youth present, but this is the process regardless of the stage of the case. The attorneys will voice any concerns and the court will make a ruling, but this only occurs on rare occasions. Judge Byrne further noted that the determination about which restraint to use depends on the circumstances. If a youth poses a risk of flight, leg restraints will be used. If a youth exhibits assaultive behavior, handcuffs will be used. Judge Byrne also explains to each youth why they are restrained so that in the future restraints may not be necessary. Since restraints are only required in about 1% of cases, Judge Byrne noted that there is adequate court time to discuss these issues with the youth.

In El Paso, the decision was made several years ago to use restraints in every hearing when a youth is detained so there are no individual case considerations, but this is something Probation may explore in the future.

In Collin County, Probation makes the determination about whether to utilize restraints, in conjunction with the transport team. Chief Hadnot indicated that these decisions will be made based on substantiated behaviors that can inform the decision. The classification of the offense is not determinative of whether the youth will appear in court in restraints. Chief Hadnot relayed a couple of examples where the offense was serious but the youth did not need to be restrained in court and conversely where the offense was a misdemeanor, but the youth presented a flight risk as well as a safety concern. Judge Wheless added that she prefers to keep the information from being shared *ex parte* and that is why the information flows through Probation.

Dr. Simmons Horton inquired about whether there is information from the jurisdictions as to who is restrained in court, including information broken down by gender, race, offense, CPS involvement, etc. This question was unresolved at the meeting. However, Judge Wheless emphasized that it is imperative to reduce the human decision points and to base decisions on Risk Instruments only.

In Lubbock, the decision about whether to use restraints in court is made by the judge who sets courtroom protocol. Chief Carter added that in Lubbock County, youth with a Child in Need of Supervision (CINS) and misdemeanor offenses are rarely detained so the data would likely suggest that youth who appear in restraints are charged with felony offenses.

In Tarrant County, restraints are rarely used in court. If restraints are requested, the decision to place juveniles in restraints (i.e., handcuffs and leg restraints) is made by the judge, in consultation with the attorneys and Probation staff. The primary driver for these

decisions is the juvenile's behavior at the time of the hearing or juvenile's past behavior in the courtroom.

Ms. Merfish added that other states which have stopped indiscriminate shackling have not included the offense as a factor. Ms. Merfish noted that common factors from other states that have addressed this issue include a history of disruptive courtroom behavior, physical harm to juvenile or another person, and flight risk.

6. *Do you believe your jurisdiction would oppose a presumption of no restraints in court without an individualized/identifiable need on a case-by-case basis?*

Mr. Castillo indicated that it is likely El Paso County would be opposed to this presumption. He said a presumption to use restraints unless there are circumstances to have them removed on an individual basis would be better received.

Chief Monkerud noted that Caldwell County would likely oppose this presumption as well. He suggested that small departments and staff resources may also cause other jurisdictions to be opposed to this presumption.

Chief Wilkerson added that a presumption against leg shackles may be more feasible in other jurisdictions.

Chief Medlin shared his belief that some jurisdictions may oppose a presumption of no restraints due to staffing concerns, location and configuration of court rooms, and the preference of judges and law enforcement assigned to court security.

7. *What are the barriers to creating a presumption against using restraints in juvenile court unless there is a safety or flight risk concern?*

Chief Hadnot noted that lack of resources and personnel in small and medium jurisdictions is an important consideration in determining whether this presumption will be feasible. Further, if a youth gets out of control in court, most restraints require a team intervention, and this will be impactful if there are not additional officers available. Another issue is the presence of multiple law enforcement entities (Sherriff, Probation, etc.) and the various ways they are trained.

Mr. Gomez provided a perspective on court security from the Office of Court Administration. Mr. Gomez noted that he conducts courthouse security audits around the state. He added that court takes place in a wide range of physical locations making court security very inconsistent. Mr. Gomez shared that some important considerations are the design of the courthouse and availability of adequate staff.

Ms. Merfish responded that in other states that have banned indiscriminate shackling, additional staff resources were not needed. She added that judicial oversight controls for the risk of safety and flight risk concerns. Ms. Merfish cited the following examples of jurisdictions that did not increase staff when transitioning away from using restraints.

- *Miami-Dade County, FL limited juvenile shackling in 2006. Since then, more than 25,000 children have appeared in the county's juvenile court without injury or escape. (Source: Miami-Dade Public Defender)*
- *The Children's Court Division of Albuquerque, NM has limited shackling for 12 years and seen no escapes and only three incidents of children "acting out in court." (Source: Juvenile and Family Court Journal, Spring 2015)*
- *In New Orleans Parish, LA, security staffing was reduced after shackling reform due to budget cuts. The parish conducts roughly 4,000 juvenile hearings a year and has had no incidents. (Source: Louisiana Center for Children's Rights)*
- *Clayton County, GA had no escapes or violence in more than a year of limiting shackling. At times, an additional deputy has been stationed outside the court since the change. However, that deputy has never been called upon to act, as there have been no incidents. (Source: Sheriff Victor Hill & deputies.)*

Chief Monkerud shared an idea raised by another central Texas Probation Chief about Texas Family Code Section 53.02 which outlines reasons for juveniles to be placed and maintained in detention including likelihood to abscond, danger to youth or others, and other criteria. He suggested these criteria could also be used to determine whether to restrain a youth in court. For example, if a youth is in detention because there is not a parent or other custodian to care for the youth, the youth may not need to be restrained in court.

Mr. Castillo underscored the need to be data driven and to only set a presumption if the data reveal the need.

Chief Carter noted that currently, the judge already has the authority to ask for a juvenile to be restrained or not. He opined that there should not be a broad, sweeping rule to tell judges how to conduct their courtroom proceedings.

Ms. Angelini added that in Bexar County, the Sherriff's Office has a written policy that anyone in custody must be restrained. Once the youth is in the courtroom, it seems that the judge's will would prevail. This could potentially create tension if the judge and the Sherriff's Office are not aligned on this issue.

Participants discussed the possible objection of defense counsel and others about judges hearing potentially prejudicial information about a youth's behavior pre-disposition. Judge

Wheless indicated that this is why she defers to Probation and does not hear underlying information about the youth's behavior. Judge Shapiro added that in her court the information is only used to determine whether to restrain the youth and the information is not otherwise used in hearings.

V. Recommendations & Conclusion

Several Texas jurisdictions, generally large to mid-size urban and suburban areas, do not utilize restraints in court during juvenile proceedings. For these jurisdictions, procedures are in place for Probation, law enforcement, attorneys, and judges to determine whether restraints are appropriate on a case-by-case basis depending on the circumstances. Some of the key factors to consider for these jurisdictions are past courtroom behavior, a risk of danger to the youth or others, or a risk of flight; seriousness of the offense has been identified as a factor that is not necessarily indicative of the need for restraints. The jurisdictions that have shifted away from using restraints unless these factors are present have successfully maintained courtroom security and found it to be beneficial to the experience of the youth and family in court.

Some Texas jurisdictions, especially small and rural areas, utilize restraints in every juvenile hearing where the child is detained. Although the issue presented at the meeting centered on the use of restraints in court, many youth are detained during transport from detention facilities that can be far away from court and this presents many logistical challenges when there is no secure area once the youth arrive at court. The physical layout of the court may also make it difficult for Probation staff to ensure the safety of the youth and others or prevent the youth from running away if they are not restrained. Also, the availability of adequate personnel could be another important consideration if youth are not restrained in court and a security issue arises.

Virtual hearings in response to COVID-19 present new opportunities for youth to appear in court without restraints but it is unclear whether this practice will continue when in-person proceedings resume.

Over half the states in the United States have added some limitation on the use of restraints in juvenile court through legislation, rule, or policy. In Texas there is no controlling law, rule, or policy on this issue and each court makes individual determinations about the use of restraints in juvenile court. Although the discussion provided a baseline for current practices throughout Texas, further efforts are needed to examine whether additional training, tools, or court rules are necessary to address the use of restraints in court. The right of a juvenile to appear in court without restraints must be balanced against the need for courtroom safety and security. To strike a balance of these interests, decisions should

be made on an individualized basis, using established criteria, and should factor in whether the particular youth presents a risk of danger or risk of flight. Distinctions can also be drawn on what type of restraints, if any, are needed. The Children's Commission will continue to provide a forum for a multi-disciplinary group that reflects various jurisdictions throughout Texas to further explore the need for court rules and/or to develop guidance on the use of restraints in juvenile court.

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Attachment B

State Shackling Rules

Table of Contents

West's Alaska Statutes Annotated
Alaska Court Rules
Delinquency Rules
Part VII. Adjudication

Delinquency Rules Rule 21.5

Rule 21.5. Use of Restraints on the Juvenile

Currentness

(a) Restraints such as handcuffs, waist belts, and footcuffs shall not be used on a juvenile during a court proceeding unless they are necessary because the juvenile is otherwise uncontrollable or constitutes a serious and evident danger to self or others, there is reason to believe that the juvenile will try to escape, or there is no less restrictive alternative available to maintain order and safety in the courtroom given available security resources.

(b) If a juvenile appears at a court proceeding in restraints, and if there is an objection to the restraints or if the juvenile is appearing without counsel, the judge must make a finding, based on an individualized assessment of the particular juvenile and the available security resources, whether the restraints are necessary. In subsequent proceedings in the same case, a judge may rely on a finding that was made previously, as long as the circumstances have not materially changed. When ruling on the necessity of restraints, the judge shall consider the following factors:

(1) any threats that the juvenile has made to cause harm to self or others, or to cause a disturbance;

(2) any behavior of the juvenile indicating that the juvenile presents a current threat to the juvenile's own safety, or to the safety of other people in the courtroom, or to the orderly course of the proceedings;

(3) any past escapes or attempts to escape, and the seriousness of the current charge, to the extent it raises a concern that the juvenile has an incentive to attempt to escape;

(4) the existence of any less restrictive alternative to maintain order and safety in the courtroom, taking into account available security resources; and

(5) the recommendations of security personnel charged with custody of the juvenile.

Credits
[Adopted effective April 15, 2015.]

Table of Rules

Delinquency Rules Rule 21.5, AK R DELINQ RULES Rule 21.5

Currency with amendments received through June 15, 2022.

End of Document

Arizona Statutes Annotated - 2017

Arizona Revised Statutes Annotated
Rules of Procedure for the Juvenile Court (Refs & Annos)
Part II. Delinquency and Incorrigibility
1. General Delinquency Provisions

17B A.R.S. Juv.Ct.Rules of Proc., Rule 12

Rule 12. Attendance of Juvenile at Proceedings

Currentness

A. Personal Appearance. A juvenile accused of committing a delinquent or incorrigible act shall appear before the court for all proceedings as directed by the court. The juvenile shall personally appear before the court for the following:

1. Any adjudication hearing;

2. Any disposition hearing;

3. Any transfer hearing; and

4. Any change of plea.

B. Telephonic or Video Appearance. For purposes of these rules, the appearance by telephone or video conferencing of the juvenile shall be considered a personal appearance. The juvenile may appear telephonically or by video conferencing only as stipulated to by the parties and authorized by the court.

C. Voluntary Absence. The court may infer that the juvenile's absence is voluntary if the juvenile had notice of the date, time and place of hearing, the right to be present at the hearing and had received a warning that the hearing would go forward in the juvenile's absence if the juvenile failed to appear.

D. Failure to Appear. The failure of the juvenile to appear at the adjudication or any other hearing, except the disposition hearing, shall not prevent the court from proceeding in the juvenile's absence and/or issuing a warrant to secure the juvenile's attendance.

E. Mechanical Restraints.

1. When a juvenile appears before a judicial officer at a hearing in the juvenile's delinquency case, the juvenile shall be free of mechanical restraints unless there are no less restrictive alternatives that will prevent flight or physical harm to the juvenile or another person. Relevant factors in determining whether the use of mechanical restraints is warranted include:

a. The juvenile has displayed threatening or physically aggressive behavior towards others;

b. The juvenile is likely to flee, has expressed an intention to flee, or has previously attempted to flee secure care;

c. A probation officer, detention administrator or designee, or juvenile detention officer has recommended the use of mechanical restraints; and

d. A present security situation in the courtroom or courthouse, including a risk of gang violence or gang-related conduct or a specific concern due to a witness presence, warrants the use of mechanical restraints.

2. A prior determination by a court that the juvenile should appear in mechanical restraints remains in effect until further order of the court.

3. If a juvenile is brought before the judicial officer in mechanical restraints, the juvenile may object through counsel. After the judicial officer has heard from the juvenile, the state, and any detention personnel, and considered the factors listed in subparagraphs (1)(a)-(d) above, the judicial officer shall approve or disapprove the use of restraints.

4. Except when a juvenile appears before a judicial officer at a hearing in the juvenile's delinquency case, the use of mechanical restraints shall be governed by the Policies and Procedures in effect for the courts in the specific county as required by the Arizona Juvenile Detention Standards.

5. Any restraints shall allow the juvenile limited movement of the hands to read, handle documents, and write.

6. Mechanical restraints include handcuffs, leg irons, belly chains, zip ties, spit hoods and masks, and any other device used to restrain movement of the arms, legs or torso.

Credits
Added Oct. 27, 2000, effective Jan. 1, 2001. Amended Sept. 2, 2016, effective Jan. 1, 2017.

APPLICATION

<Rules 9 through 35 shall apply to cases in which the offense occurred on or after January 1, 2001; Rules 36 through 66 shall apply to cases filed on or after January 1, 2001; and, Rules 67 through 87 shall apply to actions commenced on or after January 1, 2001.>

HISTORICAL NOTES
Former Rule 12, Transfer for Criminal Prosecution; Initiation of Proceedings, amended Dec. 23, 1983, effective March 1, 1984; Dec. 12, 1991, effective March 1, 1992; Jan. 27, 1994, effective June 1, 1994, was repealed by order dated Oct. 27, 2000, effective Jan. 1, 2001.

LIBRARY REFERENCES

Infants 2072, 2097, 2557, 2573.
Westlaw Topic No. 211.
C.J.S. Infants §§ 121, 140.

RESEARCH REFERENCES

Treatises and Practice Aids
5 Arizona Practice § 4:4, Petition.
5 Arizona Practice § 9:6, Practical Considerations.
NOTES OF DECISIONS

Exclusion of children 2

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Transfer hearings 3

Validity of prior rule 1

1 Validity of prior rule

Juvenile court rule, giving juvenile court discretion to exclude the general public from juvenile hearings, did not conflict with requirement in Const. Art. 6, § 15 that juvenile proceedings be held "in chambers." Wideman v. Garbarino (1989) 160 Ariz. 16, 770 P.2d 320. Infants 1006(1)

2 Exclusion of children

Juveniles, who viewed testimony of victim's six-year-old brother via closed-circuit television in room adjoining courtroom, were not "excluded" from their delinquency proceeding within meaning of A.R.S. Juv.Ct.Rules of Proc. Rule governing exclusion of child from juvenile court proceedings, as juveniles were able to confer with their counsel during breaks in testimony which were taken for such purpose; juveniles were placed in separate room because witness feared to testify in their presence because of prior threats they had made against him. Matter of Appeal in Pinal County Juvenile Action Nos. J-1123 and J-1124 (App. Div.2 1985) 147 Ariz. 302, 709 P.2d 1361. Infants 2573

3 Transfer hearings

Hearing in juvenile court on motion to transfer juvenile to adult court for criminal prosecution could not be held in the absence of the juvenile, who had committed himself voluntarily to in-patient treatment at mental health facility, although court had option of issuing bench warrant for juvenile's arrest. Appeal of Maricopa County Juvenile Action No. J-102981 (App. Div.1 1985) 147 Ariz. 316, 709 P.2d 1375. Infants 2990

Juvenile court's denial of juvenile's motion to close transfer hearing to the public was not grounds for remand in order that closed hearing might be conducted, regardless of whether it was proper to open the hearing, absent evidence that failure to close hearing in any way impeded testimony of the witnesses or otherwise resulted in any prejudice which substantively affected his transfer. Appeal in Juvenile Action J-96695 (App. Div.1 1985) 146 Ariz. 238, 705 P.2d 478. Infants 3112

4 News media

There was no abuse of discretion by juvenile judge in admitting news media and public to transfer hearing. Wideman v. Garbarino (1989) 160 Ariz. 16, 770 P.2d 320. Infants 2990

17B A. R. S. Juv. Ct. Rules of Proc., Rule 12, AZ ST JUV CT Rule 12

Current with amendments received and effective through 9/1/17

End of Document

15 CCR § 1358

§ 1358. Use of Physical Restraints.

The facility administrator, in cooperation with the responsible physician and mental health director, shall develop and implement written policies and procedures for the use of restraint devices. Restraint devices include any devices which immobilize a youth's extremities and/or prevent the youth from being ambulatory.

Physical restraints may be used only for those youth who present an immediate danger to themselves or others, who exhibit behavior which results in the destruction of property, or reveals the intent to cause self-inflicted physical harm. Physical restraints should be utilized only when it appears less restrictive alternatives would be ineffective in controlling the youth's behavior.

In no case shall restraints be used as punishment or discipline, or as a substitute for treatment. The use of restraint devices that attach a youth to a wall, floor or other fixture, including a restraint chair, or through affixing of hands and feet together behind the back (hogtying) is prohibited. The use of restraints on pregnant youth is limited in accordance with Penal Code Section 6030(f) and Welfare and Institutions Code Section 222.

The provisions of this section do not apply to the use of handcuffs, shackles or other restraint devices when used to restrain youth for movement or transportation within the facility. Movement within the facility shall be governed by Section 1358.5, Use of Restraint Devices for Movement Within the Facility.

Youth shall be placed in restraints only with the approval of the facility manager or designee. The facility manager may delegate authority to place a youth in restraints to a physician. Reasons for continued retention in restraints shall be reviewed and documented at a minimum of every hour.

A medical opinion on the safety of placement and retention shall be secured as soon as possible, but no later than two hours from the time of placement. The youth shall be medically cleared for continued retention at least every three hours thereafter.

A mental health consultation shall be secured as soon as possible, but in no case longer than four hours from the time of placement, to assess the need for mental health treatment.

Continuous direct visual supervision shall be conducted to ensure that the restraints are properly employed, and to ensure the safety and well-being of the youth. Observations of the youth's behavior and any staff interventions shall be documented at least every 15 minutes, with actual time of the documentation recorded.

In addition to the requirements above, policies and procedures shall address:

(a) documentation of the circumstances leading to an application of restraints.

(b) known medical conditions that would contraindicate certain restraint devices and/or techniques.

(c) acceptable restraint devices.

(d) signs or symptoms which should result in immediate medical/mental health referral.

(e) availability of cardiopulmonary resuscitation equipment.

(f) protective housing of restrained youth. While in restraint devices, all youth shall be housed alone or in a specified housing area for restrained youth which makes provision to protect the youth from abuse.

(g) provision for hydration and sanitation needs.

(h) exercising of extremities.

Note: Authority cited: Sections 210 and 885, Welfare and Institutions Code. Reference: Section 6030(f), Penal Code; and Section 222, Welfare and Institutions Code.

HISTORY

1. New section filed 3-6-97; operative 4-5-97 (Register 97, No. 10).

2. Amendment of subsections (a), (c) and (d) filed 1-11-2001; operative 2-10-2001 (Register 2001, No. 2).

3. Amendment of subsections (b)-(d) filed 6-23-2003; operative 7-23-2003 (Register 2003, No. 26).

4. New subsection (f) filed 5-23-2008 as an emergency; operative 5-23-2008 (Register 2008, No. 21). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 10-30-2008 or emergency language will be repealed by operation of law on the following day.

5. Certificate of Compliance as to 5-23-2008 order transmitted to OAL 9-10-2008 and filed 10-23-2008 (Register 2008, No. 43).

6. Amendment of section and Note filed 12-2-2013; operative 4-1-2014 (Register 2013, No. 49).

7. Amendment filed 11-14-2018; operative 1-1-2019 (Register 2018, No. 46).

This database is current through 6/24/22 Register 2022, No. 25

15 CCR § 1358, 15 CA ADC § 1358

End of Document

Connecticut General Statutes Annotated
Title 46b. Family Law (Refs & Annos)
Chapter 815T. Juvenile Matters (Refs & Annos)
Part I. General Provisions

C.G.S.A. § 46b-122a

§ 46b-122a. Use of mechanical restraints during juvenile proceedings. Statistics concerning use of restraints

Effective: October 1, 2015
Currentness

There shall be a presumption in juvenile proceedings that all mechanical restraints shall be removed from a preadjudicated detained juvenile prior to and throughout the detainee's appearance in court. In juvenile proceedings, in-court use of mechanical restraints on preadjudicated detainees shall be by order of the court and pursuant to Judicial Branch written policy. The Judicial Branch shall keep statistics on the use of mechanical restraints on juveniles during proceedings and, notwithstanding any provision of section 46b-124, shall provide such statistics to any member of the public upon request, provided any identifying information concerning a juvenile is redacted.

Credits
(2015, P.A. 15-183, § 3.)

C. G. S. A. § 46b-122a, CT ST § 46b-122a
The statutes and Constitution are current with all enactments of the 2022 Regular Session enrolled and approved by the Governor on or before July 1, 2022 and effective on or before July 1, 2022.

End of Document

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
ADMINISTRATIVE ORDER 15-07

Individual Determinations for the Use of Restraints on Respondents

WHEREAS, pursuant to D.C. Code § 16-2301.02, the purpose of the delinquency system is to deal with the problem of juvenile delinquency while treating children as children in all phases of their involvement, to place a premium on their rehabilitation, and to provide for the safety of the public;

WHEREAS, the decision of whether to restrain respondents during juvenile court proceedings impacts courtroom security, personnel resources, and judicial administration;

WHEREAS, the vast majority of jurisdictions have abandoned the indiscriminate use of restraints in juvenile cases through changes to court rules, amendments to institutional policies, or through statutory reform;

WHEREAS, no court rule, institutional policy or statute in the District of Columbia addresses the use of restraints on respondents during juvenile court proceedings; and it is most appropriate that decisions on the use of restraints depend on individual determinations; and

WHEREAS, the term "restraints" means any device used to control or bind the movement of a person's body or limbs.

NOW, THEREFORE, it is by the Court,

ORDERED, that the Family Court will make an individualized determination on the use of restraints at initial hearings for cases brought under Title 16, Chapter 23, of the D.C. Code. It is further,

ORDERED, that respondents will remain in restraints while they are transported in the courthouse through secure corridors. It is further,

ORDERED, that respondents will remain in restraints when they enter the courtroom before the Family Court makes an individualized determination on the use of restraints. It is further,

ORDERED, that the Family Court will provide respondents with an opportunity to contest the use of restraints when making an individualized determination. It is further,

ORDERED, that counsel may waive the appearance of a respondent who does not wish to enter the courtroom in restraints until after an individualized determination has been made. It is further,

ORDERED, that the Family Court may receive information relevant to the determination of the use of restraints from the agency, or agencies, charged with supervision or custody of the child. It is further,

ORDERED, that the Family Court will make an independent and individualized determination on the use of restraints. It is further,

ORDERED, that the Family Court will order the removal of restraints, unless the Family Court finds that there is reason to believe that the use of restraints is necessary for the safety of the respondent or others, or to prevent flight. It is further,

ORDERED, that when the use of restraints is ordered, the Family Court will make written findings of fact in support of the order. It is further,

ORDERED, that this Administrative Order shall take effect on April 6, 2015.

SO ORDERED.

