SCAC MEETING AMENDED AGENDA
Friday, March 25th, 2022
In Person at St. Mary's College of Law

I. WELCOME (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 February 4, 2022 meeting.

III. COMMENTS FROM JUSTICE BLAND

IV. REMOTE PROCEEDINGS RULES – PROPOSED CHANGES TO TRCP 21D, 500.2(G); TRCP 18C, 21, 176 AND 500.8; TRAP 14, 39, 59; JUDICIAL ADMIN 12

Task Force to present to committee for comment:
Kennon Wooten
Lisa Hobbs
Hon. Tracy Christopher
Guest Speaker: Quentin Smith, Partner V&E
Guest Speaker: Justice Chu, JP Court Travis County Precinct Five

A. December 14, 2021 Referral Letter
B. January 27, 2022 Signed Remote Proceedings Resolution
C. March 21, 2022 Letter to Justice Christopher from Statutory Probate Courts
D. December 21, 2021 Texas Remote Proceedings Assessment Report

V. TEXAS RULES OF APPELLATE PROCEDURE 6.5(D)

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

E. February 17, 2022 Referral Letter
F. March 9, 2022 Memo from SCAC Appellate Rules Sub-Committee

VI. 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
Hon. John Warren

G. October 25, 2021 Referral Letter
H. March 11, 2022 Email Updated from R. Orsinger
I. March 22, 2022 Memo from Sub-Committee
1. Flow Chart for Sedona Conference Model Rule on Sealing Federal Court
2. Commentary on Sedona Conference

J. March 24, 2021 LCJ Comment on Sealing Records

VII. TEXAS RULE OF CIVIL PROCEDURE 162

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
Hon. John Warren

K. December 7, 2021 Report of Sub-Committee on Rules 15-165a.

VIII. RULES FOR IDENTIFYING POTENTIAL DISQUALIFICATION AND RECUSAL ISSUES (38, 52, 53 AND 55)

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

L. March 24, 2022 Report from Appellate Sub-Committee

Tab A

The Supreme Court of Texas

201 West 14th Street Post Office Box 12248 Austin TX 78711
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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

Fourteenth Court of Appeals
301 Fannin Room 245
Houston, Texas 77002

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

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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

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.

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[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

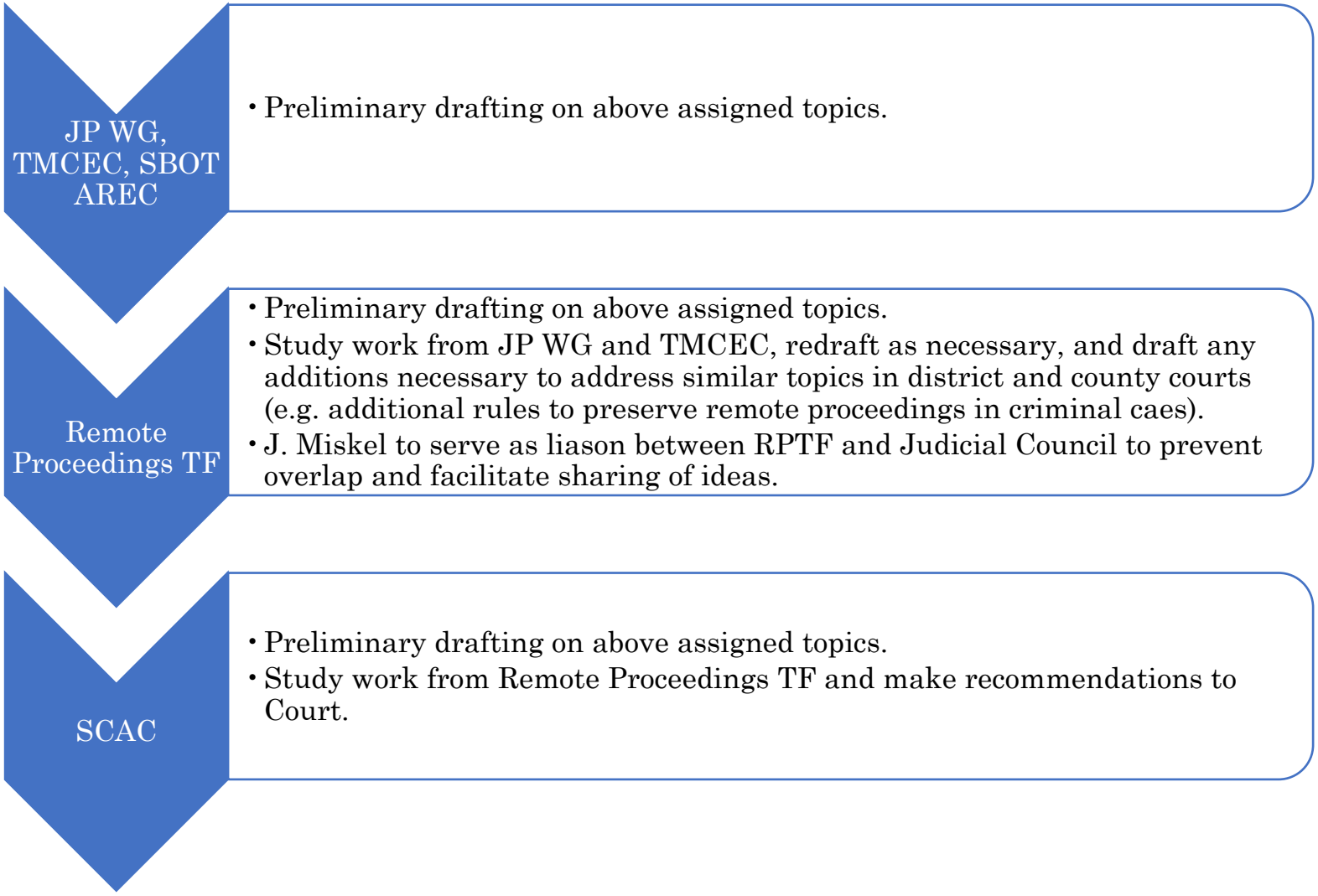
JP WG, TMCEC, SBOT AREC
• Preliminary drafting on above assigned topics.
Remote Proceedings TF
• Preliminary drafting on above assigned topics.
• Study work from JP WG and TMCEC, redraft as necessary, and draft any additions necessary to address similar topics in district and county courts (e.g. additional 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.