BY THE COURT:

DATE: April 3, 2015

Lee F. Satterfield

Lee F. Satterfield
Chief Judge

Copies to:

Judges
Magistrate Judges
Executive Officer of the Court
Clerk of the Court
Division Directors
Defender Services Branch Chief
Council of the District of Columbia, Chairman of the Committee on the Judiciary
Council of the District of Columbia, Chairman of the Committee on Education
Attorney General of the District of Columbia
Director of the Public Defender Service
Director of the Department of Youth Rehabilitation Services
United States Marshals
District of Columbia Bar
Daily Washington Law Reporter
Library

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Delaware Code Annotated
Title 10. Courts and Judicial Procedure
Part I. Organization, Powers, Jurisdiction and Operation of Courts
Chapter 9. The Family Court of the State of Delaware
Subchapter III. Procedure
Part A. Proceedings in the Interest of a Child

10 Del.C. § 1007B

§ 1007B. Use of restraints on a child

Currentness

(a) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a child during a court proceeding and must be removed either prior to or after the child has entered the courtroom for an appearance before the Court unless the Court finds both of the following conditions are met:

(1) The use of restraints is necessary due to 1 of the following factors:

a. The juvenile is presently uncontrollable and constitutes a serious and evident danger to himself or herself or others;

b. There are safety risks for the youth or staff in the court room, including but not limited to the presence of known gang associates, or other individuals including relatives, who could pose a risk to youth and staff;

c. The juvenile has a history of noncompliance with law enforcement, court security, and DYRS staff, including evidence of prior attempts to escape custody, disruptive behavior at a detention facility, and other relevant factors.

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

(b) In making a determination that restraints are necessary, the Court may receive and consider such information and evidence it believes relevant to the findings required by subsection (a) of this section. The Court shall provide the child or child's attorney an opportunity to be heard as part of any hearing to determine whether the use of restraints is necessary. If restraints are ordered, the Court shall make written findings of fact in support of the order.

(c) Any use of restraints shall allow the child limited movement of the hands to read and handle documents and writings necessary to the hearing.

Credits

Added by 80 Laws 2016, ch. 413, § 1.

10 Del.C. § 1007B, DE ST TI 10 § 1007B

Current through ch. 324 of the 151st General Assembly (2021-2022). Some statute sections may be more current, see credits for details. Revisions to 2022 Acts by the Delaware Code Revisors were unavailable at the time of publication.

End of Document

West's Florida Statutes Annotated
Florida Rules of Juvenile Procedure (Refs & Annos)
Part II. Delinquency Proceedings (Refs & Annos)
F. Hearings

Fla.R.Juv.P. Rule 8.100

Rule 8.100. General Provisions for Hearings

Currentness

Unless otherwise provided, the following provisions apply to all hearings:

(a) Presence of the Child. The child shall be present unless the court finds that the child's mental or physical condition is such that a court appearance is not in the child's best interests.

(b) Use of Restraints on the Child. Instruments of restraint, such as handcuffs, chains, irons, straitjackets, cloth and leather restraints, or other similar items, shall not be used on a child during a court proceeding except when ordered by the court prior to the child's appearance in the courtroom in accordance with this rule. Instruments of restraint must be removed prior to the child's appearance unless after an individualized assessment of the child the court finds that:

(1) The use of restraints is necessary due to one of the following factors:

(A) to prevent physical harm to the child or another person;

(B) the child's history of disruptive courtroom behavior that has placed others in potentially harmful situations or that presents a substantial risk of inflicting physical harm or himself or herself or others as evidenced by recent behavior; or

(C) a founded belief that the child presents a substantial risk of flight from the courtroom; and

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

(3) In making a determination that the use of instruments of restraint is necessary, pursuant to subdivision (b)(1), the court shall consider:

(A) any past escapes or attempted escapes by the child;

(B) evidence of a present plan of escape by the child;

(C) a credible threat by the child to harm himself or herself or another person during court;

(D) evidence of self-injurious behavior on part of the child; and

(E) any other factor that is relevant in determining whether the use of instruments of restraint are necessary pursuant to subdivision (b)(1).

(4) The court shall provide the child's attorney an opportunity to be heard before the court orders the use of restraints. Counsel shall be appointed for this hearing if the child qualifies for such appointment and does not waive counsel in writing as required by rule 8.165.

(5) If restraints are ordered, the court shall make specific and individualized findings of fact in support of the order and the least restrictive restraints shall be used. Any restraints shall allow the child limited movement of his or her hands to read and handle documents and writings necessary to the hearing.

(6) Under no circumstances should a child be restrained using fixed restraints to a wall, floor, or furniture.

(c) Absence of the Child. If the child is present at the beginning of a hearing and during the progress of the hearing voluntarily absents himself or herself from the presence of the court without leave of the court, or is removed from the presence of the court because of disruptive conduct during the hearing, the hearing shall not be postponed or delayed, but shall proceed in all respects as if the child were present in court at all times.

(d) Invoking the Rule. Prior to the examination of any witness the court may, and on the request of any party in an adjudicatory hearing shall, exclude all other witnesses. The court may cause witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

(e) Continuances. The court may grant a continuance before or during a hearing for good cause shown by any party.

(f) Record of Testimony. A record of the testimony in all hearings shall be made by an official court reporter, a court approved stenographer, or a recording device. The records shall be preserved for 5 years from the date of the hearing. Official records of testimony shall be provided only on request of a party or a party's attorney or on a court order.

(g) Notice. When these rules do not require a specific notice, all parties will be given reasonable notice of any hearing.

Credits

Former Rule 8.220 amended Dec. 28, 1984, effective Jan. 1, 1985 (462 So.2d 399). Renumbered as new Rule 8.100 and amended May 9, 1991, effective July 1, 1991 (589 So.2d 818). Amended Nov. 5, 1992, effective Jan. 1, 1993 (608 So.2d 478); Jan. 26, 1995 (649 So.2d 1370); April 29, 1999 (753 So.2d 541); July 6, 2000 (opinion withdrawn on denial of rehearing March 15, 2001); March 15, 2001 (796 So.2d 470); June 26, 2008 (985 So.2d 534); Dec. 17, 2009, effective Jan. 1, 2010 (26 So.3d 552); Dec. 6, 2018, effective Jan. 1, 2019 (258 So. 3d 1254).

Notes of Decisions (32)

West's F. S. A. R. Juv. P. Rule 8.100, FL ST JUV P Rule 8.100
Current with amendments received through 6/15/2022. Some rules may be more current, see credits for details.

End of Document

Iowa Code Annotated
Iowa Court Rules
I. Rules of Practice and Procedure
Chapter 8. Rules of Juvenile Procedure (Refs & Annos)
Restraint of Juveniles During Court Proceedings

I.C.A. Rule Rule 8.41

Rule 8.41. Routine use of restraints prohibited

Currentness

8.41(1) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, will not be used on a child during a court proceeding unless the juvenile court upon the recommendation of the juvenile court officer or the county attorney makes a finding on the record that restraints are necessary due to any of the following:

a. Recent behavior of the child has placed others at risk of substantial physical harm.

b. Sufficient grounds to believe the child is a substantial flight risk.

c. Sufficient grounds to show restraints are necessary to prevent physical harm to the child or another person during the court proceeding.

d. There are no less restrictive alternatives to restraints, including the presence of a security officer. The juvenile court officer is not considered a security officer.

8.41(2) If the juvenile court officer or the county attorney recommends that restraints are necessary, the juvenile court officer or county attorney must provide notice to the court and the child's attorney outlining the circumstances supporting that recommendation prior to the child's appearance in each court proceeding or as soon as practicable. If notice is not given in writing, a record must be made at the court proceeding.

8.41(3) The child's attorney, the juvenile court officer, and the county attorney must have an opportunity to be heard before the court prior to any court proceeding for which any recommendation to restrain the child has been made.

8.41(4) For subsequent court proceedings in the same case, the court may rely on a previous finding if the security circumstances relating to the child have not materially changed.

8.41(5) Any restraint must allow the child limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a child be restrained using fixed restraints to a wall, floor, or furniture.

8.41(6) Any restraint of children in the courtroom must balance legitimate security needs against the care, protection, and positive mental and physical development of the child while preserving the dignity and decorum of the courtroom and security of the court proceeding and court personnel.

Credits

Adopted Oct. 25, 2017, eff. Jan. 1, 2018.

I. C. A. Rule Rule 8.41, IA R Rule 8.41

State court rules are current with amendments received through June 1, 2022. Some rules may be more current, see credits for details.

ILCS S. Ct. Rule 943

Rule 943. Use of Restraints on a Minor in Delinquency Proceedings Arising Under the Juvenile Court Act

Currentness

(a) Instruments of restraint shall not be used on a minor during a court proceeding unless the court finds, after a hearing, that the use of restraints is necessary for one or more of the following reasons:

(1) Instruments of restraint are necessary to prevent physical harm to the minor or another person; or

(2) The minor has a history of disruptive behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or

(3) There is a well-founded belief that the minor presents a substantial risk of flight from the courtroom;

and there are no less restrictive alternatives to restraints that will prevent flight or physical harm to the minor or another person, including, but not limited to the presence of court personnel, law enforcement officers, or bailiffs.

(b) The court must provide the minor's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall enter an order setting forth its findings of fact.

(c) Any restraints authorized under this rule must be the least restrictive restraints necessary and must allow the minor limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances, should a minor be restrained to another minor, wall, the floor, or furniture while in the courtroom.

(d) For purposes of this rule:

(1) “Instruments of restraint” and “restraints” are handcuffs, leg shackles, leg irons, belly belts, belly chains, or other restraint devices used to restrict a minor's free movement of limbs or appendages, including those made of cloth and leather; and

(2) A “minor” is an individual under the jurisdiction of the juvenile court, as provided in Article V of the Illinois Juvenile Court Act.

Credits

Adopted Oct. 6, 2016, eff. Nov. 1, 2016.

COMMITTEE COMMENTS

(Oct. 6, 2016)

> This rule is not intended to limit the court's inherent authority to control its courtroom and/or ensure the integrity of the proceedings are maintained in the event of disruptive behavior by the minor during the proceedings.

I.L.C.S. S. Ct. Rule 943, IL R S CT Rule 943

Current with amendments received through 7/1/22. Some rules may be more current, see credits for details.

End of Document

West's Annotated Indiana Code
Title 31. Family Law and Juvenile Law
Article 30.5. Juvenile Law: Preliminary Proceedings
Chapter 2. Restraining Juveniles in Court

IC 31-30.5-2-1

31-30.5-2-1 Restraint of juveniles in court; requirements

Effective: July 1, 2015
Currentness

Sec. 1. (a) Except as provided in subsection (b), a juvenile shall not be restrained in court unless the court has determined on the record, after considering the recommendation of the sheriff or transport officer, that the juvenile is dangerous or potentially dangerous.

(b) A court may order a juvenile restrained without considering the recommendation of the sheriff or transport officer if the juvenile has caused a physical disruption while in open court.

Credits
As added by P.L.187-2015, SEC.27, eff. July 1, 2015.

I.C. 31-30.5-2-1, IN ST 31-30.5-2-1
The statutes and Constitution are current with all legislation of the 2022 Second Regular Session of the 122nd General Assembly effective through July 1, 2022.

End of Document

Kentucky Juvenile Rules of Practice and Procedure JCRPP Rule 20

JCRPP 20. Use of restraints on a child charged with a status or public offense in court

Currentness

There shall be a presumption that no child shall be restrained upon entry into the courtroom. This presumption may be rebutted with good cause shown.

Commentary

Use of restraints in a courtroom has generally been defined to include handcuffs, waist chains, ankle restraints, zip ties, or other restraints that are designed to impede movement or control behavior. (National Council of Juvenile and Family Court Judges, Resolution Regarding Shackling of Children in Juvenile Court, 2015 [hereinafter NCJFCJ Resolution]).

The Association of Prosecuting Attorneys has issued a Statement of Principles concerning the use of restraints in court that states in part, "[t]here should be a presumption against the use of restraints on juveniles in court without appropriate evidence-based and data-driven assessments indicating that there are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the public, court personnel, law enforcement officers, or bailiffs." The prosecutors note that minors "are impressionable and the indiscriminate use of restraints in court has been shown to influence juveniles such that it negatively impacts their future behavior and also fosters a negative perception of the criminal justice system, including decreasing their level of cooperation and engagement with courtroom stakeholders." (Association of Prosecuting Attorneys, Statement of Principles, 2015).

This concern is echoed by the National Council of Juvenile and Family Court Judges as it notes that restraining children in court may infringe upon the presumption of innocence, undermine confidence in the fairness of our justice system, interfere with the right to a fair trial, impede communication with judges, attorneys, and other parties, and limit the child's ability to engage in the court process. Given that research in social and developmental psychology has indicated that restraints can interfere with healthy identity development, be traumatizing and contrary to the developmentally appropriate approach to juvenile justice; negatively influence how a child behaves as well as how a child is perceived by others; and promote punishment and retribution over rehabilitation and development of children under the court's jurisdiction, it is critical to recognize the need for continued attention and consistent judicial leadership to ensure that policies regarding treatment of children in juvenile and family court are fair, age appropriate and promote justice. (NCJFC Resolution).

This rule is likewise in accord with the American Bar Association, Criminal Justice Section Resolution 107A, which states thusly: "RESOLVED, That the American Bar Association urges all federal, state, local, territorial and tribal governments to adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing the juvenile with an opportunity to be heard and finding that the

restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others." (American Bar Association, Criminal Justice Section Resolution 107A, 2015).

The NCJFCJ Resolution supports a presumptive rule or policy against shackling children, recommends that requests for exceptions be made to the court on an individualized basis and that such requests must include a cogent rationale, including the demonstrated safety risk the child poses to him or herself or others. In accord with juvenile and family court practice, JCRPP 20 creates such a rule in its purest and simplest form.

Credits

HISTORY: Adopted by Order 2019-15, eff. 2-1-20

KY Juvenile Court Rules JCRPP Rule 20, KY ST JUV CT JCRPP Rule 20

Current with amendments received through May 1, 2022. Some sections may be more current, see credits for details.

End of Document

LSA-Ch.C. Art. 408

Art. 408. Duty of court to control proceedings; use of restraints on a child

Effective: August 1, 2018
Currentness

A. The court shall require that the proceedings be conducted with dignity and in an orderly and expeditious manner, and shall control the proceedings so that justice is done. The court may exclude any person whose conduct is disruptive if the person fails promptly to heed the court's admonition to refrain from such conduct.

B. (1) Restraints shall not be used upon a child during any juvenile court proceeding except in a delinquency proceeding as specifically provided in this Paragraph.

(2) A court may permit a child to be restrained in the courtroom only upon the court's individualized determination that the use of restraints is necessary because the child presents a particularized risk of physical harm to himself or another or presents a particularized substantial risk of flight from the courtroom, and that there are no less restrictive alternative measures to prevent flight or physical harm. The fact that the child is detained is insufficient to warrant a finding that the use of restraints is necessary.

(3) If it is alleged that the use of restraints upon a child is necessary, the district attorney or law enforcement shall inform the judge and the attorney for the child prior to the proceeding. The attorney for the child shall be given an opportunity to be heard and object on the record. If the use of restraints is ordered, the judge shall state on the record the reasons therefor.

(4) In accordance with Paragraph A of this Article, a court may authorize the use of restraints when the conduct of the child during a hearing presents an imminent threat, risk of flight, or physical harm.

(5) This Paragraph does not apply when the child is in a detention center, when the child is in transport from a detention center to the courthouse, or when the child is held in the courthouse outside of the room where the juvenile delinquency proceeding will occur.

Credits
Added by Acts 1991, No. 235, § 4, eff. Jan. 1, 1992. Amended by Acts 2018, No. 453, § 1.

Editors' Notes

COMMENTS--2018

(a) The intent of Paragraph B of this Article is to allow for most youth who come to court to be unrestrained, with appropriate rare exceptions. Unnecessary use of restraints in court is stigmatizing and traumatizing to children, is incompatible with the presumption of innocence when done prior to adjudication, hinders the communication between the youth and court officials including the child's attorney, and is counter to the goal of a rehabilitative juvenile justice system.

(b) Subparagraph (B)(3) provides for the procedure if it is alleged that a youth needs to be restrained. The procedure is intended to be expedited, balancing the child's due process rights against unnecessary restraint and with individualized determination with the court's interest in efficient procedure. This Subparagraph does not require a full contradictory hearing to make a determination. Instead, the prosecutor or law enforcement officer with the information giving rise to a potential need to restrain is authorized to inform the court and the attorney for the child of the basis of the need to restrain the youth. The child has a right to be heard through counsel and to object, providing reasons why the child should not be restrained. The court makes a determination on the need to restrain and, if ordering restraint, gives reasons on the record.

(c) Subparagraph (B)(4) provides that if the child is engaging in disruptive behavior indicating an imminent risk of harm or flight while a hearing is ongoing, the court may authorize the use of restraints.

(d) Subparagraph (B)(5) clarifies that this Paragraph applies only when the child is in the courtroom, not in the detention center or in transport, or while being held in the courthouse outside of the room where the proceedings will occur.

COMMENT--1991

The source of this article is C.J.P. Article 74. Disruption of court proceedings is also actionable as contempt pursuant to Title XV, Chapter 2.

Notes of Decisions (3)

LSA-Ch.C. Art. 408, LA Ch.C. Art. 408
Current through the 2022 First Extraordinary Session.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 119. Protection and Care of Children, and Proceedings Against Them (Refs & Annos)

M.G.L.A. 119 § 86

§ 86. Use of restraints during court proceedings

Effective: July 12, 2018
Currentness

(a) For the purposes of this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:--

“Juvenile”, (1) a person appearing before a division of the juvenile court department who is (i) subject to a delinquency proceeding, (ii) a child requiring assistance or (iii) a child in a care and protection proceeding or (2) a person under the age of 21 in a youthful offender proceeding.

“Restraints”, a device that limits voluntary physical movement of an individual, including leg irons and shackles, which have been approved by the trial court department.

(b) A juvenile shall not be placed in restraints during court proceedings and any restraints shall be removed prior to the appearance of a juvenile before the court at any stage of a proceeding unless the justice presiding in the courtroom issues an order and makes specific findings on the record that: (i) restraints are necessary because there is reason to believe that a juvenile presents an immediate and credible risk of escape that cannot be curtailed by other means; (ii) a juvenile poses a threat to the juvenile's own safety or to the safety of others; or (iii) restraints are reasonably necessary to maintain order in the courtroom.

(c) The court officer charged with custody of a juvenile shall report any security concern to the presiding justice. On the issue of courtroom or courthouse security, the presiding justice may receive information from the court officer charged with custody of a juvenile, a probation officer or any other source determined by the court to be credible.

The authority to use restraints shall reside solely within the discretion of the presiding justice at the time that a juvenile appears before the court. A juvenile court justice shall not impose a blanket policy to maintain restraints on all juveniles or a specific category of juveniles who appear before the court.

Credits
Added by St.2018, c. 69, § 80, eff. July 12, 2018.

M.G.L.A. 119 § 86, MA ST 119 § 86
Current through Chapter 76 of the 2022 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

RESOLUTION REGARDING

SHACKLING OF CHILDREN IN JUVENILE COURT

Whereas, the Maryland Judiciary endorses the principles of the National Council of Juvenile and Family Court Judges (NCJFCJ) Resolution on Shackling of Children in Juvenile Court; and

Whereas, the Maryland Judiciary concurs in the NCJFCJ Resolution's definition of shackles to include handcuffs, waist chains, ankle restraints, zip ties, or other restraints that are designed to impede movement or control behavior; and

Whereas, the shackling of children during proceedings before judges and juvenile magistrates may infringe upon the presumption of innocence, undermine confidence in the fairness of our justice system, interfere with the right to a fair trial, impede communication with judges, magistrates, attorneys, and other parties, and limit the child's ability to engage in the court process; and

Whereas, research in social and developmental psychology suggests that shackling children interferes with healthy identity development; and

Whereas, placing children in shackles can be traumatizing and contrary to the developmentally appropriate approach to juvenile justice; and

Whereas, placing children in shackles can negatively influence how a child behaves as well as how a child is perceived by others; and

Whereas, shackling promotes punishment and retribution over the rehabilitation and development of children who are under the court's jurisdiction; and

Whereas, shackling is contrary to the goals of juvenile justice, as defined in the *NCJFCJ Juvenile Delinquency Guidelines* to implement a continuum of effective and least intrusive responses to reduce recidivism and develop competent and productive citizens; and

Whereas, continued attention and consistent judicial leadership are necessary to ensure that policies regarding shackling are maintained regardless of changes in leadership or administration; and

Whereas, the Maryland Judiciary has the ability to advance and maintain policies and practices that limit the use of restraints or shackles.

BE IT THEREFORE RESOLVED AS FOLLOWS:

The Maryland Judiciary supports the NCJFCJ Resolution urging the advancement of a trauma-informed and developmentally appropriate approach to juvenile justice that limits the use of shackles in the courtroom.

The Maryland Judiciary hereby responds to the NCJFCJ's call to utilize the leadership in its courts to convene security personnel and other justice system stakeholders to address shackling and to work together to identify ways to ensure the safety of children and other parties.

The Maryland Judiciary commits to the ongoing review of policies and practices related to shackling children.

The Maryland Judiciary hereby adopts as policy the presumption against the shackling of children during proceedings in the Juvenile Court. The Maryland Department of Juvenile Services and the law enforcement agencies that are responsible for the transport or transfer of children to, from, and within courthouses shall retain the discretion to employ practices that will ensure the security of the child and others. Once in the court or hearing room, however, a child is to be unshackled and remain so absent a particularized security concern. The judge or juvenile magistrate conducting the proceeding shall determine whether the child needs to be shackled in the court or hearing room pursuant to this policy. Security personnel have the ongoing responsibility for maintaining security and order throughout the proceeding.

Recommended by the Maryland Judicial Council for adoption by the Maryland Judiciary on September 16, 2015 and accepted by the Chief Judge of the Court of Appeals, September 21, 2015, Annapolis, MD.

Maine Revised Statutes Annotated
Maine Rules of Court
Rules of Unified Criminal Procedure (Refs & Annos)
IX. General Provisions

ME Rules of Unified Criminal Procedure, Rule **43A**

Rule **43A**. Physical Restraint of Juveniles

Currentness

(a) Physical restraints in a courtroom prohibited absent court order. Physical restraints shall not be used on a juvenile in a courtroom except when ordered by the court prior to or during the juvenile's appearance in the courtroom in accordance with this Rule.

(b) Determination by the court. If the transporting agency, the judicial marshal, other designated court security officer, or the State requests that physical restraints be used on a juvenile in the courtroom, the court shall be notified of that request. Upon such request, the court shall ensure that the juvenile, the juvenile's attorney, and the State are informed of the request. Additionally, prior to or during a proceeding, with similar disclosure to the parties present, and based on an individualized assessment of the particular juvenile and the available security resources, the court on its own motion may make a preliminary determination that one or more of the grounds for use of physical restraints listed in subsection (c) exists. If the juvenile or attorney for the juvenile objects, the court shall, whenever practical, provide the juvenile or the juvenile's attorney with an opportunity to state the basis of the objection before the court renders a decision on the use of restraints.

The court may order the use of physical restraints on a juvenile in the courtroom only if, based on an individualized assessment of the particular juvenile and the available security resources, it determines that:

(1) One or more of the grounds for use of physical restraints set out in subsection (c) exists; and

(2) There are no less restrictive alternatives reasonably available to maintain order and safety in the courtroom, or to prevent the risk of flight.

(c) Grounds for use of physical restraints. The following are grounds for the use of physical restraints in the courtroom:

(1) The present behavior of the juvenile creates a current and substantial threat to the juvenile's safety or to the safety of others in the courtroom, or that it creates a substantial risk of flight; or

(2) The juvenile's past behavior, including but not limited to behavior and conduct in a courtroom, creates a current and substantial risk that the juvenile will threaten the juvenile's safety or the safety of others in the courtroom, or that creates a substantial risk of flight.

(d) Findings. If the use of physical restraints is ordered over the objection of the juvenile, the court shall make findings of fact on the record in support of the order.

Credits

[Adopted October 15, **2015**, effective November 1, **2015**.]

Editors' Notes

ADVISORY NOTE--OCTOBER 2015

Rule **43A** is enacted to clarify the procedures and standards applicable when a request has been made to physically restrain a juvenile appearing before the court in a proceeding pursuant to the Maine Juvenile Code. Federal law recognizes the constitutional due process right of an adult defendant in a criminal jury proceeding to appear in court without physical restraints unless the judge has made an individualized determination that special circumstances justify use of those restraints. *See, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 629-32 (2005). The interests of the juvenile in appearing without restraints and the authority of the court to promote safety for all concerned in juvenile proceedings have not been extensively addressed by federal or state courts.

Through this Rule, Maine joins a growing number of states in recognizing that the best practice in juvenile proceedings is to avoid the use of physical restraints when it can be done without compromising the safety of the juvenile or others in the courtroom, and without creating a risk of flight.

Rules U. **Crim**. **Proc**. Rule **43A**, ME R U **CRIM** P Rule **43A**
Current with amendments received through July 1, 2022. Some rules may be more current, see credits for details.

End of Document

Michigan Compiled Laws Annotated
Michigan Court Rules of 1985

Rule 3.906. Use of Restraints on a Juvenile

MI R SPEC P MCR 3.906 | Michigan Compiled Laws Annotated | Michigan Court Rules of 1985 | Effective: September 1, 2021 *(Approx. 2 pages)*

Effective: September 1, 2021

MI Rules MCR **3.906**

Rule **3.906**. Use of Restraints on a Juvenile

Currentness

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the following factors:

(1) Instruments of restraint are necessary to prevent physical harm to the juvenile or another person.

(2) The juvenile has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(3) There is a founded belief that the juvenile presents a substantial risk of flight from the courtroom.

(B) The court's determination that restraints are necessary must be made prior to the juvenile being brought into the courtroom and appearing before the court. The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints used on a juvenile in the courtroom shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained using fixed restraints to a wall, floor, or furniture.

Credits

[Adopted July 28, 2021, effective September 1, 2021, 507 **Mich**.]

Editors' Notes

COMMENTS

Staff Comment to 2021 Adoption

The addition of MCR **3.906** establishes a procedure regarding the use of restraints on a juvenile in court proceedings.

MI Rules MCR **3.906**, MI R SPEC P MCR **3.906**
Current with amendments received through June 1, 2022. Some rules may be more current, see credits for details

End of Document

July 28, 2021

ADM File No. 2020-17

Addition of Rule 3.906
of the Michigan Court
Rules

_____

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Rule 3.906 of the Michigan Court Rules is adopted, effective September 1, 2021.

[NEW] Rule 3.906 Use of Restraints on a Juvenile

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the following factors:

(1) Instruments of restraint are necessary to prevent physical harm to the juvenile or another person.

(2) The juvenile has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.

(3) There is a founded belief that the juvenile presents a substantial risk of flight from the courtroom.

(B) The court's determination that restraints are necessary must be made prior to the juvenile being brought into the courtroom and appearing before the court. The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints used on a juvenile in the courtroom shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained using fixed restraints to a wall, floor, or furniture.

Staff comment: The addition of MCR 3.906 establishes a procedure regarding the use of restraints on a juvenile in court proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*). I support the majority's order—and I am not alone; a majority of the public comments received likewise support the adoption of this rule.[1] And Michigan now joins 31 other states (plus the District of Columbia) that have established a procedure regarding the use of restraints on a juvenile in court proceedings.[2] That there is overwhelming support for this court rule, and others like it across the country, should not be misconstrued as suggesting that the majority does not appreciate the complexity of the problem and the available solutions, or that the majority does not value or prioritize the safety and security of our local courtrooms. To the contrary, this Court, like every other court in this state, is often called upon to weigh competing interests in difficult situations and make the best decision it can. That is, in fact, the very essence of our job. Here, in my view, those potentially competing interests include giving trial judges the flexibility, discretion, and autonomy they need to control the procedures and security in their courtrooms and ensuring that juveniles who interact with Michigan's justice system are not subjected to physical, mental, and emotional trauma or judicial bias as a result of being shackled. There is no serious debate that these interests are important and deserving of careful consideration, and I find it unfair to suggest, as my dissenting colleague does, that the court rule is "underdeveloped" or adopted without careful consideration.

Our careful consideration of these competing interests has revealed that the indiscriminate shackling of juveniles is a practice to be avoided when it does not jeopardize the safety of the courtroom. Social science shows that the use of restraints on a juvenile has the potential to cause bias or prejudice on the part of the judge or jury in a courtroom setting, thereby possibly impinging on a juvenile's rights to due process and the presumption of innocence. It has also been shown that shackling causes unnecessary stress and is harmful to juveniles and their families because it causes shame and humiliation. Children with disabilities are at risk of exacerbated harm from shackling, and the use of restraints can create difficulties for the attorney-client relationship. While no one seriously disputes that courtroom safety is important, studies show that shackling

[1] The Court received 15 comments during the public comment period. Nearly all commenters expressed support for the concept of the proposal or the actual published version.

[2] See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling*, available at <https://njdc.info/campaign-against-indiscriminate-juvenile-shackling/> (accessed July 18, 2021) [https://perma.cc/ZPE4-FZN6].

youth has little effect on courtroom safety[3] and is inconsistent with the rehabilitative goals of the juvenile justice system, which are not punitive in nature. In fact, minimizing restraints has been shown to improve engagement and communication in the courtroom and between a juvenile and her attorney.[4]

My dissenting colleague argues that trial judges should have flexibility to exercise their discretion to manage the security of the courtrooms. I agree. This rule simply requires exercise of that discretion before a young person is shackled in the courtroom. I also agree that the factors identified by my dissenting colleague as relevant to the safety and security of our local courtrooms are valid concerns for a trial court to consider in evaluating whether a juvenile should be shackled while in the courtroom. But I disagree that the new court rule does not give trial courts the ability to consider these factors in making that decision. For example, nothing in this court rule prohibits a trial court from considering a juvenile's mental condition, character, or reputation for dangerousness when considering whether "[i]nstruments of restraint are necessary to prevent physical harm to the juvenile or another person" as provided in MCR 3.906(A)(1). The rule does, however, prohibit a trial judge from *indiscriminately* shackling young people appearing in the courtroom without considering these factors. But why would a trial judge want to shackle a young person when it is not necessary for safety reasons?

I am, admittedly, less concerned than my dissenting colleague about our trial courts' ability to establish the actual procedures necessary to effectuate the requirements of MCR 3.906. With virtually every other court rule established by this Court, we have successfully relied on our trial courts to exercise their discretion and experience to ensure—at the granular level—that both the spirit and the letter of the court rule are complied with. I have complete confidence that this rule does not present a challenge our trial courts cannot meet with the same level of competence they continue to exhibit with respect to all other court rules, especially with the discretion afforded to trial courts to use remote or virtual hearings when necessary.

VIVIANO, J. (*dissenting*). I dissent from the majority's order because I think the new rule it adopts is underdeveloped and confusing, and, as a result, has the potential to jeopardize the safety and security of judges, court staff, litigants, and members of the public who attend court hearings. Although I do not necessarily object to a rule governing the procedure for determining whether restraints should be used on juvenile

[3] See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling: Toolkit*, available at <https://njdc.info/wp-content/uploads/2016/01/Toolkit-Final-011916.pdf> p 5 (accessed July 18, 2021) [https://perma.cc/KX79-99LW].

[4] See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling: Issue Brief*, available at <https://njdc.info/wp-content/uploads/2016/01/NJDC_CAIJS_Issue-Brief.pdf> pp 2-3 (accessed July 18, 2021) [https://perma.cc/YCK6-WFJD].

defendants during court hearings, we should allow considerable flexibility for trial judges to manage their own courtrooms, including making determinations regarding the level of security that is necessary to protect the safety and security of all involved. That concern was universally expressed by every law enforcement agency and judicial association that submitted public comments concerning this proposed rule change.

My primary concern with this new rule is that it limits the safety factors that a trial court may consider and apparently does not allow trial courts to consider other factors that they have always considered in making pretrial release decisions. Thus, for example, a trial court apparently cannot consider a juvenile's "mental condition, including character and reputation for dangerousness." MCR 6.106(F)(1)(d). Also excluded from the list are "the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence," MCR 6.106(F)(1)(e), and the juvenile's "prior criminal record, including juvenile offenses," MCR 6.106(F)(1)(a).[5] I can think of no justification for limiting trial courts from full consideration of all factors bearing on the safety and security of court proceedings.

In addition, although the new procedure appears to allow for a determination regarding the use of restraints to be made before a juvenile enters the courtroom (in contrast to the proposed rule, which appeared to require the restraints to be removed even before the trial court had an opportunity to address the issue), it remains unclear how such a determination will be initiated (i.e., by the court on its own initiative or at the request of the prosecutor or law enforcement officer?). What we do know is even more problematic: the court's determination regarding the use of restraints will be made out of the presence of the juvenile, since the trial court's "determination . . . must be made prior to the juvenile being brought into the courtroom and appearing before the court." MCR 3.906(B). This may raise questions regarding a defendant's constitutional right to be present during "stage[s] of trial where [their] substantial rights might be adversely affected." *People v Mallory*, 421 Mich 229, 247 (1984). And, as if to emphasize the Court's indifference to the safety concerns that have been raised, the new rule omits any express reference to a procedure whereby the prosecutor or a law enforcement official can raise the issue of restraints, but instead requires that only one party to the proceeding—"the juvenile's attorney"—be given "an opportunity to be heard before the court orders the use of restraints." MCR 3.906(B). Does this mean that the prosecutor does not have a right to be heard on this topic?

[5] It is also unclear what is meant by "*a founded belief* that the juvenile presents a substantial risk of flight from the courtroom." MCR 3.906(A)(3) (emphasis added). Is that as opposed to an *unfounded* belief?

Court security lapses can have tragic consequences. Because I think this new rule is confusing and has the potential to jeopardize the safety of court proceedings, I respectfully dissent.

ZAHRA, J., joins the statement of VIVIANO, J.

West's North Carolina General Statutes Annotated
Chapter 7B. Juvenile Code (Refs & Annos)
Subchapter II. Undisciplined and Delinquent Juveniles
Article 24. Hearing Procedures

N.C.G.S.A. § 7B-2402.1

§ 7B-2402.1. Restraint of juveniles in courtroom

Effective: October 1, 2007
Currentness

At any hearing authorized or required by this Subchapter, the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom. Whenever practical, the judge shall provide the juvenile and the juvenile's attorney an opportunity to be heard to contest the use of restraints before the judge orders the use of restraints. If restraints are ordered, the judge shall make findings of fact in support of the order.

Credits
Added by S.L. 2007-100, § 1, eff. Oct. 1, 2007.

N.C.G.S.A. § 7B-2402.1, NC ST § 7B-2402.1
The statutes and Constitution are current through S.L. 2022-10 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's Revised Statutes of Nebraska Annotated
Chapter 43. Infants and Juveniles
Article 2. Juvenile Code
(c) Law Enforcement Procedures

Neb.Rev.St. § 43-251.03

43-251.03. Limitation on use of restraints; written findings

Currentness

(1) Restraints shall not be used on a juvenile during a juvenile court proceeding and shall be removed prior to the juvenile's appearance before the juvenile court, unless the juvenile court makes a finding of probable cause that:

(a) The use of restraints is necessary:

(i) To prevent physical harm to the juvenile or another person;

(ii) Because the juvenile:

(A) Has a history of disruptive courtroom behavior that has placed others in potentially harmful situations; or

(B) Presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or

(iii) Because the juvenile presents a substantial risk of flight from the courtroom; and

(b) There is no less restrictive alternative to restraints that will prevent flight or physical harm to the juvenile or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

(2) The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall make written findings of fact in support of the order.

(3) For purposes of this section, restraints includes, but is not limited to, handcuffs, chains, irons, straitjackets, and electronic restraint devices.

Credits
Laws 2015, LB 482, § 3, eff. Aug. 30, 2015.

Neb. Rev. St. § 43-251.03, NE ST § 43-251.03
Current through the end of the 2nd Regular Session of the 107th Legislature (2022)

End of Document

Revised Statutes Annotated of the State of New Hampshire
Title X. Public Health (Ch. 125 to 149-R)
Chapter 126-U. Limiting the Use of Child Restraint Practices in Schools and Treatment Facilities

N.H. Rev. Stat. § 126-U:13

126-U:13 Restriction of the Use of Mechanical Restraint in Courtrooms.

Effective: September 1, 2010
Currentness

At any hearing under RSA 169-B, RSA 169-C, or RSA 169-D, the judge may subject a child to mechanical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the child's escape, or provide for the safety of the courtroom. Whenever practical, the judge shall provide the child and the child's attorney an opportunity to be heard to contest the use of mechanical restraint before the judge orders its use. If mechanical restraint is ordered, the judge shall make written findings of fact in support of the order.

Credits
Source. 2010, 375:2, eff. Sept. 1, 2010.

N.H. Rev. Stat. § 126-U:13, NH ST § 126-U:13
Current through Chapter 143 of the 2022 Reg. Sess. Some statute sections may be more current, see credit for details.

End of Document

New Jersey Statutes Annotated
New Jersey Rules of Court
Part V. Rules Governing Practice in the Chancery Division, Family **Part**
Chapter IV. Juvenile Delinquency Actions
Rule 5:19. General Provisions

R. **5**:**19**-**4**

5:**19**-**4**. Use of Restraints on a Juvenile

Currentness

(a) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, shall not be used on a juvenile during a court proceeding and must be removed prior to the juvenile's entry into the courtroom. Instruments of restraint may be used if, on application to or by the court, the court finds that:

(1) The use of restraints is necessary due to one of the following factors:

(A) Instruments of restraint are necessary to prevent physical harm to the juvenile or another person; or

(B) The juvenile presents a substantial risk of flight from the courtroom; and

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the juvenile or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

(b) In making the determination that instruments of restraint are necessary, the factors that can be considered are:

(1) any past escapes or attempted escapes by the juvenile;

(2) evidence of a present plan of escape involving the juvenile;

(3) any credible threats by the juvenile to harm him or herself or others during court;

(4) evidence of self-injurious behavior on the **part** of the juvenile;

(5) any recent history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on the juvenile or others;

(6) any other factors the court deems relevant to assess present risk in the court proceeding.

(c) The court shall provide the juvenile's attorney and the prosecutor an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall make findings of fact on the record in support of the order.

(d) If restraints are deemed necessary, the least restrictive restraints shall be used. Any restraints shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained to a stationary object or another person.

Credits

Note: Adopted November 9, 2016 to be effective January 1, **2017**.

R. **5**:**19**-**4**, **NJ** R **CH** **DIV** **FAM** PT R. **5**:**19**-**4**

New Jersey rules are current with amendments received through May 15, 2022. Some rules may be more current; see credits for details.

End of Document

NMRA, Rule 10-223A

RULE 10-223A. PHYSICAL RESTRAINTS IN THE COURTROOM

Currentness

A. Purpose. This rule is intended to balance legitimate security needs in court facilities with the purpose of the Children's Code to provide care, protection, and wholesome mental and physical development of children subject to children's court proceedings and to preserve the dignity, decorum, and safety of judicial proceedings involving children.

B. Use of Physical Restraints in the Courtroom; Reasonable Grounds Required. Children shall not be brought before the court wearing any physical restraint devices except as ordered by the court during or prior to the hearing, based on particularized security needs relating to the facility, available security personnel and other resources, individualized determinations in a particular case, or other reasonable grounds supporting a need for physical restraints. In proceedings before a jury, every reasonable effort must be made to avoid the jury's observation of the child in physical restraints.

C. Challenge to the Use of Restraints. Before or after any child is ordered restrained, the court shall permit any party to be heard on the issue of whether reasonable grounds exist for use of physical restraints in a particular situation or as to a particular child.

Credits

[Approved effective Sept. 30, 2011. Amended effective April 9, 2012.]

Editors' Notes

COMMITTEE COMMENTARY

This rule is intended to express the policy of not having children in physical restraints inside the courtroom except where required by legitimate security concerns in a particular case, at a location in general, or in light of other relevant temporary or permanent circumstances. It does not control transport procedures or other matters outside the courtroom. The rule requires no particular formality in timing or mode of raising or addressing security concerns and permits a presiding judge to promulgate and evaluate either general or specific requirements as the need may arise.

NMRA, Rule 10-223A, NM R CHILD CT Rule 10-223A
Current with amendments received through June 1, 2022.

End of Document

West's Nevada Revised Statutes Annotated
Title 5. Juvenile Justice (Chapters 62-63)
Chapter 62D. Procedure in Juvenile Proceedings
Miscellaneous Provisions

N.R.S. 62D.415

62D.415. Use of instrument of restraint on child during proceeding

Effective: October 1, 2015
Currentness

1. An instrument of restraint may be used on a child during a court proceeding only if the restraint is necessary to prevent the child from:

(a) Inflicting physical harm on himself or herself or another person; or

(b) Escaping from the courtroom.

2. Whenever practical, the judge shall provide the:

(a) Child and his or her attorney an opportunity to be heard regarding the use of an instrument of restraint before the judge orders the use of an instrument of restraint.

(b) Prosecuting attorney an opportunity to be heard regarding whether the use of an instrument of restraint is necessary pursuant to subsection 1.

3. In making a determination pursuant to subsection 2 as to whether an instrument of restraint is necessary pursuant to subsection 1, the court shall consider the following factors:

(a) Any previous escapes or attempted escapes by the child.

(b) Evidence of a present plan of escape by the child.

(c) A credible threat by the child to harm himself or herself or another person.

(d) A history of self-destructive tendencies by the child.

(e) Any credible threat of an attempt to escape by a person not in custody.

(f) Whether the child is subject to a proceeding:

(1) That is not in the jurisdiction of the juvenile court pursuant to subsection 3 of NRS 62B.330; or

(2) For transfer or certification for criminal proceedings as an adult pursuant to NRS 62B.335, 62B.390 or 62B.400.

(g) Any other factor that is relevant in determining whether the use of an instrument of restraint on the child is necessary pursuant to subsection 1.

4. The determination of the judge pursuant to subsection 2 must contain specific findings of fact and conclusions of law supporting the determination.

5. If an instrument of restraint is used on a child, the restraint must allow the child limited movement of his or her hands to hold any document or writing necessary to participate in the proceeding.

6. As used in this section, "instrument of restraint" includes, without limitation, handcuffs, chains, irons and straightjackets.

Credits
Added by Laws 2015, c. 361, § 3.5, eff. Oct. 1, 2015.

N. R. S. 62D.415, NV ST 62D.415
Current through Ch. 2 (End) of the 33rd Special Session (2021). Text subject to revision and classification by the Legislative Counsel Bureau.

End of Document

Compilation of Codes, Rules and Regulations of the State of New York
Title 9. Executive Department
Subtitle E. Office of Children and Family Services
Part 168. State Schools and Centers (Refs & Annos)

9 NYCRR 168.3

Section 168.3. Use of physical and medical restraints

Currentness

(a) *Physical restraints.* Permissible physical restraints, consisting solely of handcuffs and footcuffs, shall be used only in cases where a child is uncontrollable and constitutes a serious and evident danger to himself or others. They shall be removed as soon as the child is controllable. Use of physical restraints shall be prohibited beyond one-half hour unless a child is being transported by vehicle and physical restraint is necessary for public safety. If restraints are placed on a child's hands and feet, the hand and foot restraints are not to be joined, as for example, in hog tying. When in restraints, a child may not be attached to any furniture or fixture in a room nor to any object in a vehicle.

(1) The division shall prohibit the utilization of foot manacles.

(2) Physical restraints may be utilized beyond one-half hour only in the case of vehicular transportation where such utilization of physical restraints is necessary for public safety.

(b) *Medical restraint.* For the purposes of this Part, medical restraint shall mean medication administered either by injection or orally for the purposes of quieting an uncontrollable child.

(1) Medical restraint shall be administered only in situations where a child is so uncontrollable that no other means of restraint can prevent the child from harming himself.

(2) Medical restraint shall be authorized only by a physician and be administered only by a registered nurse or a medical doctor.

(c) *Prn orders of psychiatric medication.* A *pro re nata* order, authorizing a registered nurse to administer prescribed psychiatric medication, for purposes of crisis intervention, may be used by the Division for Youth pursuant to the following guidelines:

(1) Prescription by medical doctor. Before any Prn order may be prescribed, a medical doctor must examine the child and determine the need for such an order in terms of the individual child's ongoing treatment needs at the facility. These Prn orders shall be prescribed on an individual basis and shall not be prescribed *pro forma* to all children at the time of their arrival at a facility, as follows:

(i) The medical doctor must sign the order and the medical doctor must provide specific instructions and guidelines for the nurse.

(ii) Periodic review of all Prn orders must be made by a medical doctor, monthly, including physically examining the child.

(iii) At the time of the periodic review, the medical doctor must indicate, in writing, reasons for his continuing the Prn order.

(2) Administration by registered nurse. A registered nurse may administer a Prn order when the actions of the child clearly present a danger to himself or other residents, as follows:

(i) She must physically examine the child and refer to the child's medical record including the specific instructions left by the medical doctor for utilization of the Prn order.

(ii) The pulse and blood pressure of children receiving such medication must be taken during the first half hour by the nurse and periodically thereafter until his release.

(iii) The nurse must keep a record indicating the results of those examinations and shall prepare a medication report indicating reasons giving rise to her dispensing the medication.

(iv) If the initial or subsequent examination by the nurse reveals the development of any symptoms indicating an adverse reaction to the medication, she shall immediately notify the medical doctor.

(d) *Reporting requirements.* Use of physical and medical restraints shall be reported, pursuant to subdivision (j) of section 168.2 of this Part.

Credits

Sec. added, filed July 18, 1973; amds. filed: Aug. 2, 1974; Feb. 26, 1975; March 31, 1977 eff. March 31, 1977. Substituted new (a).

Current with amendments included in the New York State Register, Volume XLIV, Issue 28 dated July 13, 2022. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 9, § 168.3, 9 NY ADC 168.3

End of Document

Baldwin's **Ohio** Revised Code Annotated
Rules of Superintendence for the Courts of **Ohio** (Refs & Annos)

Sup. R. Rule **5**.**01**

Sup R **5**.**01** Local child restraint rule

Currentness

Each court or division of a court shall adopt a local rule governing the use of physical restraints on children appearing in court proceedings before the court or division. The local rule shall do all of the following:

(A) Create a presumption that physical restraint shall not be utilized unless the judge or magistrate before whom the child is appearing makes an individualized determination on the record that there is no less restrictive alternative to the use of physical restraint and that the physical restraint of the child is necessary because of either of the following:

(1) The child represents a current and significant threat to the safety of the child's self or other persons in the courtroom;

(2) There is a significant risk the child will flee the courtroom.

(B) Require the judge or magistrate to permit any party, as defined in Juv.R. 2(Y), to be heard on the issue of whether the use of physical restraint is necessary for that particular child at that particular proceeding;

(C) If physical restraint is found necessary by the judge or magistrate, require the restraint be the least restrictive necessary to meet the risk requiring the restraint and in a manner which does not unnecessarily restrict the movement of the child's hands.

CREDIT(S)

(Adopted eff. 7-1-16)

Relevant Additional Resources
Additional Resources listed below contain your search terms.

RESEARCH REFERENCES

Treatises and Practice Aids

Painter & Pollis, **Ohio** Appellate Practice App L, Rules of Superintendence for the Courts of **Ohio** (Selected Rules).

Rules of Superintendence Rule **5**.**01**, OH ST **SUP** Rule **5**.**01**
Current with amendments received through July 1, 2022. Some rules may be more current, see credits for details.

End of Document

West's Oregon Revised Statutes Annotated
Title 34. Human Services; Juvenile Code; Corrections
Chapter 419A. Juvenile Code: General Provisions and Definitions (Refs & Annos)
Restraints

O.R.S. § 419A.240

419A.240. Use of physical restraints during juvenile court proceedings

Effective: January 1, 2022
Currentness

During any juvenile court proceeding under this chapter and ORS chapters 419B and 419C regarding a youth, adjudicated youth or young person:

(1)(a) Instruments of physical restraint, such as handcuffs, chains, irons, straitjackets, cloth restraints, leather restraints, plastic restraints and other similar items, may not be used during the juvenile court proceeding and must be removed prior to the youth, adjudicated youth or young person being brought into the courtroom unless the court finds that the use of restraints is necessary due to an immediate and serious risk of dangerous or disruptive behavior and there are no less restrictive alternatives that will alleviate the immediate and serious risk of dangerous or disruptive behavior.

(b) If the means do not exist to remove instruments of physical restraint as described in paragraph (a) of this subsection prior to the youth, adjudicated youth or young person being brought into the courtroom, such restraints shall be removed prior to commencement of the proceeding.

(c) Instruments of physical restraint removed under this subsection must remain removed for the duration of the proceeding.

(2) In determining whether an immediate and serious risk of dangerous or disruptive behavior exists, the court may consider:

(a) Whether the youth, adjudicated youth or young person has a history of dangerous or disruptive behavior that has placed the youth, adjudicated youth or young person or others in potentially harmful situations as evidenced by recent behavior;

(b) Whether the youth, adjudicated youth or young person presents a substantial risk of inflicting physical harm on himself or others; and

(c) Whether the youth, adjudicated youth or young person presents a substantial risk of flight from the courtroom or courtroom premises.

(3) In determining whether a less restrictive alternative will alleviate the immediate and serious risk of dangerous or disruptive behavior, the court may consider the presence of court personnel, law enforcement officers, juvenile department staff or counselors, or bailiffs.

(4) When the use of restraints is requested by a law enforcement agency, the juvenile department or other party to the juvenile court proceeding, the request must be made in writing and presented to the court and other parties prior to the youth, adjudicated youth or young person's appearance in the courtroom for the juvenile court proceeding. The request must describe discrete, recent, concrete and observable examples of behaviors or risk factors that justify the use of restraints.

(5) The court shall provide the attorney for the youth, adjudicated youth or young person an opportunity to be heard prior to ordering the use of restraints. If restraints are ordered, the court shall make written findings of fact in support of the order.

(6) Any restraints used must allow the youth, adjudicated youth or young person limited movement of the hands to read and handle documents and writings necessary to the juvenile court proceeding. Under no circumstances should a youth, adjudicated youth or young person be restrained to a stationary object or another person.

(7) Restraints may not be used as punishment, for convenience or as a substitute for staff supervision.

Credits

Added by Laws 2017, c. 257, § 2, eff. Jan. 1, 2018. Amended by Laws 2021, c. 489, § 48, eff. Jan. 1, 2022.

O. R. S. § 419A.240, OR ST § 419A.240

Current through Chapter 2 enacted in the 2022 Regular Session of the 81st Legislative Assembly, which convened February 1, 2022 and adjourned sine die March 4, 2022, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Some statute sections may be more current, see credits for details.

End of Document

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 42 Pa.C.S.A. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Actions, Proceedings and Other Matters Generally
Chapter 63. Juvenile Matters (Refs & Annos)
Subchapter C. Procedures and Safeguards

42 Pa.C.S.A. § 6336

§ 6336. Conduct of hearings

Effective: November 26, 2014
Currentness

(a) General rule.--Hearings under this chapter shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 6303 (relating to scope of chapter).

(b) Functions of district attorney.--The district attorney, upon request of the court, shall present the evidence in support of the petition and otherwise conduct the proceedings on behalf of the Commonwealth.

(c) Record.--If requested by the party or ordered by the court the proceedings shall be recorded by appropriate means. If not so recorded, full minutes of the proceedings shall be kept by the court.

(d) Proceeding in camera.--Except in hearings to declare a person in contempt of court and in hearings as specified in subsection (e), the general public shall be excluded from hearings under this chapter. Only the parties, their counsel, witnesses, the victim and counsel for the victim, other persons accompanying a party or a victim for his or her assistance, and any other person as the court finds have a proper interest in the proceeding or in the work of the court shall be admitted by the court. The court may temporarily exclude the child from the hearing except while allegations of his delinquency are being heard.

(e) Open proceedings.--The general public shall not be excluded from any hearings under this chapter:

(1) Pursuant to a petition alleging delinquency where the child was 14 years of age or older at the time of the alleged conduct and the alleged conduct would be considered a felony if committed by an adult.

(2) Pursuant to a petition alleging delinquency where the child was 12 years of age or older at the time of the alleged conduct and where the alleged conduct would have constituted one or more of the following offenses if committed by an adult:

(i) Murder.

(ii) Voluntary manslaughter.

(iii) Aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) or (2) (relating to aggravated assault).

(iv) Arson as defined in 18 Pa.C.S. § 3301(a)(1) (relating to arson and related offenses).

(v) Involuntary deviate sexual intercourse.

(vi) Kidnapping.

(vii) Rape.

(viii) Robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery).

(ix) Robbery of motor vehicle.

(x) Attempt or conspiracy to commit any of the offenses in this paragraph.

Notwithstanding anything in this subsection, the proceedings shall be closed upon and to the extent of any agreement between the child and the attorney for the Commonwealth.

(f) Discretion of court.--The court at any disposition proceeding under subsection (e) shall have discretion to maintain the confidentiality of mental health, medical or juvenile institutional documents or juvenile probation reports.

(g) Summary offenses.--The provisions of subsection (d), insofar as subsection (d) relates to the exclusion of the general public from the proceedings, shall apply to proceedings involving a child charged with a summary offense when the proceedings are before a judge of the minor judiciary, the Philadelphia Municipal Court or a court of common pleas.

(h) Adjudication alternative.--The magisterial district judge may refer a child charged with a summary offense to an adjudication alternative program under section 1520 (relating to adjudication alternative program) and the Pennsylvania Rules of Criminal Procedure.

Credits

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978. Amended 1986, Dec. 11, P.L. 1521, No. 165, § 9, effective in 60 days; 1995, April 6, P.L. 997, No. 11 (Spec. Sess. No. 1), § 1, effective in 60 days; 2012, Oct. 25, P.L. 1655, No. 204, § 7, effective in 90 days [Jan. 23, 2013]; 2014, Sept. 27, P.L. 2482, No. 138, § 2, effective in 60 days [Nov. 26, 2014].

Editors' Notes

SUSPENDED IN PART

<For purposes of delinquency proceedings, Pa.R.J.C.P. No. 800 suspends 42 Pa.C.S.A. § 6336(b), insofar as inconsistent with Pa.R.J.C.P. Nos. 242(B)(1)(b), 406(A)(2)(b), and 512(A), which provide the district attorney shall present the evidence in support of the petition and otherwise conduct the proceedings on behalf of the Commonwealth.>

<For purposes of delinquency proceedings, Pa.R.J.C.P. No. 800 suspends 42 Pa.C.S.A. § 6336(c), insofar as inconsistent with Pa.R.J.C.P. No. 127(A), which requires all proceedings to be recorded, except for detention hearings.>

<For purposes of dependency proceedings, Pa.R.J.C.P. No. 1800(2) suspends 42 Pa.C.S.A. § 6336(c) insofar as inconsistent with Pa.R.J.C.P. No. 1127(A) and 1242(B)(2), which require all proceedings to be recorded, except for shelter care hearings.>

BAR ASSOCIATION COMMENT

Source Note: Reenactment of act of December 6, 1972 (No. 333), § 19 (11 P.S. § 50-316).

JT. ST. GOVT. COMM. COMMENT

This section is derived from Section 24 of the Uniform Act. Subsection (a) continues existing law which does not authorize a jury trial: *Commonwealth* v. *Johnson*, 211 Pa.Superior Ct. 62, 234 A.2d 9 (1969). In *Debacker* v. *Brainard*, 90 S.Ct. 163, 164 (1969), the United States Supreme Court dismissed the appeal as an inappropriate case to decide the issue of a juvenile's constitutional right to a jury trial.

In subsection (b) the duty is placed upon the district attorney upon the request of the court to present the evidence in support of the petition to ensure that the probation officer who must in most cases subsequently supervise the treatment of the adjudged delinquent is not also his prosecutor. Since under this act in delinquency cases the Commonwealth has a burden of proof and must go forward with the evidence, except in the simplest cases participation by a "Commonwealth" attorney is necessary.

Subsection (c) requires the recording of the proceedings or the keeping of minutes without specifying the method by which the record is made. In *Gault* the need for an adequate record as a basis for review was noted. The final orders of the court would, of course, be subject to appeal as provided in the Act of 1895, June 24, P.L. 212, § 7, as amended, 17 P.S. 181, 182, 184, 184.1 and 190 [Repealed].

In connection with subsection (d), the Comment to Section 24 of the Uniform Act notes:

> "There has been some recent tendency to permit publicity [of] juvenile court proceedings on the theory that this will act as a curb to juvenile delinquency. There is little evidence to support this theory and considerable indication that it affords the hard-core delinquent the kind of recognition he wants. On the other hand, the harm it causes may be great in the case of the repentant offender.
>
> "The section as drawn permits the court in its discretion to admit news reporters. This is frequently done with the understanding that the identity of the cases observed will not be published, a procedure generally satisfactory to the news media.
>
> "The exception in contempt cases is probably required in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, ..."

Notes of Decisions (60)

42 Pa.C.S.A. § 6336, PA ST 42 Pa.C.S.A. § 6336
Current through 2022 Regular Session Act 35. Some statute sections may be more current, see credits for details.

End of Document

West's Pennsylvania Administrative Code
Title 237. Juvenile Rules
Part I. Rules
Subpart A. Delinquency Matters
Chapter 1. General Provisions
Part A. Business of Courts

237 Pa. Code Rule 139

Rule 139. Use of Restraints on the Juvenile.

Currentness

Restraints shall be removed prior to the commencement of a proceeding unless the court determines on the record, after providing the juvenile an opportunity to be heard, that they are necessary to prevent:

1) physical harm to the juvenile or another person;

2) disruptive courtroom behavior, evidenced by a history of behavior that created potentially harmful situations or presented substantial risk of physical harm; or

3) the juvenile, evidenced by an escape history or other relevant factors, from fleeing the courtroom.

Official Note: Rule 139 adopted April 26, 2011, effective June 1, 2011.

Credits
Adopted June 1, 2011.

Current through Pennsylvania Bulletin, Vol. 52, Num. 26, dated June 25, 2022. Some sections may be more current, see credits for details.

237 Pa. Code Rule 139, 237 PA ADC Rule 139

End of Document

Code of Laws of South Carolina 1976 Annotated
Title 63. South Carolina Children's Code (Refs & Annos)
Chapter 19. Juvenile Justice Code
Article 13. Dispositional Powers of the Court (Refs & Annos)

Code 1976 § 63-19-1435

§ 63-19-1435. Use of restraints on juveniles in court.

Effective: June 2, 2014
Currentness

(A) If a juvenile appears before the court wearing instruments of restraint, such as handcuffs, chains, irons, or straightjackets, the court in any proceeding may not continue with the juvenile required to wear instruments of restraint unless the court first finds that:

(1) the use of restraints is necessary due to one of the following factors:

(a) the juvenile poses a threat of serious harm to himself or others;

(b) the juvenile has a demonstrable recent record of disruptive courtroom behavior that has placed others in potentially harmful situations; or

(c) there is reason to believe the juvenile is a flight risk; and

(2) there are no less restrictive alternatives to restraints that will prevent flight or physical harm to the juvenile or another person, including, but not limited to, court personnel, law enforcement officers, or bailiffs.

(B) The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall make findings of fact in support of the order.

Credits
HISTORY: 2014 Act No. 186 (S.440), § 1, eff June 2, 2014.

Code 1976 § 63-19-1435, SC ST § 63-19-1435
Current through 2022 Act No. 239, except Act No. 226, subject to final approval by the Legislative Council, technical revisions by the Code Commissioner, and publication in the Official Code of Laws.

End of Document

West's **Tennessee** Code Annotated
State Rules of Court
Tennessee Rules of Juvenile Practice and Procedure
Delinquent/Unruly Proceedings

Tennessee Rules of Juvenile Procedure, Rule **204**

Rule **204**. Use of Restraints on Children in the Courtroom

Currentness

(a) Children appearing in juvenile court may be restrained if the court determines that:

(1) The behavior of the child represents a threat to his or her safety or the safety of other people in the courtroom; or

(2) The behavior of the child presents a substantial risk of flight from the courtroom; and

(3) There are no less restrictive alternatives to restraints that will prevent flight or risk of harm to the child or another person in the courtroom.

(b) Any party may request to be heard as to whether or not restraints are necessary, and upon request, a judge shall make findings on the record regarding the decision to restrain the child.

Credits
[Adopted effective July 1, 2016.]

Editors' Notes

ADVISORY COMMISSION COMMENTS
The general statutory requirement is to “remove the taint of criminality” from children appearing in our juvenile courts.

It is not anticipated by this Commission that juvenile courts will be required to engage in an extensive fact-finding hearing prior to ruling that restraints on a particular child are appropriate. It is further understood that **Tennessee** juvenile courtrooms vary greatly in structure, availability of security personnel and their ability to handle security concerns. A few of the factors the court may wish to consider prior to ruling restraints are appropriate are:

1) The seriousness of the charges;

2) The delinquency history of the child;

3) Any past disruptive courtroom behavior by the child;

4) Any past escape attempts by the child;

5) Any security risks at a particular time in a courtroom due to structure and/or low staffing levels of security personnel.

The Commission is seeking to promote an individual determination by the court as to whether a child should be restrained in the courtroom. The focus of this rule should be balancing between the child's best interest and the safety of the courtroom. This rule only addresses children within the courtroom. It does not address transportation to and from the courthouse and to and from the courtroom.

A large number of children in delinquency proceedings have suffered neglect or abuse, and/or have physical or mental disabilities. Restraints on these children are particularly inappropriate in most circumstances.

Communication between a child and an adult attorney is often difficult, and restraints compound that problem. Children disengage from communication with their attorneys even more than adult defendants because "juveniles have limited understanding of the criminal justice system and the roles of the institutional actors within it." *Graham v. Florida*, 560 U.S. 48, 51 (2010).

Juvenile Procedure Rule **204**, TN R **JUV** P Rule **204**
State court rules are current with amendments received through May 1, 2022. Some rules may be more current; see credits for details.

End of Document

West's Utah Code Annotated
Title 80. Utah Juvenile Code
Chapter 6. Juvenile Justice
Part 6. Delinquency Proceedings

U.C.A. 1953 § 80-6-609
Formerly cited as UT ST § 78A-6-122

§ 80-6-609. Restraint of a minor

Effective: September 1, 2021
Currentness

(1) As used in this section, “restrained” means the use of handcuffs, chains, shackles, zip ties, irons, straightjackets, and any other device or method that is used to immobilize a minor.

(2)(a) The Judicial Council shall adopt rules that address the circumstances under which a minor may be restrained while appearing in juvenile court.

(b) The Judicial Council shall ensure that the rules consider both the welfare of the minor and the safety of the juvenile court.

(c) A minor may not be restrained during a juvenile court proceeding unless restraint is authorized by rules of the Judicial Council.

Credits
Laws 2021, c. 261, § 176, eff. Sept. 1, 2021.

U.C.A. 1953 § 80-6-609, UT ST § 80-6-609
Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

West's Vermont Statutes Annotated
Title Thirty-Three. Human Services
Part 4. Juvenile Proceedings
Chapter 51. General Provisions (Refs & Annos)

33 V.S.A. § 5123

§ 5123. Transportation of a child

Currentness

(a) The Commissioner for Children and Families shall ensure that all reasonable and appropriate measures consistent with public safety are made to transport or escort a child subject to this chapter in a manner that:

(1) reasonably avoids physical and psychological trauma;

(2) respects the privacy of the child; and

(3) represents the least restrictive means necessary for the safety of the child.

(b) The Commissioner for Children and Families shall have the authority to select the person or persons who may transport a child under the Commissioner's care and custody.

(c) The Commissioner shall ensure supervisory review of every decision to transport a child using mechanical restraints. When transportation with restraints for a particular child is approved, the reasons for the approval shall be documented in writing.

(d) It is the policy of the State of Vermont that mechanical restraints are not routinely used on children subject to this chapter unless circumstances dictate that such methods are necessary.

Credits
2009, No. 28, § 2, eff. May 21, 2009.

33 V.S.A. § 5123, VT ST T. 33 § 5123
The statutes are current through Acts of the Adjourned Session of the 2021-2022 Vermont General Assembly (2022) effective as of June 9, 2022. Some sections might be more current; see effective date in individual sections.

End of Document

Juvenile Court Rules, JuCR 1.6

RULE 1.6. PHYSICAL RESTRAINTS IN THE COURTROOM

Currentness

(a) Use of Restraints on Juvenile Respondents. Juveniles shall not be brought before the court wearing any physical restraint devices except when ordered by the court during or prior to the hearing. Instruments of restraint, such as handcuffs, ankle chains, waist chains, strait jackets, electric-shock producing devices, gags, spit masks and all other devices which restrain an individual's freedom of movement shall not be used on a respondent during a court proceeding and must be removed prior to the respondent's appearance before the court unless the court finds both that:

(1) The use of restraints is necessary due to one of the following factors:

(A) Present behavior of the respondent represents a current threat to his or her own safety, or the safety of other people in the courtroom;

(B) Recent disruptive courtroom behavior of the respondent has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm to himself or herself or others; or

(C) Present behavior of the respondent presents a substantial risk of flight from the courtroom; and

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the respondent of another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

(b) Challenge to the use of restraints. Before or after any juvenile is ordered restrained, the court shall permit any party to be heard on the issue of whether the use of physical restraints is necessary in a particular situation or as to a particular child.

Credits
[Adopted effective September 1, 2014.]

JuCR 1.6, WA R JUV CT JuCR 1.6
State court rules are current with amendments received through 6/1/22. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Some rules may be more current, see credits for details.

Tab R

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

May 31, 2019

Mr. Charles L. “Chip” Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters. Some require immediate attention, while others are longer-range initiatives. I have provided a complete list for the Committee’s information.

Several matters arise from legislation passed by the 86th Legislature, which, if signed by the Governor, takes effect immediately or on September 1, 2019. The Committee should conclude its work on them by its June 21, 2019 meeting. Many of the changes may be simple and straightforward. They are:

Joint Judicial Campaign Activity. The State Commission on Judicial Conduct has disciplined judges for joint campaign activities based on Canons 2B and 5(2) of the Code of Judicial Conduct. Canon 2B states in part: “A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.” Canon 5(2) states in part: “A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.” HB 3233, passed by the 86th Legislature, adds Election Code § 253.1612, which states that the “Code of Judicial Conduct may not prohibit, and a judicial candidate may not be penalized for, a joint campaign activity conducted by two or more judicial candidates.” The Committee should consider whether the text of the rules should be changed or a comment added to reference or restate the statute.

MDL Applicability. Government Code §§ 74.161-.201 create the Judicial Panel on Multidistrict Litigation, and Rule of Judicial Administration 13 governs its operation. SB 827, § 2 adds § 74.1625 to prohibit the MDL panel from transferring two types of actions: (1) DTPA actions (unless specifically allowed under the DTPA) and (2) Texas Medicaid Fraud Prevention Act actions. The amendment does not direct that Rule 13 be changed, but the Committee should consider whether the text of Rule 13.1 should be changed and a comment added to reference or restate the statute.

Expedited Actions. Rule of Civil Procedure 169 implements Government Code § 22.004(h). SB 2342 adds § 22.004(h-1), which calls for rules, "[i]n addition to the rules adopted under [s]ubsection (h), . . . to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000 . . . balanc[ing] the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions." Rules necessary to implement this change must be adopted by January 1, 2021. But the statute makes various other changes that take effect September 1, 2019. The Committee should consider whether other rules should be changed, such as Rules of Civil Procedure 47, 224, and 500.3, or comments added to reference or restate the statute by that date.

Dismissal. Rule of Civil Procedure 91a provides for the dismissal of baseless causes of action, implementing Government Code § 22.004(g). Civil Practice and Remedies Code § 30.021 mandates an award of costs and attorney fees to the prevailing party. HB 3300 amends § 30.021 to make an award discretionary and applies to cases commenced on or after September 1, 2019. The Committee should consider whether other rules should be changed or comments added to reference or restate the statute by that date.

Notice of Appeal. SB 891, § 7.02, adds Civil Practice and Remedies Code § 51.017 to require service of notice of appeal on court reporters. The Committee has already considered this change. The statute is effective September 1, 2019.

One other matter arising from legislation passed by the 86th Legislature requires rule-making by January 1, 2020:

Public Guardians. Section 24 of SB 667, passed by the 86th Legislature, adds Subchapter G-1 to Chapter 1104 of the Estates Code, which governs public guardians and directs the Court "in consultation with the Office of Court Administration . . . and the presiding judge of the statutory probate courts . . . [to] adopt rules necessary to implement this subchapter." Section 67 of the bill provides that the Court "shall adopt rules necessary to implement Subchapter G-1, . . . including rules governing the transfer of the guardianship of the person or of the estate of a ward, or both, if appropriate, to an office of public guardian established under that subchapter or a public guardian contracted under that subchapter." OCA and Judge Guy Herman will draft these rules, and the Committee should review them.

Other matters arising from legislation passed this Session set extended deadlines for rule-making:

Citation. SB 891, passed by the 86th Legislature, amends several state statutes to address citation. The bill adds Government Code § 72.034 directing the Court "by rule [to] establish procedures for the submission of public information to the public information Internet website by a person who is required to publish the information" by June 1, 2020. The bill also adds Civil Practice and Remedies Code § 17.033 requiring the Court to "adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence" by December 31, 2020. The Committee should make recommendations.

Protective Order Registry Forms. SB 325 requires the Office of Court Administration to create an online registry for family violence protective orders and applications and to permit public access to certain information about the protective orders by June 1, 2020. The bill also adds Government Code § 72.158 directing the Court to "prescribe a form for use by a person requesting a grant or removal of public access" to the information and permits the Court to prescribe related procedures. The bill does not specify a deadline for the forms. The Committee should recommend appropriate forms.

Criminal Forms. HB 51 adds Government Code § 72.0245 requiring the Office of Court Administration to create a number of forms for use in criminal actions, such as forms to waive a jury trial and enter a plea of guilty or nolo contendere, and forms for a trial court to admonish a defendant before accepting a guilty or nolo contendere plea. It also requires the Supreme Court to "by rule . . . set the date by which all courts with jurisdiction over criminal actions must adopt and use the forms created . . . ." OCA will work with Holly Taylor, the Court of Criminal Appeals' Rules Attorney, to formulate a plan to develop the forms. The Committee should review the forms when drafted. The statutory deadline is September 1, 2020.

Procedures Related to Mental Health. SB 362 directs the Supreme Court to "adopt rules to streamline and promote the efficiency of court processes under Chapter 573, Health and Safety Code" and "adopt rules or implement other measures to create consistency and increase access to the judicial branch for mental health issues." The Judicial Commission on Mental Health will draft these rules, and the Committee should review them.

CPS and Juvenile Cases. HB 2737 requires the Court and its Children's Commission to "annually . . . provide guidance to judges who preside over child protective services cases or juvenile cases," and requires the Court to "adopt the rules necessary to accomplish the purpose of this section." The statute sets no deadline. The Children's Commission is developing an implementation plan. The Committee should review any rules proposed by the Commission.

Transfer on Death Deed Forms. SB 874 requires the Court to promulgate "a form for use to create a transfer on death deed and a form for use to create an instrument for revocation of a transfer on death deed." The statute sets no deadline. The Probate Forms Task Force will develop these and other forms for the Committee's review.

Finally, there are several matters unrelated to recent legislation on which the Court requests the Committee's recommendations.

Suits Affecting the Parent-Child Relationship. In response to HB 7, passed by the 85th Legislature, the Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The Phase II Report is attached to this letter. The Committee should review the Phase II Report and make recommendations.

Out-of-Time Appeals in Parental Rights Termination Cases. A parent whose appeal from a judgment terminating his rights in a child is untimely may contend that the delay is not his fault and may blame ineffective assistance of counsel. This can complicate and extend the appellate process. The Committee should consider rules to address this situation, including:

- a narrow late-appeal procedure;
- an abate-and-remand procedure like the one proposed in the Phase II Report;
- a habeas- or bill-of-review-style procedure; and
- prophylactic procedures not considered in the Phase I or Phase II Reports, such as a requirement that trial counsel stay on until the notice of appeal has been filed.

Registration of In-House Counsel. A majority of states require that an attorney employed as in-house counsel and residing in one state but licensed in another either register, obtain a limited license, or be fully licensed to practice in the state of residence. The Board of Law Examiners has approved new Rule 23 of the Rules Governing Admission to the Bar, requiring only registration of in-house counsel. The proposed rule is attached. The Committee should review the rule and make recommendations.

Civil Rules in Municipal Courts. Municipal Court Judge Ryan Henry has proposed that procedural rules be adopted for civil cases in municipal courts. The Committee should set up a process for considering Judge Henry's proposals and making recommendations.

Motions for Rehearing in the Courts of Appeals. Justice Christopher and the State Bar Court Rules Committee have each proposed amendments to Rule of Appellate Procedure 49.3, which are attached. The Committee should consider both and make recommendations.

Parental Leave Continuance Rule. In the attached memorandum, the State Bar Court Rules Committee proposes a parental leave continuance rule. The State of Florida has studied such a procedure in depth. The Committee should consider that work and the proposal and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 17-9070

REPORT OF THE HOUSE BILL 7 TASK FORCE FOR PROCEDURAL RULES IN SUITS AFFECTING THE PARENT–CHILD RELATIONSHIP FILED BY A GOVERNMENTAL ENTITY

Phase II

Submitted to the Supreme Court of Texas on December 31, 2018

TO THE HONORABLE SUPREME COURT:

INTRODUCTION

The House Bill 7 Task Force for Procedural Rules in Suits Affecting the Parent-Child Relationship Filed by a Governmental Entity ("HB 7 Task Force") was established on July 10, 2017 by the Supreme Court of Texas (hereinafter "Supreme Court"), pursuant to Misc. Docket No. 17-9070. The HB 7 Task Force was charged with the responsibility to advise the Supreme Court regarding rules to be adopted or revised for trial and post-trial proceedings in cases involving termination of the parent-child relationship.

The need for a revision of the rules arose from House Bill 7, enacted by the 85th Legislature (Act of May 26, 2017, 85th Leg., R.S., ch. 317), effective September 1, 2017. House Bill 7 added Section 105.002(d) of the Family Code, directing the Department of Family and Protective Services ("Department") and the Supreme Court of Texas Children's Commission ("Children's Commission") to consider whether broad-form or specific jury questions should be required in Suits Affecting the Parent Child Relationship (SAPCR) filed by the Department. House Bill 7 also added Section 263.4055 of the Texas Family Code (hereinafter "Family Code") directing the Supreme Court to establish procedures to address the conflict between the filing of a motion for new trial and the filing of an appeal of a final order rendered under Chapter 263 of the Family Code, as well as the period of time, including an extension of at least 20 days, for a court reporter to submit the reporter's record of a trial to an appellate court following a final order rendered under Chapter 263. In addition, the Supreme Court requested that the HB 7 Task Force examine possible reasons for the increase in parental termination appeals and make recommendations on how to address the increase. Supreme Court of Texas Misc. Order 17-9070 directed the HB 7

Task Force to advise the Court on the rules required by House Bill 7 as well as other recommendations deemed appropriate to expedite and improve the trial and appeal of cases governed by Family Code Chapter 263 no later than December 1, 2017. The HB 7 Task Force submitted a report on November 27, 2017. *See Appendix A.* House Bill 7 required recommendations to be submitted to the Texas Legislature no later than December 31, 2017, and that report was submitted on December 15, 2017.

The Supreme Court of Texas, in Misc. Order 17-9070, appointed the following persons to the HB 7 Task Force:

Hon. Dean Rucker, Chair, Presiding Judge, Seventh Administrative Judicial Region of Texas, Midland

Hon. Eva Guzman, Court Liaison to the HB 7 Task Force and Children's Commission's Chair, Justice, Supreme Court of Texas, Austin

Hon. Debra H. Lehrmann, Justice, Supreme Court of Texas, Austin

Tina Amberboy, Executive Director, Supreme Court Children's Commission, Austin

Mark Briggs, Attorney, El Paso

Hon. Ada Brown, Justice, 5th Court of Appeals, Dallas

Audrey Carmical, General Counsel, Department of Family and Protective Services, Austin

William B. Connolly, Attorney, Houston

Lawrence M. Doss, Attorney, Lubbock

Anna Ford, Director of Litigation, Department of Family and Protective Services

Sandra D. Hachem, Assistant County Attorney for Harris County, Houston

Lisa Bowlin Hobbs, Attorney, Austin

Anissa Johnson, Attorney, Office of Court Administration, Austin

Hon. Sandee Marion, Chief Justice, 4th Court of Appeals, San Antonio

Hon. Michael Massengale, Justice, 1st Court of Appeals, Houston

Dylan Moench, Staff Attorney, Supreme Court Children's Commission, Austin

Richard R. Orsinger, Attorney, San Antonio

Hon. Paul Rotenberry, Judge, 326th District Court, Abilene

Georganna L. Simpson, Attorney, Dallas

Hon. John J. Specia, Judge (Ret.), San Antonio

Hon. Angela Tucker, Judge, 199th District Court, McKinney

Luz A. ("Lucy") Williamson, Attorney, Edinburg

Martha Newton, Rules Attorney, Supreme Court of Texas, Austin

RECOMMENDATIONS

The HB 7 Task Force recommended the following in its November 2017 Report to the Supreme Court:

1. Amend Texas Rule of Civil Procedure 277 to eliminate the use of broad-form jury questions in termination of parental rights cases.

The HB 7 Task Force recommended that the Supreme Court, as an exercise of its rulemaking authority, require granulated charges in parental termination cases and that Texas Rule of Civil Procedure (Tex. R. Civ. P.) 277 should be amended to eliminate the use of broad-form jury questions in termination of parental rights cases. The HB 7 Task Force also crafted a pattern jury charge (PJC) to effectuate the move from broad-form submission to separate questions on the two elements (grounds and best interest) required for termination under Sections 161.001(b)(1) and (2), Texas Family Code.

The Court referred the suggested rule change to the Supreme Court Advisory Committee (SCAC) for consideration. The SCAC considered the HB 7 Task Force recommendation on Friday, September 28, 2018 and voted to support the Rule 277 language submitted by the Task Force in its November 2017 Report, but declined to support the Task Force PJC suggestions. Rather, the SCAC voted to support its own PJCs and on November 14, 2018, Judge Dean Rucker, Chair of the HB 7 Task Force, along with the Executive Director of the Children's Commission submitted a memo to the Supreme Court General Counsel articulating concerns about the SCAC PJC recommendations. *See Appendix B*. This matter is pending before the Supreme Court.

2. Amend Texas Rule of Appellate Procedure 28.4(b) to require that Notice of Appeal should be provided to the court reporter who prepared the record and to the trial judge who heard the case.

In its November 2017 report, the Task Force further recommended that Texas Rule of Appellate Procedure (Tex. R. App. P.) 28.4(b) be amended to require that notice of appeal should be provided to the court reporter(s) who prepared the record(s) and to the trial judge who heard the case. *See Appendix A, Page 19*. The HB 7 Task Force also determined, at the time, that there was no conflict between the rules related to a motion for new trial and the filing of a notice of appeal and thus no related rule amendments were recommended when the original report was submitted on November 27, 2017. *See Appendix A, Page 7*. However, the motion for new trial was revisited by the HB 7 Task Force during Phase II as part of its discussion related to ineffective assistance of counsel.

3. Amend Texas Rule of Appellate Procedure 35.1 to allow an extension of time for Filing of the Court Reporter Record

Finally, the November 2017 report recommended that the Supreme Court extend the time to file the court reporter record from 10 to 15 days in all accelerated appeals. *See Appendix A, Page 20*.

4. Additional Issues Considered by the Task Force in 2018

Throughout 2018, the HB 7 Task Force continued to meet to discuss: (1) a parent's right to counsel on appeal as well as notice of the right to appeal, and what procedures might be appropriate to ensure that appeals are pursued at the parent's direction; (2) procedural issues related to motions for new trial and post-trial matters, such as a meaningful opportunity to establish a record to support a claim of ineffective assistance of counsel; (3) the appropriateness of *Anders*-style procedure or alternative methods for appellate counsel to indicate that a parental-termination appeal lacks merit; and (4) the increase in parental termination appeals. All matters were assigned to two subcommittees chaired by Justice Michael Massengale (First Court of Appeals) and Chief Justice Sandee Marion (Fourth Court of Appeals). The subcommittees' recommendations were adopted by the HB 7 Task Force on October 17, 2018 and are outlined below.

(1) Indigent Parent's Right to Counsel on Appeal, Notice of Right to Appeal, and Show of Authority to Appeal

An indigent parent in a parental-termination proceeding is entitled to representation of counsel until the case is dismissed, all appeals are exhausted or waived, or the attorney is relieved or replaced.[1]

The HB 7 Task Force proposes that a defendant in a parental-termination suit be notified in the citation about the right to counsel, including the right to counsel on appeal. This will provide an additional measure of notice in the event appointed counsel later declines to pursue an appeal due to abandonment of the case by the parent. The admonition could be added to the required notice and take the following form:

> "You have the right to be represented by an attorney. If you are indigent and unable to afford an attorney, you have the right to request the appointment of an attorney by contacting the court at [address], [telephone number]. If you appear in opposition to the suit, claim indigence, and request the appointment of an attorney, the court will require you to sign an affidavit of indigence and the court may hear evidence to determine if you are indigent. If the court determines you are indigent and eligible for appointment of an attorney, the court will appoint an attorney to represent you."
>
> "You are further notified that if a judgment is rendered against you, you have a right to appeal the judgment to the court of appeals and to the Supreme Court of Texas, and if you are indigent an attorney will be appointed to conduct the appeal at no cost to you."

To the extent the Supreme Court is currently considering a revision of Rule 99 to include standard form citations, the Task Force proposes the creation of a customized form citation, in English and Spanish (and with an internet citation to translations in other languages), to be used in parental

[1] Tex. Fam. Code § 107.016(3)

termination cases. Such a citation could have language customized to address the availability of default judgments in parental-termination cases.

The filing of a notice of appeal starts the process of immediately preparing a record, for which a court reporter might not be compensated.[2] To avoid initiating the preparation of an appellate record in circumstances when a terminated parent may not be actually seeking to challenge a final order, the HB 7 Task Force recommends an amendment to Rule 28.4(c) to require that a notice of appeal include an attorney certification that "the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal." *See Appendix C, Rule 28.4(c)*. The Task Force further proposes a similar certification in a petition for review filed in the Supreme Court. *See Appendix D, Rule 53.2(l)*. As an enforcement mechanism, the Task Force proposes borrowing from the procedure in Texas Rule of Civil Procedure 12 to challenge an attorney's authority but eliminating the requirement of a sworn motion.[3]

(2) <u>Motion for New Trial and Ineffective Assistance of Counsel (IAC)</u>

The law applicable to claims of ineffective assistance of counsel (IAC) is heavily influenced by the development of the law in criminal contexts. There is a critical distinction between the procedural universes applicable to IAC claims in criminal and civil contexts. To the extent IAC law as implemented in Texas makes it very difficult to effectively advance an IAC claim on direct appeal,[4] the Court of Criminal Appeals has explained that direct appeal is not the preferred method of raising IAC, and post-conviction habeas corpus is the preferred procedural avenue.[5] Thus a person convicted of a crime gets a second bite at the IAC apple, albeit without a right to appointed counsel. By contrast, the exhaustion of a direct appeal in a parental-termination case is essentially the end of the procedural road, at least to the extent a terminated parent has no other procedural opportunity to collaterally attack a final order of termination.

The IAC standard has two elements: (1) deficient professional conduct, and (2) prejudice.[6] A major limitation on IAC claims under the *Strickland* standard is that because attorneys may have strategic reasons at the time they make decisions that may be second-guessed in hindsight, they are presumed to have acted reasonably[7] and generally will not be held ineffective unless they have had an opportunity to explain themselves.[8] In other words, an IAC claim generally must be supported by evidence beyond the mere record of the underlying proceeding. The successful IAC claimant usually needs a supplemental record consisting of at least affidavits, and often an evidentiary hearing.

[2] Tex. R. App. P. 28.4(b)(1)
[3] Tex. R. Civ. P. 12
[4] *See e.g., Trevino v. Thaler, 569 U.S. 413, 417, 133 S. Ct. 1911, 1915 (2013); Robinson v. State, 16 S.W.3d 808, 811 (Tex. Crim. App. 2000)*
[5] *Mata v. State*, 226 S.W. 3d 425, 430 n. 14 (Tex. Crim. App. 2007); Robinson, 16 S.W.3d at 810
[6] *In re M.S.*, 115 S.W.3d 534, 545 (Tex. 2003) (citing *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984)).
[7] *Id.*
[8] *See Walker v. Texas Dept. of Family & Protective Servs., 312 S.W.3d 608, 623 (Tex. App.—Houston [1st Dist.] 2009 pet. denied*

Post-judgment timelines in parental-termination cases provide a limited opportunity for a lawyer to evaluate potential IAC claims and build a record to support them, particularly when juxtaposed against the likelihood that the lawyer evaluating an IAC claim has been newly appointed at or after entry of a final order. If an appellate lawyer is appointed at the same time the final order is entered, to the extent there will be an IAC issue raised, the lawyer has to determine the grounds for IAC, ascertain how to create a sufficient evidentiary record to prove IAC, file the motion for new trial within 30 days of the order, and get the evidence into the record either in written form or by means of an evidentiary hearing before the 75th day, when the motion for new trial is denied by operation of law if not ruled upon earlier.[9]

Initially, the Task Force considered a proposal to amend Rule 329b of the Texas Rules of Civil Procedure for a suit for termination of the parent-child relationship or a suit affecting the parent child relationship seeking managing conservatorship filed by a governmental entity. The proposal required that the request for preparation of a reporter's record be made within 20 days of a final order in the case. The proposal then required that the motion for new trial be filed prior to or within 30 days after the filing of the completed reporter's record. The subcommittee also recommended an amendment to Texas Rule of Appellate Procedure 38.6(a) which would provide that if a motion for new trial was timely filed as provided, the appellant's brief must be filed within 20 days after the later of (1) the date the clerk's record was supplemented to include post-judgment filings; or (2) the date the reporter's record was supplemented to include post-judgment proceedings. Finally, the proposal provided for an amendment to Rule 6 of the Texas Rules of Judicial Administration to require that the intermediate appellate courts must bring a final disposition of an appeal within 180 days after the later of (1) the date the clerk's record was filed; or (2) the date the reporter's record was filed.

After discussion of the proposal at the October 17, 2018 Task Force meeting, the Task Force rejected the proposal. The Task Force then discussed and adopted a more facile proposal that would provide an opportunity for the limited abatement of an appeal for the purpose of holding an evidentiary hearing in support of an IAC claim. The abatement would not exceed twenty days and would toll the running of the 180-day period for the appellate court to bring the appeal to final disposition as required by Texas Rule of Judicial Administration 6.2(a). *See Appendix C, Rule 28.4(d).*

(3) *Anders* / Certificate of No Merit

The HB 7 Task Force recognizes that there is significant momentum behind the *Anders* practice in the appellate courts,[10] and the Supreme Court gave no indication that it was seeking to eliminate the practice. The Supreme Court's charge directed the Task Force to draft *Anders* brief procedures in appeals of parental termination and child protection cases for inclusion in the Rules of Appellate Procedure. The Task Force was also asked to propose a rule addressing the inconsistency presented by the *In re P.M.* decision relating to the right to counsel through Supreme Court review in parental termination appeals in contrast to analogous procedures in the criminal-law context, in which there is

[9] Tex. R. Civ. P. 329b(a); Tex. R. Civ. P. 329b(c)
[10] *E.g., In re P.M., 520 S.W.3d 24, 27 (Tex. 2016)*

no statutory right to continued representation through the petition stage at the Court of Criminal Appeals.

Additional proposed amendments to Rules 28.4 and 53.2 provide a suggested procedure for attorney handling and appellate disposition of "frivolous parental termination and child protection appeals." *See Appendix C, Rule 28.4(f), (g) and (h) and Rule 53.2(m)*. Amendments to these rules will resolve the *In re P.M.* dilemma by specifying that an appointed appellate lawyer invoking the frivolous-appeal procedure should not actually move to withdraw for that reason, nor should the court of appeals allow the attorney to withdraw solely for that reason. The proposed rule amendments otherwise codify the traditional *Anders* standard for explaining the basis for the attorney's conclusion that the appeal is frivolous, as well as the procedure for the appellant to file a *pro se* response. Proposed Rule 53.2(m) would allow counsel, after the court of appeals has determined the appeal to be frivolous, to adopt the brief filed in the court of appeals by reference in a petition for review with the Texas Supreme in lieu of the contents required by subparts (f)-(j) above.

The Task Force also submits with this report a "Parental Termination Brief Checklist" suitable for publication on appellate court websites to guide the evaluation of parental-termination appeals and, if warranted, *Anders* briefs. *See Appendix E*.

(4) <u>Increase in Appeals/Opinion Templates</u>

HB 7 Task Force members discussed the increase in appellate filings in the intermediate appellate courts and the Texas Supreme Court during the initial phase of its work in 2017. The Task Force reviewed data on appellate filings since 2011 but did not arrive at a consensus for the reasons for the increase. At the Supreme Court's direction as the Task Force entered into Phase II of its work, the Task Force considered whether the Supreme Court should promote or adopt a template designed to produce shorter Court of Appeals opinions. To that end, a HB 7 subcommittee drafted several templates designed to streamline COA review of appeals. *See Appendix F*. Template A is used when the issue on appeal is limited to statutory grounds only. Template B is used when the issue on appeal is limited to the best interest of the child. Template C is used when the issues on appeal involve both statutory grounds and best interest. The templates are appropriate only when the complaints on appeal are the legal and/or factual sufficiency of the evidence to support a ground for termination and/or the best interest finding.

CONCLUSION

The members of the House Bill 7 Task Force are honored to have been entrusted with the opportunity to make recommendations to the Supreme Court on these post-trial issues. The discussions of this assembled body of distinguished jurists and attorneys were robust and enlightening. I trust that the Task Force has fully dispatched the charge of the Court. Should the Court determine that there are related issues that should be considered by this Task Force, we remain ready to be of service. Allow

me to express our gratitude for the privilege of assisting the Court in the exercise of its important role in overseeing the rules of procedure that govern litigation in the courts of our State.

DEAN RUCKER
Chair of the HB 7 Task Force

Phase II Report
Appendix A

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 17-9070

REPORT OF THE HOUSE BILL 7 TASK FORCE FOR PROCEDURAL RULES IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP FILED BY A GOVERNMENTAL ENTITY

Submitted to the Supreme Court of Texas on November 27, 2017

TO THE HONORABLE SUPREME COURT:

I. INTRODUCTION

The House Bill 7 Task Force for Procedural Rules in Suits Affecting the Parent-Child Relationship Filed by a Governmental Entity ("HB 7 Task Force") was established on July 10, 2017 by the Supreme Court of Texas (hereinafter "Supreme Court"), pursuant to Misc. Docket No. 17-9070. The HB 7 Task Force was charged with the responsibility to advise the Supreme Court regarding rules to be adopted or revised for trial and post-trial proceedings in cases involving termination of the parent–child relationship.

The need for a revision of the rules arose from House Bill 7, enacted by the 85th Legislature (Act of May 26, 2017, 85th Leg., R.S., ch. 317), effective September 1, 2017. House Bill 7 added Section 105.002(d) of the Family Code, directing the Department of Family and Protective Services ("Department") and the Supreme Court of Texas Children's Commission ("Children's Commission") to consider whether broad-form or specific jury questions should be required in Suits Affecting the Parent Child Relationship (SAPCR) filed by the Department. House Bill 7 also added Section 263.4055 of the Texas Family Code (hereinafter "Family Code") directing the Supreme Court to establish procedures to address the conflict between the filing of a motion for new trial and the filing of an appeal of a final order rendered under Chapter 263 of the Family Code, as well as the period of time, including an extension of at least 20 days, for a court reporter to submit the reporter's record of a trial to an appellate court following a final order rendered under Chapter 263. In addition, the Supreme Court requested that the HB 7 Task Force examine possible reasons for the increase in parental termination appeals and make recommendations on how to address the increase. Supreme Court of Texas Misc. Order 17-9070 directs the HB 7 Task Force to advise the Court on the rules required by House Bill 7 as well as other recommendations deemed appropriate to expedite and improve the trial and appeal of cases governed by Family Code Chapter 263 no later than December 1, 2017. In formulating the recommendations, the HB 7 Task Force is to be guided by the principle that proceedings under Chapter 263 should be expedited to minimize disruption and confusion in the lives of children and parents without precluding full consideration of the issues and their just and fair resolution. House Bill 7 requires recommendations to be submitted to the Texas Legislature no later than December 31, 2017.

The Supreme Court of Texas, in Misc. Order 17-9070, appointed the following persons to the HB 7 Task Force:

Hon. Dean Rucker, Chair, Presiding Judge, Seventh Administrative Judicial Region of Texas, Midland

Hon. Debra H. Lehrmann, Justice, Supreme Court of Texas, Austin

Tina Amberboy, Executive Director, Supreme Court Children's Commission, Austin

Mark Briggs, Attorney, El Paso

Hon. Ada Brown, Justice, 5th Court of Appeals, Dallas

Audrey Carmical, General Counsel, Department of Family and Protective Services, Austin

William B. Connolly, Attorney, Houston

Lawrence M. Doss, Attorney, Lubbock

Anna Ford, Director of Litigation, Department of Family and Protective Services

Sandra D. Hachem, Assistant County Attorney for Harris County, Houston

Lisa Bowlin Hobbs, Attorney, Austin

Anissa Johnson, Attorney, Office of Court Administration, Austin

Hon. Sandee Marion, Chief Justice, 4th Court of Appeals, San Antonio

Hon. Michael Massengale, Justice, 1st Court of Appeals, Houston

Dylan Moench, Staff Attorney, Supreme Court Children's Commission, Austin

Richard R. Orsinger, Attorney, San Antonio

Hon. Paul Rotenberry, Judge, 326th District Court, Abilene

Georganna L. Simpson, Attorney, Dallas

Hon. John J. Specia, Judge (Ret.), San Antonio

Hon. Angela Tucker, Judge, 199th District Court, McKinney

Luz A. ("Lucy") Williamson, Attorney, Edinburg

Hon. Eva Guzman, Court Liaison to the HB 7 Task Force and Children's Commission's Chair, Justice, Supreme Court of Texas, Austin

Martha Newton, Rules Attorney, Supreme Court of Texas, Austin

II. PROCESS OF REVIEW

The HB 7 Task Force worked in accordance with a timeline and a work plan that outlined the issues for review. The HB 7 Task Force held one in-person meeting on August 18, 2017. Additional

teleconferences were held on September 18th, October 11th, and October 18th. In addition to meetings and conference calls, the HB 7 Task Force reviewed and provided input to the Final Report.

Work Plan (Schedule and Deliverables):

08/18/17 (Fri)	HB7 TF met in Austin
09/01/17 (Fri)	8/18/17 meeting summary provided to HB7 TF
09/18/17 (Mon)	HB7 TF conference call, input collected
10/01/17 (Mon)	Report writing began
10/10/17 (Tues)	First draft of report to HB7 TF
10/11/17 (Wed)	HB7 TF conference call to discuss filing of court reporter record
10/18/17 (Wed)	HB7 TF conference call to discuss report
11/01/17 (Wed)	Second draft provided to HB7 TF
11/15/17 (Wed)	Edits completed
12/01/17 (Fri)	Report submitted to Supreme Court
12/29/17 (Fri)	Report submitted to Texas Legislature

III. RECOMMENDATIONS

The HB 7 Task Force recommends that the Supreme Court, as an exercise of its rulemaking authority, require granulated charges in parental termination cases and that Texas Rule of Civil Procedure (Tex. R. Civ. P.) 277 should be amended to eliminate the use of broad-form jury questions in termination of parental rights cases. The Task Force further recommends that Texas Rule of Appellate Procedure (Tex. R. App. P.) 28.4(b) be amended to require that notice of appeal should be provided to the court reporter(s) who prepared the record(s) and to the trial judge who heard the case. The HB 7 Task Force determined that there is no conflict between the rules related to a motion for new trial and the filing of a notice of appeal and thus no related rule amendments are required or recommended. Finally, the HB 7 Task Force requests additional guidance from the Supreme Court on the issues related to the increase in number of appeals. The Supreme Court provided additional guidance prior to the September 18, 2017 conference call, and granted permission for the HB 7 Task Force to take up resolution of this last remaining issue after January 1, 2018. Thus, with regard to the increase in parental termination appeals, this report contains no recommendations or further discussion. The increase in parental termination appeals and related matters will be studied in early 2018 and a report will be issued to the Supreme Court in the near future.

IV. Discussion: Broad-Form Jury Charge in Parental Termination Cases

At the August 18, 2017 in-person meeting, the HB 7 Task Force discussed: (1) Broad-form Jury Submission; (2) Motion for New Trial and Notice of Appeal; (3) Filing of the Court Reporter's Record; and (4) Increase in Parental Termination Appeals. The discussion on broad-form submission centered on the case law in this area, the history of broad-form submission, the reasoning for the practice, and the problems presented by the use of broad-form submission. In particular, the inability to determine precisely which grounds form the basis of a termination presents a burden on the appellate courts because a challenge to the sufficiency of the evidence must address each and every alleged termination ground rather than being confined to those grounds actually found by a jury. The HB 7 Task Force also discussed the movement among parent advocates to require the jury to address each ground as to each parent, due process concerns, and whether changes to Rule 277 should apply to private termination cases.

Broad-form jury charges in parental termination cases have been specifically sanctioned by the Supreme Court since *Tex. Dep't of Human Servs. v. E.B.,* 802 S.W.2d 647 (Tex. 1990). The Court ruled that Tex. R. Civ. P. 277 (Rule 277) mandates broad-form submission to be used whenever feasible. However, in 2002, the Supreme Court allowed exceptions to the requirement for broad-form submissions in *Crown Life Ins. v. Casteel,* 22 S.W.3d 378 (Tex. 2000), stating that Rule 277 is not absolute. The 10th Court of Appeals in Waco extended the application of *Crown Life,* to termination cases in *In the Interest of B.L.D*., 113 S.W.3d 340 (Tex. 2003) stating "in termination cases, procedural due process requires a strict application of [Tex. R. Civ. P.] 292's requirement of accord by ten or more jurors" and "the disjunctive form of the charge, without more, may violate due process because it allows for the possibility of termination based on a statutory ground not found by at least ten jurors to have been violated." *Id. at 216.* The Supreme Court overturned the appellate court's ruling on the ground that the error had not been properly preserved but did not reach the merits of the argument and acknowledged the intermediate appellate courts were divided on the issue. See Appendix A for additional history related to use of broad-form submission.

The Task Force also discussed whether the Supreme Court set precedent for granulated questions when in 2012 the Court amended Tex. R. Civ. P. 306 (Rule 306) to require that in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, the judgment must state the specific grounds for termination or for appointment of the managing conservator. Thus, amended Rule 306 may support that broad-form submission is no longer "feasible" under Rule 277.

At the end of the discussion, Judge Rucker appointed a subcommittee to lead the charge on drafting proposed amendments to Rule 277. Task Force members Richard Orsinger, Justice Michael Massengale, Bill Connolly, and Brenda Kinsler (a Department litigation specialist who attended the August 18th meeting on behalf of Task Force member Anna Ford), agreed to serve on the subcommittee and report back to the full committee on the conference call scheduled for September 18, 2017.

On the September 18, 2017 conference call, Task Force member Richard Orsinger noted for the group that the challenge in drafting an amended rule was dealing with multiple children and multiple parents and multiple grounds. The concept for the change proposed to the full HB 7 Task Force was to fold the ground into the question so that the individual ground would be integrated into a stand-alone question, as to the mother, and father, and as to each child separately.

The HB 7 Task Force discussed that it is a rare case that has only one mother and one father, acknowledging that there could be one mother with several children and different fathers for each child. Also, there was discussion that it is unlikely that the same termination grounds would be applicable to all parents. In other words, there could be a ground (and thus a jury question) that would relate to only one parent – or one child. Representatives from the Harris County Attorney's Office noted that even if one parent abuses a child, but not others in the home, case law holds that parental rights can be terminated on all children based on the abuse of one child and the risk presented to others in the home. Task Force member Sandra Hachem expressed concern that granulated jury questions will cause confusion. Task Force member Justice Massengale noted that it is not always going to be the case that conduct endangering one child necessarily endangers another child and a jury needs to make a determination with regard to each ground and each child noting that the statutory language found in Family Code Sections 161.001(b)(1)(D) and (E) refer to "the child," not "a child."

The Task Force also discussed the House Bill 7 amendment to Section 161.206(a-1), Family Code, which requires clear and convincing evidence for each parent in order to terminate parental rights of that parent.

At the conclusion of the September 18, 2017 call, the HB 7 Task Force agreed to recommend amending Rule 277, adding a comment to the proposed rule change, and submitting an example of jury questions to be proposed for inclusion in the Supreme Court's administrative order announcing the rule amendment. See Appendix B. Task Force member Sandra Hachem objected to amending Rule 277.

On the October 18, 2017 conference call, the HB 7 Task Force discussed Rule 277 again, including whether the rule change should apply to all terminations, private and state-sponsored. Judge Rucker notified Task Force members that he had informed the Executive Committee of the Family Law Council that the Task Force was considering a recommendation to amend Rule 277 and that the proposed recommendation would encompass both private and state-sponsored termination cases.

Task Force member Audrey Carmical, General Counsel for the Department of Family and Protective Services, expressed concerns about potential confusion of jurors if the state moves away from broad-form submission to granular questions. Ms. Carmical was invited by Judge Rucker to submit a written statement to the Task Force of the Department's concerns. Ms. Carmical submitted a written statement on October 18, 2017, noting that while the Department acknowledges and appreciates the importance of enhancing parents' due process protections, the use of granulated submission may lead to an unintended negative impact on permanency outcomes for children in care. Specifically, prior

to the *E.B.* decision, attorneys who utilized narrow form submission experienced cases in which jurors would often become confused as to which ground constituted abuse and which ground constituted neglect. As a result, nine jurors might find for termination under Family Code 161.001(b)(1)(D) but another three might find for termination under (E), failing to meet the required number of jurors to find for termination of parental rights. Ms. Carmical's note went on to say that there were situations prior to *E.B.* where a judge was "forced to appoint DFPS as Permanent Managing Conservator of the subject children, leaving them to grow up in foster care." The Department anticipates that confusion is likely to increase with the use of narrow submission as pursuant to Tex. R. Civ. P. 292(a), because the same ten or more jurors are required to agree on all answers made upon which the court bases its judgment. Ms. Carmical also requested that an analysis of *In re E.M.*, 494 S.W.3d 209, 229 (Tex. App.—Waco 2015, pet. denied) from the Waco Court of Appeals in 2015 and *In re C.C.*, No. 10-16-00129-CV, 2016 WL 6808944, at *13 (Tex. App.—Waco Nov. 16, 2016, no pet.) be added as a report appendix. See Appendix C.

V. Discussion: Motion for New Trial and Notice of Appeal

The 2012 changes made to Rule 28.4, Texas Rules of Appellate Procedure, required that parental termination appeals be treated as an accelerated appeal under Tex. R. App. P. 26.1 (Rule 26.1), including the requirement that a notice of appeal be filed 20 days after the judgment is signed. Under Tex. R. Civ. P. 329b (Rule 329b), motions for new trial may be filed up to 30 days after a final judgment is signed and a trial court has 75 days to rule on the motion. The 85th Texas Legislature proposed a solution to this perceived conflict in the filed version of House Bill 7, which required a motion for new trial within five days of a final judgment in a child protection case and required the trial court to rule on the motion within 14 days. The language was withdrawn from House Bill 7 before final passage so that this matter could be examined by the HB 7 Task Force.

At the August 18, 2017 meeting, the HB 7 Task Force discussed whether five days was too short a time to properly prepare a motion for a new trial because it is unlikely that a court reporter's record could be produced in such a short amount of time. Also, there was concern that attorneys would not be able to properly review the record for errors and may therefore be motivated to file a boilerplate motion, potentially missing a point of error. The HB 7 Task Force also discussed the merits of shortening the time for disposition of a motion for new trial in parental termination and child protection cases from 75 days to 60 days after the signing of a final order. However, it was pointed out that there is no rule or law that prohibits an attorney from pursuing both a motion for new trial and filing a notice of appeal at the same time.

This point was reiterated and discussed again during the September 18, 2017 conference call, and it was noted that a trial court's plenary power allows the court to rule on the motion for new trial even if a notice of appeal has been filed. Task Force member Justice Michael Massengale submitted additional reasons for not truncating the period for filing a motion for new trial in termination proceedings via an email sent to the Task Force on October 18, 2017, including that there may be a

different lawyer handling the appeal and the new attorney will need time to become familiar with the case. Also, the motion for new trial may need to be supported by evidence, adduced either through affidavits or an evidentiary hearing.

Thus, the HB 7 Task Force recommends that time to file a motion for new trial should not be amended and to do so in the manner envisioned by the filed version of House Bill 7 would dramatically truncate the timeline and potentially damage a parent's ability to challenge error. However, the HB 7 Task Force did agree to recommend amendment to Tex. R. App. P. 28.4 (Rule 28.4) to require the attorney filing the notice of appeal to provide notice to the court reporter(s) who prepared the record(s) and the trial judge who heard the case. See Appendix D.

VI. Discussion: Filing of the Court Reporter Record

In 2011, the HB 906 Task Force appointed by the Texas Supreme Court studied the matters of time to file the reporter's record and the extension of time to file the record. In the HB 906 Task Force report submitted to the Supreme Court on October 14, 2011, the HB 906 Task Force recommended that court reporters be required to file the reporter's record within 30 days of the filing of the notice of appeal. The HB 906 Task Force also recommended that an extension or extensions could be granted by the court of appeals for good cause, not to exceed 60 days cumulatively, absent extraordinary circumstances. *Final Report of the Task Force for Post-Trial Rules in Cases Involving Termination of the Parental Relationship* (October 14, 2011), at pages 7 and 17. The Supreme Court did not adopt the recommendation and instead amended Tex. R. App. P. 35.3(c) to permit extensions of 10 days each in an accelerated appeal. The Court further provided in Tex. R. App. P. 28.4(b)(2) that any extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances. Since that time, court reporters have voiced concern about their ability to complete a trial record within the 10-day period while maintaining their normal court duties. Court reporters have also stated that trial courts are often reluctant to release court reporters from their regular duties to complete a trial record or hire substitute court reporters due to budgetary pressure from county commissioners' courts.

At the August 18, 2017 meeting, the HB 7 Task Force discussed whether timelines should be adjusted to account for the number of days it takes to prepare a record as well as who should have responsibility to notify the court reporter that a notice of appeal has been filed. Many court reporters had reported to HB 7 Task Force members that much of the problem stems from not receiving timely notice that a notice of appeal has been filed, and that by the time they are made aware, the deadline to file the record is upon them or has already passed.

Task Force members discussed commencing the 180-day deadline for the appellate court to resolve the appeal from the date the reporter's record is filed rather than the date notice of appeal is filed, but there was strong resistance to any changes that might delay the resolution of the appeal. General

concern was also expressed that any changes that were made solely to parental termination and child protection cases would result in these cases receiving a lower priority than other accelerated appeals. Motions to extend the initial deadline for the reporter's record from 10 days to 15 days for all accelerated appeals, and to extend the initial deadline from 10 to 15 days only for child protection cases were considered by the HB 7 Task Force. Both motions failed to pass.

The HB 7 Task Force also discussed that the urgency of resolving child protection appeals outweighs a rule amendment allowing court reporters more time to file the reporter's record. This discussion was bolstered by the fact that the appellate court members of the Task Force stated that the courts of appeal are routinely granting requests for extensions of time to file the reporter record while still being able to timely issue opinions. It was also noted that the courts of appeal already have the authority to grant an extension beyond the 30 cumulative days for extraordinary circumstances, such as a lengthy jury trial.

All HB 7 Task Force members agreed that the Texas Rules of Appellate Procedure should be amended to require an attorney filing a notice of appeal to notify the court reporter at the time the notice of appeal is filed. This issue was revisited during the HB 7 Task Force's September 18, 2017 conference call and the decision was made to recommend that the attorney filing a notice of appeal also be required to notify the trial court judge who handled the trial. See Appendix D.

On the September 18, 2017, conference call, the HB 7 Task Force agreed to revisit the court reporter record issue once more and a conference call was scheduled for Wednesday, October 11, 2017. On the October 11, 2017 conference call, the HB 7 Task Force heard from three members about the volume of records created in CPS cases and that many court reporters are spending a great deal of their personal time to produce records timely. It was also reported that there is a shortage of substitute court reporters in certain parts of the state. A minority of members were of the opinion that the problem with filing the record timely is not related to whether there are 10 days or 15 days to do so, but rather the dearth of court reporter resources available throughout the state. Others expressed the opinion that if the deadline is to be extended to 15 days for this type of accelerated case, that the time to file the report record in all cases on an accelerated timetable should be adjusted to allow for 15 days rather than 10. The Task Force considered a motion to extend the time to file the reporter's record in all accelerated appeals from 10 days to 15 days, noting that extending to 15 days encompasses two weekends for the reporter to timely file the record instead of just one. The motion passed 12-2. Subsequent to the call held on October 11, 2017, Task Force Member Judge John J. Specia, submitted a written statement on October 16, 2017, to Judge Dean Rucker, Task Force Chair, requesting that his prior vote in favor of the motion be changed to reflect that he abstained from voting. Thus the vote was revised and recorded as eleven in favor, two opposed, and one in abstention.

On the October 18, 2017 conference call, the Task Force again discussed the issue of extending the time to file the reporter's record from 10 to 15 days. Prior to the October 18, 2017 conference call, Task Force member Lisa Hobbs, in support of the Task Force recommendation to extend the time to

file the reporter's record in all accelerated appeals, noted that it makes little sense to give more time solely to prepare a record in what should arguably be the most accelerated of appeals [appeals of parental termination and child protection cases] than other accelerated appeals, given the instability an appeal may create in a child's life. The HB 7 Task Force agreed to propose amendments to Tex. R. App. P 35.1 (Rule 35.1) to extend the time to file the court reporter(s) record(s) from 10 to 15 days. See Appendix E.

VII. CONCLUSION

I am honored to have again been selected to chair this Task Force of distinguished justices, judges and lawyers. On behalf of the members of the House Bill 7 Task Force, please allow me to express our gratitude for the privilege of assisting the Court in the exercise of its important role in overseeing the rules of procedure that govern litigation in the courts of our State.

DEAN RUCKER
Chair of the HB 7 Task Force

APPENDIX A

Background regarding broad-form submission was provided by Task Force Member Richard Orsinger of San Antonio, who served on the State Bar of Texas' Pattern Jury Charge Committee–Family Law that drafted the broad-form submission question for parental termination that is in use today. Orsinger explained that the Chair of that PJC Committee was U.T. Law Professor John J. Sampson, who wrote a law review article exploring the history of broad-form submission, *TDHS v E.B., The Coup de Grace For Special Issues*, 23 ST. MARY'S L.J. 221 (1991) ("Sampson"). Professor Sampson divided jury submission practice in Texas into three eras: the era from 1913-1973, where courts were required to submit issues "distinctly and separately;" the era from 1973-1988, where the courts had discretion to submit either separate questions or detailed instructions with questions in broad-form; and the era after January 1, 1988, where the courts were required to "submit ... the cause upon broad-form questions" "whenever feasible." *Id*. at 227-35 (quoting Tex. R. Civ. P. 277). Professor Sampson characterized the 1988 amendment to Rule 277 as a "radical" reform. *Id*. at 234. To add further context, Orsinger quoted the following language from Chief Justice Pope's unanimous Opinion for the Court in *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984):

> Prior to 1913 there was such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible. In 1913, to escape from the unsuccessful general charge, the Texas Legislature enacted article 1984a. Submission of Special Issues Act, ch. 59, § 1, 1913 Tex. Gen. Laws 113. The new procedure required the use of special issues that would be submitted separately and distinctly.
>
> In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The Supreme Court in 1973 amended Rule 277, Tex. R. Civ. P., by abolishing the requirement that issues be submitted distinctly and separately. Since that time, broad issues have been repeatedly approved by this court as the correct method for jury submission.
>
> This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.

Given this background, the PJC Family Law Committee suggested a broad-form submission where the grounds for termination were specified in instructions, and the jury was further instructed that termination must be in the best interest of the child, and the jury was asked: "Should the parent–child relationship between PARENT and CHILD be terminated?" This instruction was used in a 1988 Travis County parental-termination case, *TDHS v. E.B.* The mother was terminated by the trial court, but the Austin Court of Appeals reversed, saying that the broad-form submission could have resulted in termination when only five jurors thought the mother had placed the child in a dangerous situation while another five jurors thought the mother had engaged in dangerous conduct, but the minimum required ten jurors did not agree that any one ground for termination existed. Sampson, at 244-45.

The Court of Appeals also said that the jury question invaded the role of the trial court "to determine the ultimate legal question of whether the parent–child relationship should be terminated." *Id.*

A unanimous Supreme Court reversed the Court of Appeals, in an opinion authored by Justice Eugene A. Cook, who was Board Certified in Family Law by the Texas Board of Legal Specialization, and who wrote:

> The issue before this court is whether Rule 277 of the Texas Rules of Civil Procedure means exactly what it says, that is, "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions."

Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647, 648 (Tex. 1990). Justice Cook went on to say:

> The charge in parental rights cases should be the same as in other civil cases. The controlling question in this case was whether the parent–child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under § 15.02 the jury relied on to answer affirmatively the questions posed. All ten jurors agree that the mother had endangered the child by doing one or the other of the things listed in § 15.02. Petitioner argues that the charge, as presented to the jury, violates her due process right by depriving a natural mother of her fundamental right to the care, custody and management of her children. Recognizing her rights does not change the form of submission. The standard for review of the charge is abuse of discretion, and abuse of discretion occurs only when the trial court acts without reference to any guiding principle. Here the trial court tracked the statutory language in the instruction and then asked the controlling question. This simply does not amount to abuse of discretion.
>
> Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer.
>
> Accordingly, we reverse the judgment of the court of appeals and affirm the judgment of the trial court.

Id. at 649. Broad-form submission thus became the rule in parental-termination cases.

The pendulum on broad-form submission began to swing back in the case of *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), where the Supreme Court reversed a trial court for making a broad-form submission based on instructions relating to two theories of liability, one of which was valid under Texas law and the other of which was invalid. The Supreme Court wrote that Rule 277 required broad-form submission "whenever feasible," but that broad-form submission was not feasible when one or more grounds for recovery was invalid or uncertain. *Id.* at 389-90. In the parental termination case of *In the Interest of B.L.D.*, 56 S.W.3d 203 (Tex. App.–Waco 2001), *rev'd on other grounds*, 113 S.W.3d 340 (Tex. 2003), the Court of Appeals held that a broad-form submission that does not guarantee that at least ten jurors agreed on the same ground for termination violates due process of law. *Id.* at 219.

APPENDIX B

Rule 277. Submission to the Jury

In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.

The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

In any cause in which the jury is required to apportion the loss among the parties the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.

In a suit in which termination of the parent–child relationship is requested, the court shall submit separate questions for each parent and each child on (1) each individual ground for termination of the parent–child relationship and (2) whether termination of the parent–child relationship is in the best interest of the child.

The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

Comment to 2017 Change:

The rule has been amended to require a jury question on each individual statutory ground for termination as to each parent and each child without requiring further granulated questions for subparts of an individual ground for termination. The rule has also been amended to require a separate question on best interest of the child as to each parent and each child.

Recommended Pattern Jury Charge

The following format for the submission of each of the grounds pleaded are recommended for submission to the Pattern Jury Charge Family/Probate Committee should the Supreme Court adopt the HB 7 Task Force recommendations:

Question No. 1

Do you find by clear and convincing evidence that MOTHER [and/or] FATHER knowingly placed or knowingly allowed the child[ren] to remain in conditions or surroundings which endangered the physical or emotional well-being of the child[ren]?

Answer by writing "Yes" or "No" as to MOTHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Answer by writing "Yes" or "No" as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 2

Do you find by clear and convincing evidence that MOTHER [and/or] FATHER engaged in conduct or knowingly placed the child[ren] with persons who engaged in conduct that endangered the physical or emotional well-being of the child[ren]?

Answer by writing "Yes" or "No" as to MOTHER.

CHILD 1. Answer: _____ CHILD

2. Answer: _____

Answer by writing "Yes" or "No" as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 3

Do you find by clear and convincing evidence that MOTHER [and/o]r FATHER constructively abandoned the child[ren] who [has/have] been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and (i) the department has made reasonable efforts to return the child[ren] to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child[ren]; and (iii) the parent has demonstrated as inability to provide the child[ren] with a safe environment.

Answer by writing “Yes” or “No” as to MOTHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Answer by writing “Yes” or “No” as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Question No. 4

Do you find by clear and convincing evidence that termination of the parent–child relationship between MOTHER [and/or] FATHER and the child is in the best interests of the child?

Answer by writing “Yes” or “No” as to MOTHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

Answer by writing “Yes” or “No” as to FATHER.

CHILD 1. Answer: _____

CHILD 2. Answer: _____

APPENDIX C

In *E.M.*, the Waco Court of Appeals, consistent with the Supreme Court's decision in *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W. 3d 647, 649 (Tex. 1990), concluded the trial court did not abuse its discretion in refusing Mother's request for a jury charge instruction requiring the agreement of 10 jurors as to any predicate act. *In re E.M.*, 494 S.W.3d 209, 229 (Tex. App.—Waco 2015, pet. denied). In so finding, the Waco Court reiterated and in essence reaffirmed the Supreme Court's reasoning in *E.B.* by quoting the following passage from that case:

> The controlling question in this case was whether the parent–child relationship between the mother and each of her two children should be terminated, not what specific ground or grounds under [the predecessor to family code section 161.001] the jury relied on to answer affirmatively the questions posed. All ten jurors agree that the mother had endangered the child by doing one or the other of the things listed in [the predecessor to section 161.001]. Respondent argues that the charge, as presented to the jury, violates her due process right by depriving a natural mother of her fundamental right to the care, custody and management of her children. Recognizing her rights does not change the form of submission.... Here the trial court tracked the statutory language in the instruction and then asked the controlling question. This simply does not amount to abuse of discretion.

Tex. Dep't of Human Servs. v. E.B., 802 S.W. 3d at 649; *In re E.M.*, 494 S.W.3d 209, 229 (Tex. App.—Waco 2015, pet. denied).

Notably, the decision in *E.M.* was penned by Chief Justice Gray, who was the lone dissenter in the Waco Court of Appeals decision in *In re B.L.D.*, in which Justice Gray had stated:

> [T]he due process argument regarding broad form submissions in a termination case has been considered and summarily rejected by the Supreme Court. *Texas Dept. of Human Services v. E.B.,* 802 S.W.2d 647, 649 (Tex.1990). The Dosseys have not brought themselves within the *Crown Life* exception because they have not shown that any theory submitted to the jury was "an improperly submitted invalid theory." *Crown Life Ins. v. Casteel,* 22 S.W.3d 378, 388 (Tex. 2000). We fly in the face of existing Texas Supreme Court precedent on this issue by holding to the contrary.

In re B.L.D., 56 S.W.3d 203, 221 (Tex. App.—Waco 2001), *rev'd on other grounds*, 113 S.W.3d 340 (Tex. 2003).

The Waco Court of Appeals also held the trial court did not abuse its discretion by submitting a broad-form jury charge on the six termination grounds. *In re C.C.*, No. 10-16-00129-CV, 2016 WL 6808944, at *13 (Tex. App.—Waco Nov. 16, 2016, no pet.). In so concluding, the Waco Court stated that:

> [L]ast year we noted that the Supreme Court has held that a trial court does not abuse its discretion by submitting a broad-form jury charge in a termination case.

In re E.M., 494 S.W.3d 209, 229 (Tex. App.–Waco 2015, pet. denied) (citing *Tex. Dep't Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (op. on reh'g)).

APPENDIX D

Rule 28.4 Accelerated Appeals in Parental Termination and Child Protection Cases

(a) ***Application and Definitions.***

(1) Appeals in parental termination and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Rule 28.4.

(2) In Rule 28.4:

(A) a "parental termination case" means a suit in which termination of the parent–child relationship is at issue.

(B) a "child protection case" means a suit affecting the parent–child relationship filed by a governmental entity for managing conservatorship.

(b) ***Notice of Appeal.***

(1) Service of Notice. In addition to requirements for service of notice of appeal imposed in Rule 25.1(e), the notice of appeal must be served on the court reporter or court reporters responsible for preparing the reporter's record.

(2) Clerk's Duties. In addition to the responsibility imposed on the trial court clerk in Rule 25.1(f), the trial court clerk must immediately send a copy of the notice of appeal to the judge who tried the case.

(c) ***Appellate Record.***

(1) Responsibility for Preparation of the Reporter's Record. In addition to the responsibility imposed on the trial court in Rule 35.3(c), when the reporter's responsibility to prepare, certify and timely file the reporter's record arises under Rule 35.3(b), the trial court must direct the official or deputy reporter to immediately commence the preparation of the reporter's record. The trial court must arrange for a substitute reporter, if necessary.

(2) Extension of Time. The appellate court may grant an extension of time to file a record under Rule 35.3(c); however, the extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances.

(3) Restriction on Preparation Inapplicable. Section 13.003 of the Civil Practice & Remedies Code does not apply to an appeal from a parental termination or child protection case.

(d) ***Remand for New Trial.*** If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days after the mandate is issued by the appellate court.

APPENDIX E

Rule 35. Time to File Record; Responsibility for Filing Record

35.1. Civil Cases. The appellate record must be filed in the appellate court within 60 days after the judgment is signed, except as follows:

(a) if Rule 26.1(a) applies, within 120 days after the judgment is signed;

(b) if Rule 26.1(b) applies, within ~~10~~ 15 days after the notice of appeal is filed; or

(c) if Rule 26.1(c) applies, within 30 days after the notice of appeal is filed.

Phase II Report
Appendix B

HOUSE BILL 7 TASK FORCE ON RULES OF PROCEDURE IN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP FILED BY A GOVERNMENTAL ENTITY (HB7 TASK FORCE)

TO: NINA HESS HSU

FROM: HON. DEAN RUCKER, CHAIR, HB 7 TASK FORCE

RE: BROAD-FORM SUBMISSION OF JURY QUESTIONS IN PARENTAL TERMINATION CASES

DATE: NOVEMBER 14, 2018

In November 2017, after many months of meetings and deliberations, the House Bill 7 Task Force submitted a report to the Supreme Court recommending that the Supreme Court, as an exercise of its rulemaking authority, require granulated charges in parental termination cases and that Texas Rule of Civil Procedure (Tex. R. Civ. P.) 277 should be amended to eliminate the use of broad-form jury questions in termination of parental rights cases. The Court referred the suggested rule change to the Supreme Court Advisory Committee (SCAC) for consideration. The SCAC considered the HB 7 Task Force recommendation on Friday, September 28, 2018.

On behalf of the HB 7 Task Force, I write to inform the Court of our concerns with a portion of the recommendations made by the SCAC

In its November 2017 Report to the Supreme Court, the HB 7 Task Force recommended the following amendment to TRCP 277:

In a suit in which termination of the parent-child relationship is requested, the court shall submit separate questions for each parent and each child on (1) each individual ground for termination of the parent-child relationship and (2) whether termination of the parent-child relationship is in the best interest of the child.

The HB 7 Task Force also crafted a pattern jury charge (PJC) to effectuate the move from broad-form submission to separate questions on the two elements (grounds and best interest) required for termination under Sections 161.001(b)(1) and (2), Texas Family Code.

HB 7 TF example (Texas Family Code Section 161.001(b)(1)(D) or "D" ground)

Do you find by clear and convincing evidence that MOTHER [and/or] FATHER knowingly placed or knowingly allowed the child[ren] to remain in conditions or surroundings which endangered the physical or emotional well-being of the child[ren]?

Answer by writing "Yes" or "No" as to MOTHER
Child 1. Answer ____

Child 2. Answer ____

Answer by writing "Yes" or "No" as to FATHER

Child 1. Answer ____

Child 2. Answer ____

SCAC considered this PJC on September 28, 2018 and rejected it. Instead, the SCAC voted 26-2 to word the PJC related to grounds in Texas Family Code Section 161.001(b)(1) as follows:

SCAC example (Texas Family Code Section 161.001(b)(1)(D) or "D" ground)

As to those children named below, do you find by clear and convincing evidence that Parent 1 or Parent 2 knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endangered the child's physical or emotional well-being.

Answer "Yes" or "No" as to Parent 1 as to each Child

Child 1. Answer ____

Child 2. Answer ____

Answer "Yes" or "No" as to Parent 2 as to each Child

Child 1. Answer ____

Child 2. Answer ____

The HB 7 Task Force agrees with the form of the proposed jury question recommended by the SCAC; however, the Task Force believes that any jury questions on a ground or grounds for termination of parental rights should strictly follow the statutory language for grounds in Section 161.001(b)(1), Texas Family Code.

As to the jury question on Best Interest, the following resulted.

HB 7 TF example (Texas Family Code Section 161.001(b)(2) or "Best Interest")

Do you find by clear and convincing evidence that termination of the parent-child relationship between MOTHER [and/or] FATHER and the child is in the best interest of the child?

Answer by writing "Yes" or "No" as to MOTHER

Child 1. Answer ____

Child 2. Answer ____

Answer by writing "Yes" or "No" as to FATHER

Child 1. Answer ____
Child 2. Answer ____

SCAC considered this PJC on September 28, 2018 and rejected it. Instead, the SCAC voted 26-2 to word the PJC related to best interest as follows:

SCAC example (Texas Family Code Section 161.001(b)(2) or "Best Interest")

If you have answered Question 1 [or 2 or 3, etc] "Yes" as to any Parent or any Child, then answer Question 2 [or 3 or 4, etc., depending on the number of grounds preceding] as to that Parent or Child. Otherwise do not answer Question 2.

Question 2:

As to those children named below, do you find by clear and convincing evidence that terminating the parent-child relationship is in the child's best interest and that the parent–child relationship with Parent 1 or Parent 2 should be terminated?

Answer "Yes" or "No" as to Parent 1 as to each Child

Child 1. Answer ____

Child 2. Answer ____

Answer "Yes" or "No" as to Parent 2 as to each Child

Child 1. Answer ____

Child 2. Answer ____

While the Task Force agrees with SCAC's recommendation predicating the answer to Question 2 (best interest) on whether the jury has answered Question 1 (grounds) in the affirmative, the Task

Force has concerns about the SCAC's addition of the language "and that the parent-child relationship with Parent 1 or Parent 2 ***should be terminated***?" (emphasis supplied)

The inclusion of the additional language into the best interest question as suggested by SCAC adds a jury finding that is not required by statute and may lead to confusion. If that language remains in the best interest jury question as recommended by SCAC, an enterprising attorney could and likely will argue to the jury that although the jury may determine that there is clear and convincing evidence that a ground or grounds for termination exists, and that there is clear and convincing evidence that termination is in the child's best interest, but that the jury could still answer "no" as to whether the parent–child relationship *should be terminated*, especially since the additional language is *"and that the parent–child relationship with Parent 1 or Parent 2 should be terminated"* is phrased in the conjunctive.

Further, the matter of whether the parent-child relationship "should be terminated" is subsumed in the jury question on best interest of the child. Any jury charge on termination will contain a definition of "best interest" and will set out the factors the jury should consider when determining whether the termination of parental rights is in a child's best interest. The jury charge will set out the relevant factors set out in the Texas Supreme Court's seminal decision in *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976). There is no need to risk confusing a jury by asking the jury whether the parent-child relationship "should be terminated." Both the Family Code and caselaw clearly inform the bench and bar that only two elements are required to support a termination of parental rights, those being (1) a finding of a ground for termination of parental rights, and (2) a finding that the termination of parent rights is in the child's best interest. Further, if the SCAC recommendation to include the "should be terminated" language as a finding in a termination case, does this third finding require clear and convincing evidence or will it be subject to some other standard of proof? The SCAC's reasoning for including the "should be terminated" stems from the discretionary word "may" rather than "shall" in Texas Family Code Section 161.001(b)(1), which provides that a court *may* order termination of the parent-child relationship if the court finds by clear and convincing evidence on grounds and best interest. The SCAC has expressed a concern that even if a jury finds grounds for termination exist and that the termination is in the best interest of the child, the trial court has the discretion under Section 161.001(b)(1) to disregard the jury's answers supporting termination of parental rights. However, it is unknown how often a judge enters a judgment notwithstanding the verdict when a jury finds grounds and best interest by clear and convincing evidence.

Rather than adopting the SCAC's solution to this issue by asking a jury whether termination of the parent-child relationship "should be granted" as a part of the best interest question, the Task Force suggests that a better way to address the issue is by amending the Texas Family Code to ensure that a court may not contravene a jury verdict in a parental termination case.

The HB 7 Task Force will be submitting a final report on the additional issues referred by the Court. The Task Force's concerns expressed in this memorandum will be contained in that report.

cc: Jaclyn Daumerie

Martha Newton

Phase II Report
Appendix C

Rule 28. Accelerated, Agreed, and Permissive Appeals in Civil Cases

28.4. Accelerated Appeals in Parental Termination and Child Protection Cases

(a) *Application and Definitions.*

(1) Appeals in parental termination and child protection cases are governed by the rules of appellate procedure for accelerated appeals, except as otherwise provided in Rule 28.4.

(2) In Rule 28.4:

(A) a "parental termination case" means a suit in which termination of the parent-child relationship is at issue.

(B) a "child protection case" means a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship.

(b) *Appellate Record.*

(1) Responsibility for Preparation of Reporter's Record. In addition to the responsibility imposed on the trial court in Rule 35.3(c), when the reporter's responsibility to prepare, certify and timely file the reporter's record arises under Rule 35.3(b), the trial court must direct the official or deputy reporter to immediately commence the preparation of the reporter's record. The trial court must arrange for a substitute reporter, if necessary.

(2) Extension of Time. The appellate court may grant an extension of time to file a record under Rule 35.3(c); however, the extension or extensions granted must not exceed 30 days cumulatively, absent extraordinary circumstances.

(3) Restriction on Preparation Inapplicable. Section 13.003 of the Civil Practice & Remedies Code does not apply to an appeal from a parental termination or child protection case.

(c) <u>*Certification by Appointed Counsel and Motion to Show Authority*. A notice of appeal filed by appointed counsel must state that the attorney consulted with the appellant and the appellant has directed the attorney to pursue the appeal. A party, the district clerk, or a court reporter may, by written motion stating a belief that the appeal is being prosecuted without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least three days before the hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to file the notice of appeal. Upon failure to show such authority, the court shall strike the notice of appeal. The motion shall be heard and determined within ten days of service of the motion, and all appellate deadlines shall be suspended pending the court's ruling. The court must rule on the motion</u>

to show authority not later than the third day following the date of the hearing on the motion, and if the court does not timely rule, the motion is considered to have been denied by operation of law.

(d) *Remand for Evidentiary Hearing*. For good cause shown by written motion filed no later than 20 days after the later of the date the clerk's record was filed or the date the reporter's record was filed, the appellate court may order a remand for the limited purpose of holding an evidentiary hearing concerning an allegation of ineffective assistance of counsel. The appellate court must rule on the motion for remand within three days; otherwise it will be denied by operation of law. The trial court shall begin the evidentiary hearing no later than the seventh day after the abatement order. The hearing shall be recorded by a court reporter and the trial court shall make findings of fact as to whether any counsel rendered deficient performance on behalf of appellant and whether appellant was prejudiced as a result. No later than 20 days from the date of the abatement order the court reporter shall file a supplemental reporter's record of the hearing and the district clerk shall file a supplemental clerk's record, including the trial court's findings of fact, and the appeal shall be reinstated. The deadline in Rule 6.2(a) of the Rules of Judicial Administration shall be tolled for no more than 20 days pending an abatement ordered under this rule.

(e) *Remand for New Trial.* If the judgment of the appellate court reverses and remands a parental termination or child protection case for a new trial, the judgment must instruct the trial court to commence the new trial no later than 180 days after the mandate is issued by the appellate court.

(f) *Frivolous Parental Termination and Child Protection Appeals*. An appointed attorney representing a party appealing from a final order in a parental termination case or child protection case should not move to withdraw based upon a determination that the appeal is frivolous.[11] Instead, the attorney must:

(1) certify that the attorney has determined the appeal to be frivolous because there are no appellate issues arguable on their merits;[12]

(2) contemporaneously file a brief that:

(A) demonstrates the attorney has mastered the record and researched the case adequately;

(B) explains the attorney's determination that there are no nonfrivolous grounds for appeal; and

(C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and

(D) in a parental termination case, addresses all issues included in the Parental Termination Appeal Checklist approved by the Supreme Court;

[11] *In re P.M.*, 520 S.W.3d 24, 26 (Tex. 2016); *In re A.M.*, 495 S.W.3d 573, 582-83 & n.2 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

[12] *In re D.A.S.*, 973 S.W.2d 296, 297 (Tex. 1998) (citing *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396 (1967)).

(3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and

(4) contemporaneously file a copy of the written notice provided to the client in satisfaction of Rule 28.4(d)(3).

(g) *Pro Se Response to Certification of Frivolous Appeal*. A party appealing from a final order in a parental termination case or child protection case whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b). An appellate court may abate the appeal for appointment of a new lawyer to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

(h) *Court of Appeals Disposition of Frivolous Parental Termination and Child Protection Appeals*. In addition to the requirements of Rule 47, upon determination that an appeal in a parental termination case or child protection case is frivolous because there are no appellate issues arguable on their merits, a court of appeals should affirm the final order, subject to the requirements that the attorney still must:

(1) within five days after the opinion is handed down, send the client a copy of the opinion and judgment;

(2) inform the client that the attorney and the court of appeals both determined the appeal is frivolous because there are no appellate issues arguable on their merits;

(3) advise the client that the attorney cannot recommend that further review of a frivolous appeal;

(4) notify the client of the right to file a petition for review under Rule 53; and

(5) file a petition for review if actually requested by the client. [13]

[13] *Cf*. TEX. R. APP. P. 48.4 ("In criminal cases, the attorney representing the defendant on appeal shall, within five days after the opinion is handed down, send his client a copy of the opinion and judgment, along with notification of the defendant's right to file a pro se petition for discretionary review under Rule 68. This notification shall be sent certified mail, return receipt requested, to the defendant at his last known address. The attorney shall also send the court of appeals a letter certifying his compliance with this rule and attaching a copy of the return receipt within the time for filing a motion for rehearing. The court of appeals shall file this letter in its record of the appeal.").

Phase II Report
Appendix D

Rule 53. Petition for Review

53.2. Contents of Petition

The petition for review must, under appropriate headings and in the order here indicated, contain the following items:

(a) *Identity of Parties and Counsel*. The petition must give a complete list of all parties to the trial court's final judgment, and the names and addresses of all trial and appellate counsel.

(b) *Table of Contents*. The petition must have a table of contents with references to the pages of the petition. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of Authorities*. The petition must have an index of authorities arranged alphabetically and indicating the pages of the petition where the authorities are cited.

(d) *Statement of the Case*. The petition must contain a statement of the case that should seldom exceed one page and should not discuss the facts. The statement must contain the following:

(1) a concise description of the nature of the case (e.g., whether it is a suit for damages, on a note, or in trespass to try title);

(2) the name of the judge who signed the order or judgment appealed from;

(3) the designation of the trial court and the county in which it is located;

(4) the disposition of the case by the trial court;

(5) the parties in the court of appeals;

(6) the district of the court of appeals;

(7) the names of the justices who participated in the decision in the court of appeals, the author of the opinion for the court, and the author of any separate opinion;

(8) the citation for the court of appeals' opinion; and

(9) the disposition of the case by the court of appeals, including the disposition of any motions for rehearing or en banc reconsideration, and whether any motions for rehearing or en banc reconsideration are pending in the court of appeals at the time the petition for review is filed.

(e) *Statement of Jurisdiction*. The petition must state, without argument, the basis of the Court's jurisdiction.

(f) *Issues Presented*. The petition must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included. If the matter complained of originated in the trial court, it

should have been preserved for appellate review in the trial court and assigned as error in the court of appeals.

(g) *Statement of Facts*. The petition must affirm that the court of appeals correctly stated the nature of the case, except in any particulars pointed out. The petition must state concisely and without argument the facts and procedural background pertinent to the issues or points presented. The statement must be supported by record references.

(h) *Summary of the Argument*. The petition must contain a succinct, clear, and accurate statement of the arguments made in the body of the petition. This summary must not merely repeat the issues or points presented for review.

(i) *Argument*. The petition must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. The argument need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court. The argument should state the reasons why the Supreme Court should exercise jurisdiction to hear the case with specific reference to the factors listed in Rule 56.1(a). The petition need not quote at length from a matter included in the appendix; a reference to the appendix is sufficient. The Court will consider the court of appeals' opinion along with the petition, so statements in that opinion need not be repeated.

(j) *Prayer*. The petition must contain a short conclusion that clearly states the nature of the relief sought.

(k) *Appendix*.

(1) Necessary Contents. Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the judgment or other appealable order of the trial court from which relief in the court of appeals was sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any;

(C) the opinion and judgment of the court of appeals; and

(D) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based (excluding case law), and the text of any contract or other document that is central to the argument.

(2) Optional Contents. The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit

was based, pleadings, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the petition.

(l) *Certification by Appointed Counsel*. In a case in which the petitioner has a statutory right to counsel for purposes of seeking review by the Supreme Court, a petition filed by appointed counsel must state that the attorney consulted with the petitioner and the petitioner has directed the attorney to file a petition for review.

(m) *Review of Appeal Determined to be Frivolous by the Court of Appeals*. To the extent appointed counsel informed the court of appeals that, after thoroughly reviewing the record, counsel concluded that there are no non-frivolous grounds for appeal, and the court of appeals likewise determined the appeal to be frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.

Phase II Report
Appendix E

PARENTAL TERMINATION BRIEF CHECKLIST

You are strongly encouraged to consult your client, consult trial counsel, and complete and append this checklist to your *Anders* brief to ensure compliance with the appellate rules and to assist the court in conducting its examination of the record. Provide citations to the record and to relevant authority, where appropriate, in the right-hand column to demonstrate compliance by the trial court or parties.

Pretrial	
Service of process	
Any adverse pretrial rulings	
Pretrial effectiveness of counsel	
Did counsel's representation reflect satisfaction of basic obligations to the client, as described in the American Bar Association's *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*?[14]	
Did counsel's representation reflect an appropriate attorney-client relationship?[15]	
Did counsel's representation reflect an appropriate pretrial investigation?[16]	
Did counsel's representation reflect appropriate utilization of informal and formal discovery procedures?[17]	
Did counsel's pretrial representation reflect appropriate preparation?[18]	
Trial	
Timeliness of proceeding under Family Code § 263.401	
Jury selection, if applicable	
Any adverse rulings during trial on objections or motions	
Sufficiency of the evidence, including a recitation of applicable legal elements and evaluation of evidence adduced at trial, including any evidence suggesting that termination would not be in the best interest of the child	
Jury instructions, if applicable	
Effectiveness of counsel at trial	
Did counsel's representation at trial reflect appropriate preparation, including the identification, location, and preparation of all witnesses, as well as adequate cross-examination of adverse witnesses?[19]	
Did counsel object to inadmissible evidence and otherwise take appropriate steps to preserve error?	

[14] AM. BAR ASS'N, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, at 8-11, https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf (basic obligations of parent's attorney) [hereinafter, *ABA Standards*]; *see also* TEX. FAM. CODE § 107.0131(a)(1)(I).
[15] *ABA Standards*, at 11-19 (relationship with the client).
[16] *ABA Standards*, at 19-20 (investigation).
[17] *ABA Standards*, at 20-21 (informal and formal discovery).
[18] *ABA Standards*, at 21-29 (court preparation, hearings).
[19] *ABA Standards*, at 21-29 (court preparation, hearings).

Post-trial	
Any adverse rulings on post-trial motions	
Post-trial effectiveness of counsel	
Was the client actually represented by counsel during the period when a motion for new trial could be filed?	
Did counsel utilize appropriate post-trial procedures, including the utilization of a motion for new trial as necessary to supplement the record and preserve error?[20]	
In the Supreme Court of Texas: Any issues identified by appellant in pro se filings responding to a previous certification that the appeal is frivolous	

[20] *ABA Standards*, at 29-32 (post hearings/appeals).

INSTRUCTIONS FOR USE OF TEMPLATES

The sample opinions are designed to provide guidance and are by no means comprehensive for use in all parental termination appeals.

These sample opinions are for use only when the complaints on appeal are the legal and/or factual sufficiency of the evidence to support a ground(s) for termination and/or the best interest finding.

Use only the footnotes applicable to the issues in the appeal.

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

Opinion by: _____, Justice

Sitting: _____, Justice
_____, Justice
_____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.[1] Father/Mother does not challenge the sufficiency of the evidence supporting the trial court's/jury's statutory predicate finding(s). Instead, Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that terminating his/her parental rights is in his/her child's/children's best interests. We affirm the trial court's order.

BACKGROUND[2]

[Recitation of basic facts: Department received report, filed petition, child/children removed, statutory ground(s) pleaded by Department . . . .] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENCE REQUIRED, STANDARDS OF REVIEW

The evidentiary standards[3] the Department must meet and the statutory grounds[4] the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal[5] and factual[6] sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. Father's/Mother's Course of Parental Conduct

The trial court/jury found by clear and convincing evidence that [statutory ground(s)]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1) ([list grounds paragraphs *e.g.*, (N), (O)]). On appeal, Father/Mother does not challenge this/these predicate statutory ground/s finding/s.

B. Best Interests of the Child/Children

Instead, Father/Mother challenges the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child/children's best interests. *See id.* § 161.001(b)(2). The non-exclusive *Holley* factors[7] for assessing best interests of children are well known. Applying each standard of review and the applicable factors, we examine the evidence pertaining to the best interests of the child/children.

C. Evidence of Best Interests of the Child/Children

A bench/jury trial was held on [date/s]. The trial court/jury heard testimony from [list of witnesses], and it received recommendations from the children's attorney ad litem. The trial court/jury heard testimony pertaining to the child's/children's best interests, and the trial court/jury

was the "sole judge[] of the credibility of the witnesses and the weight to give their testimony." *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); *In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Father/Mother argues that the evidence that parental termination was in the child's/children's best interest is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard testimony that [key evidence of *Holley* factors, (and statutory factors, if appropriate) with cites after each key fact or facts; e.g., desires of the child, present and future emotional and physical needs of the child, present or future emotional and physical danger to the child, child's age and physical and mental vulnerabilities, etc.] *Holley*, 544 S.W.2d at 372 (factors (_), (_), (_)); *see also* TEX. FAM. CODE ANN. § 263.307(b)(_), (_), (_).

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the evidence is legally and factually sufficient to demonstrate that terminating Father's/Mother's parental rights to his/her child/children was in the child/children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *Holley*, 544 S.W.2d at 372.

CONCLUSION

Because (1) Father/Mother does not challenge the trial court's/jury's finding, by clear and convincing evidence, of a predicate ground for termination and (2) the evidence is legally and factually sufficient to support the trial court's/jury's finding that termination of Father's/Mother's parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

[1] To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

[2] Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

[3] Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

[4] Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;
(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;
(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
(J) been the major cause of:
  (i) the failure of the child to be enrolled in school as required by the Education Code; or
  (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:

(i) Section 19.02 (murder);
(ii) Section 19.03 (capital murder);
(iii) Section 19.04 (manslaughter);
(iv) Section 21.11 (indecency with a child);
(v) Section 22.01 (assault);
(vi) Section 22.011 (sexual assault);
(vii) Section 22.02 (aggravated assault);
(viii) Section 22.021 (aggravated sexual assault);
(ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
(x) Section 22.041 (abandoning or endangering child);
(xi) Section 25.02 (prohibited sexual conduct);
(xii) Section 43.25 (sexual performance by a child);
(xiii) Section 43.26 (possession or promotion of child pornography);
(xiv) Section 21.02 (continuous sexual abuse of young child or children);
(xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
(xvi) Section 43.05(a)(2) (compelling prostitution);

(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;

(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
(i) the department has made reasonable efforts to return the child to the parent;
(ii) the parent has not regularly visited or maintained significant contact with the child; and
(iii) the parent has demonstrated an inability to provide the child with a safe environment;

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
(i) failed to complete a court-ordered substance abuse treatment program; or
(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(Q) knowingly engaged in criminal conduct that has resulted in the parent's:
(i) conviction of an offense; and
(ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;

(R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;

(T) been convicted of:
(i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
(ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
(iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that

contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or

(iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or

(U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code.

Id. § 161.001(b)(1).

[5] Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to "'look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'" *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). "[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id*. If the court "determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true," the evidence is legally sufficient. *Id*.

[6] Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if "a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266.

[7] *Holley* Factors. The Supreme Court of Texas identified the following as factors to consider in determining the best interest of a child in its landmark case *Holley v. Adams*:

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the best interest of the child;
(F) the plans for the child by these individuals or by the agency seeking custody;
(G) the stability of the home or proposed placement;
(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted); *accord In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors); *see also* TEX. FAM. CODE ANN. § 263.307 (West 2014) (articulating best-interest factors to "be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment").

Fourth Court of Appeals
San Antonio, Texas

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

BEFORE JUSTICE _____, JUSTICE _____, AND JUSTICE _____

In accordance with this Court's opinion of this date, the trial court's order terminating ___'s parental rights to A.B.C. [and D.E.F.] is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____
_____, Justice

created on: October 7, 2018

Phase II Report, Appendix F
Template B

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

Opinion by: _____, Justice

Sitting: _____, Justice
_____, Justice
_____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.[1] Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that his/her course of conduct met a statutory ground for termination. Because (1) the evidence was sufficient to support the trial court's/jury's finding of a predicate ground/predicate grounds for terminating Father's/Mother's parental rights, and (2) Father/Mother does not challenge the finding that terminating his/her parental rights was in the child's/children's best interest, we affirm the trial court's order.

BACKGROUND[2]

[Recitation of basic facts: Department received report, filed petition, child/children removed. Father/Mother reoffended, did not complete service plan, or other ground.] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENTIARY STANDARDS, STATUTORY GROUNDS, STANDARDS OF REVIEW

The evidentiary standards[3] the Department must meet and the statutory grounds[4] the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal[5] and factual[6] sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. First Statutory Ground Finding

The trial court/jury found by clear and convincing evidence that [first statutory ground]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_).

Father/Mother argues that the evidence to support this finding is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard evidence that . . . .[brief recitation of facts pertaining to and supporting the first statutory ground]

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the trial court/jury could have formed a firm belief or conviction that [first statutory ground] . *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_); [Texas Supreme Court case cite].

B. Second Statutory Ground Finding

[Repeat the same format from first ground, or, state that one ground is sufficient. [cite]]

C. Best Interests of the Child/Children

Father/Mother does not challenge the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child's/children's best interests. *See id.* § 161.001(b)(2).

CONCLUSION

Because (1) the evidence was legally and factually sufficient to support the trial court's/jury's finding by clear and convincing evidence of a predicate ground/predicate grounds for termination and (2) Father/Mother does not challenge the finding that termination of his/her parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

[1] To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

[2] Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

[3] Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

[4] Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;
(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
(J) been the major cause of:
  (i) the failure of the child to be enrolled in school as required by the Education Code; or
  (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
  (i) Section 19.02 (murder);
  (ii) Section 19.03 (capital murder);
  (iii) Section 19.04 (manslaughter);
  (iv) Section 21.11 (indecency with a child);
  (v) Section 22.01 (assault);
  (vi) Section 22.011 (sexual assault);
  (vii) Section 22.02 (aggravated assault);
  (viii) Section 22.021 (aggravated sexual assault);
  (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
  (x) Section 22.041 (abandoning or endangering child);
  (xi) Section 25.02 (prohibited sexual conduct);
  (xii) Section 43.25 (sexual performance by a child);
  (xiii) Section 43.26 (possession or promotion of child pornography);
  (xiv) Section 21.02 (continuous sexual abuse of young child or children);
  (xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
  (xvi) Section 43.05(a)(2) (compelling prostitution);
(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
  (i) the department has made reasonable efforts to return the child to the parent;

(ii) the parent has not regularly visited or maintained significant contact with the child; and
(iii) the parent has demonstrated an inability to provide the child with a safe environment;

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
(i) failed to complete a court-ordered substance abuse treatment program; or
(ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(Q) knowingly engaged in criminal conduct that has resulted in the parent's:
(i) conviction of an offense; and
(ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;

(R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;

(T) been convicted of:
(i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
(ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
(iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or
(iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or

(U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code;

Id. § 161.001(b)(1).

[5] Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to "'look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'" *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). "[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id*. If the court "'determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,'" the evidence is legally sufficient. *Id*.

[6] Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if "a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. "If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266.

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. and [D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

BEFORE JUSTICE _____, JUSTICE _____, AND JUSTICE _____

In accordance with this Court's opinion of this date, the trial court's order terminating ___'s parental rights to A.B.C. [and D.E.F]. is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____
_____, Justice

Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

Opinion by: _____, Justice

Sitting: _____, Justice
_____, Justice
_____, Justice

Delivered and Filed:

AFFIRMED

Appellant Father/Mother appeals the trial court's order terminating his/her parental rights to his/her child/children _____.[1] Father/Mother asserts the evidence is neither legally nor factually sufficient for the trial court/jury to have found by clear and convincing evidence that his/her course of conduct met a statutory ground for termination or that terminating his/her parental rights is in his/her child/children's best interests. Because the evidence was legally and factually sufficient to support the trial court's/jury's statutory ground(s) and best interest findings, we affirm the trial court's order.

BACKGROUND[2]

[Recitation of basic facts: Department received report, filed petition, child/children removed. Father/Mother reoffended, did not complete service plan, or other ground.] On _____, after a bench/jury trial, the trial court terminated Father's/Mother's parental rights. Father/Mother appeals.

EVIDENTIARY STANDARDS, STATUTORY GROUNDS, STANDARDS OF REVIEW

The evidentiary standards[3] the Department must meet and the statutory grounds[4] the trial court/jury must find to terminate a parent's rights to a child are well known, as are the applicable legal[5] and factual[6] sufficiency standards of review. We apply them here.

BASES FOR TERMINATION

A. First Statutory Ground Finding

The trial court/jury found by clear and convincing evidence that [first statutory ground]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_).

Father/Mother argues that the evidence to support this finding is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard evidence that _____ [brief recitation of facts pertaining to and supporting first statutory ground]

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the trial court/jury could have formed a firm belief or conviction that [first statutory ground]. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(_); [Texas Supreme Court case cite].

B. Second Statutory Ground Finding

[Repeat the same format from first ground, or, state that one ground is sufficient. [cite]]

C. Best Interests of the Child/Children

Father/Mother also challenges the sufficiency of the evidence supporting the trial court's/jury's finding that terminating his/her parental rights is in his/her child's/children's best interests. *See id.* § 161.001(b)(2). The non-exclusive *Holley* factors[7] for assessing best interests of children are well known. Applying each standard of review and the applicable factors, we examine the evidence pertaining to the best interests of the child/children.

D. Evidence of Best Interests of the Child/Children

A bench/jury trial was held on [date/s]. The trial court/jury heard testimony from [list of witnesses], and it received recommendations from the children's attorney ad litem. The trial court/jury heard testimony pertaining to the child's/children's best interests, and the trial court/jury was the "sole judge[] of the credibility of the witnesses and the weight to give their testimony." *See City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005); In re *H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006).

Father/Mother argues that the evidence that parental termination was in the child's/children's best interest is legally and factually insufficient because _____.

The Department responds _____.

The trial court/jury heard testimony that _____.

[key evidence that implicates *Holley*, (and statutory factors, if appropriate) with cites after each key fact or facts; e.g., desires of the child, present and future emotional and physical needs of the child, present or future emotional and physical danger to the child, child's age and physical and mental vulnerabilities, etc.] *Holley*, 544 S.W.2d at 372 (factors (_), (_), (_)); *see also* TEX. FAM. CODE ANN. § 263.307(b)(_), (_), (_).

Considering all the evidence in the light most favorable to the trial court's/jury's findings, we conclude the evidence is legally and factually sufficient to demonstrate that terminating

Father's/Mother's parental rights to his/her child/children was in the child/children's best interests. *See* TEX. FAM. CODE ANN. § 161.001(b)(2); *Holley*, 544 S.W.2d at 372.

CONCLUSION

Because the evidence was legally and factually sufficient to support the trial court's/jury's finding, by clear and convincing evidence, (1) of a predicate ground/predicate grounds for termination and (2) that termination of Father's/Mother's parental rights is in the best interest of the child/each child, we affirm the trial court's order.

_____, Justice

[1] To protect the minors' identities, we refer to the parent/parents and the child/children using aliases/initials. *See* TEX. R. APP. P. 9.8.

[2] Because Father/Mother is the only appellant, we limit our recitation of the facts to those that pertain to Father/Mother and the child/children.

[3] Clear and Convincing Evidence. If the Department moves to terminate a parent's rights to a child, the Department must prove by clear and convincing evidence that the parent's acts or omissions met one or more of the grounds for involuntary termination listed in section 161.001(b)(1) of the Family Code and that terminating the parent's rights is in the best interest of the child. TEX. FAM. CODE ANN. § 161.001(b) (West Supp. 2017); *In re J.F.C.*, 96 S.W.3d 256, 261 (Tex. 2002). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. FAM. CODE ANN. § 101.007 (West 2014). The same evidence used to prove the parent's acts or omissions under section 161.001(b)(1) may be used in determining the best interest of the child under section 161.001(b)(2). *In re C.H.*, 89 S.W.3d 17, 28 (Tex. 2002); *In re D.M.*, 452 S.W.3d 462, 471 (Tex. App.—San Antonio 2014, no pet.). The trial court may consider a parent's past deliberate conduct to infer future conduct in a similar situation. *D.M.*, 452 S.W.3d at 472.

[4] Statutory Grounds for Termination. The Family Code authorizes a court to terminate the parent-child relationship if, inter alia, it finds by clear and convincing evidence that the parent's acts or omissions met certain criteria. *See* TEX. FAM. CODE § 161.001(b). Here, the trial court/jury found Father's/Mother's conduct met the following criteria or ground [delete inapplicable grounds]:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;
(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months;
(C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;
(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition;
(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;
(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;
(I) contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261;
(J) been the major cause of:
  (i) the failure of the child to be enrolled in school as required by the Education Code; or
  (ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;
(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections, or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:
  (i) Section 19.02 (murder);
  (ii) Section 19.03 (capital murder);
  (iii) Section 19.04 (manslaughter);
  (iv) Section 21.11 (indecency with a child);
  (v) Section 22.01 (assault);
  (vi) Section 22.011 (sexual assault);
  (vii) Section 22.02 (aggravated assault);
  (viii) Section 22.021 (aggravated sexual assault);
  (ix) Section 22.04 (injury to a child, elderly individual, or disabled individual);
  (x) Section 22.041 (abandoning or endangering child);
  (xi) Section 25.02 (prohibited sexual conduct);
  (xii) Section 43.25 (sexual performance by a child);
  (xiii) Section 43.26 (possession or promotion of child pornography);
  (xiv) Section 21.02 (continuous sexual abuse of young child or children);
  (xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and
  (xvi) Section 43.05(a)(2) (compelling prostitution);
(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
(N) constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and:
  (i) the department has made reasonable efforts to return the child to the parent;
  (ii) the parent has not regularly visited or maintained significant contact with the child; and
  (iii) the parent has demonstrated an inability to provide the child with a safe environment;
(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for

not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child, and:
  (i) failed to complete a court-ordered substance abuse treatment program; or
  (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance;

(Q) knowingly engaged in criminal conduct that has resulted in the parent's:
  (i) conviction of an offense; and

(R) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition; been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription;

(S) voluntarily delivered the child to a designated emergency infant care provider under Section 262.302 without expressing an intent to return for the child;

(T) been convicted of:
  (i) the murder of the other parent of the child under Section 19.02 or 19.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 19.02 or 19.03, Penal Code;
  (ii) criminal attempt under Section 15.01, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.01, Penal Code, to commit the offense described by Subparagraph (i);
  (iii) criminal solicitation under Section 15.03, Penal Code, or under a law of another state, federal law, the law of a foreign country, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 15.03, Penal Code, of the offense described by Subparagraph (i); or
  (iv) the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code; or

(U) been placed on community supervision, including deferred adjudication community supervision, or another functionally equivalent form of community supervision or probation, for being criminally responsible for the sexual assault of the other parent of the child under Section 22.011 or 22.021, Penal Code, or under a law of another state, federal law, or the Uniform Code of Military Justice that contains elements that are substantially similar to the elements of an offense under Section 22.011 or 22.021, Penal Code;

Id. § 161.001(b)(1).

[5] Legal Sufficiency. When a clear and convincing evidence standard applies, a legal sufficiency review requires a court to "'look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.'" *In re J.L.*, 163 S.W.3d 79, 85 (Tex. 2005) (quoting *J.F.C.*, 96 S.W.3d at 266). "[L]ooking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, [and the] court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id*. If the court "'determines that [a] reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true,'" the evidence is legally sufficient. *Id*.

[6] Factual Sufficiency. Under a clear and convincing standard, evidence is factually sufficient if "a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." *C.H.*, 89 S.W.3d at 25; *accord In re H.R.M.*, 209 S.W.3d 105, 108 (Tex. 2006). We must consider "whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding." *J.F.C.*, 96 S.W.3d at 266; *accord H.R.M.*, 209 S.W.3d at 108. "If, in light of the entire record, the disputed evidence that a reasonable

factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient." *J.F.C.*, 96 S.W.3d at 266.

[7] *Holley* Factors. The Supreme Court of Texas identified the following as factors to consider in determining the best interest of a child in its landmark case *Holley v. Adams*:

(A) the desires of the child;
(B) the emotional and physical needs of the child now and in the future;
(C) the emotional and physical danger to the child now and in the future;
(D) the parental abilities of the individuals seeking custody;
(E) the programs available to assist these individuals to promote the best interest of the child;
(F) the plans for the child by these individuals or by the agency seeking custody;
(G) the stability of the home or proposed placement;
(H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
(I) any excuse for the acts or omissions of the parent.

Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976) (footnotes omitted); *accord In re E.N.C.*, 384 S.W.3d 796, 807 (Tex. 2012) (reciting the *Holley* factors) ; *see also* TEX. FAM. CODE ANN. § 263.307 (West 2014) (articulating best-interest factors to "be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment").

Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. __-__-_____-CV

IN THE INTEREST OF A.B.C. [and D.E.F.], Child/Children

From the _____ Judicial District Court, _____ County, Texas
Trial Court No. _____
Honorable _____, Judge Presiding

BEFORE JUSTICE _____, JUSTICE _____, AND JUSTICE _____

In accordance with this Court's opinion of this date, the trial court's order terminating ___'s parental rights to A.B.C. [and D.E.F.] is AFFIRMED. Appellant is indigent; no costs are taxed in this appeal.

SIGNED

_____
_____, Justice

Tab S

MEMORANDUM

TO: **Supreme Court Advisory Committee**

FROM: **Appellate Rules Subcommittee**

RE: **Appeals in Parental Termination Cases**

DATE: **September 28, 2022**

In response to HB 7, passed by the 85th Legislature, the Texas Supreme Court appointed the HB 7 Task Force to draft the rules required by the statute and to make any other recommendations for expediting and improving the trial and appeal of cases governed by Family Code Chapter 264. On November 27, 2017, the HB 7 Task Force submitted a report and recommendations to the Court ("Phase I Report"). The Committee studied the Phase I Report and made recommendations to the Court. Subsequently, on December 31, 2018, the Task Force submitted a second report and recommendations to the Court ("Phase II Report"). The HB 7 Phase II Report recommends a rule standardizing procedures for frivolous appeals in this context and opinion templates for use in parental termination cases. The Court's referral letter asks the Appellate Rules Subcommittee to review these HB 7 Task Force recommendations.

The HB 7 Task Force proposed the addition of new subparts to Rule 28.4. At the May 27, 2022 meeting, the Appellate Rules Subcommittee submitted to the full Committee comments and proposed revisions to the proposed rule. The following votes were taken.

	Question	Result	Vote Count
1.	Do we want a rule on briefs in frivolous appeals?	Yes	17-1
2.	Should it apply to parental termination and child custody cases or should it be limited to suits filed by a governmental entity in which terminate the parent-child relationship or appointment of conservatorship for the child is requested?	Narrow	10-4
3.	Should it apply only to appointed counsel or to all counsel?	Appointed	consensus
4.	Should the term frivolous be further defined?	No	consensus
5.	Do we want a parental termination brief checklist?	No	consensus
6a.	Do we want the CA, if the parent identifies a colorable issue, to have discretion to make existing attorney brief that issue or decide to have new counsel appointed?	Yes	17-1
6b.	Should RJA 6.2 be tolled for any abatement?	No	14-1
7.	Do we want opinion templates?	No	21-1

Based on these votes, the Appellate Rules Subcommittee recommends adoption of the following revised version of the rule to address frivolous appeals in this context.

28.4 ACCELERATED APPEALS IN PARENTAL TERMINATION AND CHILD PROTECTION CASES

(__) *Appeal Deemed Frivolous.* In an appeal from a final order in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship, an attorney appointed to represent a party appealing from a final order should not move to withdraw based upon a determination that the appeal is frivolous. Instead, the attorney must:

(1) certify that the attorney has determined the appeal to be frivolous; and

(2) contemporaneously file a brief that:

(A) demonstrates the attorney has adequately reviewed the record and researched the case; and

(B) explains the basis for the attorney's determination that the appeal is frivolous; and

(C) provides citations to the record to facilitate appellate review and to assist the client in exercising the right to file a pro se brief; and

(3) notify the client in writing of the right to access the appellate record and provide the client with a form motion for pro se access to the appellate record; and

(4) contemporaneously file a copy of the written notice provided to the client.

(__) *Pro Se Response to Certification of Appeal Deemed Frivolous*. A party appealing from a final order in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a governmental entity for managing conservatorship whose attorney has certified the appeal to be frivolous may file a pro se response identifying nonfrivolous grounds for appeal. Any such response must be filed on the schedule applicable to an appellee's brief under Rule 38.6(b). An appellate court may abate the appeal for existing counsel to provide additional briefing or for appointment of a new lawyer to evaluate a nonfrivolous ground for appeal that has not been adequately addressed by counsel.

(__) *Court of Appeals Disposition of Appeal Deemed Frivolous*. In addition to the requirements of Rule 47, upon determination that an appeal in a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by

a governmental entity for managing conservatorship is frivolous, a court of appeals should affirm the final order subject to the requirements that the attorney still must:

(1) within five days after the opinion is issued, send the client a copy of the opinion and judgment and a notification that:

(A) the attorney and the court of appeals both determined the appeal is frivolous;

(B) the attorney cannot recommend further review of a frivolous appeal;

(C) the client has the right to file a petition for review under Rule 53; and

(2) if requested by the client, file a petition for review following the notifications required under subsection (1).

The HB 7 Task Force also proposed the addition of Rule 53.2(m). To conform Rule 53.2(m) to the revised Rule 28.4, the Subcommittee recommends adoption of the following revised Rule 53.2(m).

53.2. CONTENTS OF PETITION

(__) *Review of Appeal Deemed Frivolous by the Court of Appeals in a Suit for Termination of the Parent-Child Relationship or a Suit Affecting the Parent-Child Relationship Filed by a Governmental Entity for Managing Conservatorship*. If counsel filed the certification under Rule 28.4(__)(1), and the court of appeals determined the appeal was frivolous, the petition may adopt the brief filed in the court of appeals by reference in lieu of the contents required by subparts (f)-(j) above.

Tab T

The Supreme Court of Texas

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Telephone: 512/463-1312 Facsimile: 512/463-1365

May 6, 2022

Mr. Charles L. "Chip" Babcock
Chair, Supreme Court Advisory Committee
Jackson Walker L.L.P.
cbabcock@jw.com

Re: Referral of Rules Issues

Dear Chip:

The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters.

Texas Rule of Appellate Procedure 39.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Appellate Procedure 39.7 to clarify that all parties may participate in oral argument when it is granted, even if a party did not request oral argument on the cover of the party's brief. The Committee should review and make recommendations.

Texas Rule of Civil Procedure 193.7. In the attached memorandum, the State Bar Court Rules Committee proposes amending Texas Rule of Civil Procedure 193.7 to clarify that a party must specifically state that a particular document will be used against the producing party to trigger the 10-day period for the producing party to object to the document's authenticity. The Committee should review and make recommendations.

As always, the Court is grateful for the Committee's counsel and your leadership.

Sincerely,

Nathan L. Hecht
Chief Justice

Attachments

STATE BAR OF TEXAS
COMMITTEE ON COURT RULES
REQUEST FOR AMENDMENT TO RULE 193.7
TEXAS RULE OF CIVIL PROCEDURE

I. RELEVANT WORDING OF EXISTING RULE 193.7

193.7 Production of Documents Self-Authenticating

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

[COMMENT]

7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. See Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to object to authenticity. A trial court may also order this procedure. An objection to authenticity must be made in good faith.

II. PROPOSED RULE MODIFICATION:

193.7 Production of Documents Self-Authenticating

A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the **specific** document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.

[COMMENT]

7. The self-authenticating provision is new. Authentication is, of course, but a condition precedent to admissibility and does not establish admissibility. See Tex. R. Evid. 901(a). The ten-day period allowed for objection to authenticity (which period may be altered by the court in appropriate circumstances) does not run from the production of the material or information but from the party's actual awareness that the document will be used. To avoid complications at trial, ~~a~~ **the offering** party may identify prior to trial the documents intended to be offered, **by Bates numbers or other means,** thereby triggering the obligation to object to authenticity. **A general reference to all documents produced by a party is insufficient.** A trial court may also order this procedure. An objection to authenticity must be made in good faith.

III. BRIEF STATEMENT OF REASONS FOR REQUESTED CHANGES AND ADVANTAGES TO BE SERVED BY THE PROPOSED NEW RULE:

Neither the Rules nor Texas jurisprudence clearly state whether a party may trigger the 10-day response requirement by making general averments that it intends to use "all documents" that have been produced or will be produced. This type of "bulk" designation has caused confusion and dispute over what seems to be a Rule designed to streamline the discovery process. Practitioners have noted the vagueness of the rule and debated whether the rule has (or should have) a specificity requirement. *See e.g.* Tate Hemingson, *Pro-Tips*: *Authentication Letter*, (https://www.mondaq.com/unitedstates/trials-appeals-compensation/402156/pro-tips-the-self-authentication-letter) ("What if the other side has produced 20,000 documents? Are you really going to use all 20,000 documents? Can you really expect them to raise authenticity objections within a 10-day period? The Rule is not clear on this.").

Many parties abuse this Rule by placing in their initial pleadings or discovery requests a statement that all documents produced by the opposing party will be used. This is done specifically as an effort to trigger Rule 193.7's objection requirement. However, practitioners have noted that Rules do not make clear whether this is effective. *See e.g.* Dan Christensen, *Common Discovery Issues in Personal Injury Litigation*, Annual LAU Seminar (2005) ("Whether this tactic would effectively trigger the 10-day objection period or not has not been addressed by any case known to this author."). Practitioners report that this is a widespread problem.

The Texarkana court commented on, but did not determine, the "specificity" issue, by concluding that the respondent waived a complaint by failing to timely complain about the vague notice. *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117, 130-31 (Tex. App.—Texarkana 2008), *rev'd on other grounds*, *Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837 (Tex. 2010) ("If Wal-Mart had any complaints concerning the notice, it should have raised those complaints in the trial court at a time when any deficiency could have been remedied.").

The Bar would benefit from clarity of the question whether this requirement can be triggered by either (i) a general reference to all documents or a category of documents or (ii) a statement in a pleading that all documents produced by the opposing party will be used. The Committee believes that the better approach would be to require a party to make specific reference

to a document in order for the 10-day period to be triggered. The proposed amendment makes a single-word change to Rule 193.7 with the intent spelled out clearly in proposed amendments to the Rule's comment.