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?

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 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.

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 B

RESOLUTION OF THE STATE BAR OF TEXAS BOARD OF DIRECTORS IN SUPPORT OF REMOTE PROCEEDINGS

WHEREAS the COVID-19 global pandemic has resulted in court proceedings, depositions, mediations, arbitrations and other litigation-related activities being conducted remotely using software compatible with computers, tablets and smart phones ("Remote Proceedings");

WHEREAS Remote Proceedings increase access to courts and make it easier to participate in judicial and litigation-related proceedings;

WHEREAS Remote Proceedings are more cost-effective to litigants and conserve judicial resources;

WHEREAS changes to Texas rules and procedures are needed in order to allow Remote Proceedings to continue regardless of the state of public health conditions;

WHEREAS the Supreme Court of Texas created the Remote Proceedings Task Force (the "Task Force") to study procedural impediments to Remote Proceedings and to draft proposed rule amendments to remove such impediments;

WHEREAS the Task Force has now provided suggested rule amendments; and

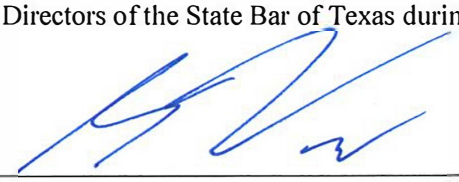
WHEREAS the Board of Directors still acknowledges the importance of in-person proceedings, it hereby wishes to preserve the option of Remote Proceedings where appropriate.

THEREFORE, BE IT RESOLVED that the Board of Directors of the State Bar of Texas:

SUPPORTS the efforts of the Supreme Court of Texas and the Task Force to remove impediments to Remote Proceedings; and

SUPPORTS the Supreme Court of Texas adopting and implementing rule amendments removing impediments to Remote Proceedings.

This Resolution was duly passed by the Board of Directors of the State Bar of Texas during remote proceedings this 27th day of January, 2022.



Santos Vargas, Chair
State Bar of Texas Board of Directors

Tab C

STATUTORY PROBATE COURTS

STATE OF TEXAS

Guy Herman, Presiding Statutory Probate Judge

P.O. Box 1748, Austin, TX 78767
200 W. 8th Street, Second Floor
Phone: (512) 854-9258
Fax: (512) 854-4418

March 21, 2022

Chief Justice Tracy Christopher
Fourteenth Court of Appeals

Re.: Remote Proceedings

I, as the presiding Statutory Probate Judge and on behalf of the unanimous consent of the 19 statutory probate court judges, write in support of permanent rules permitting remote proceedings by agreement of the parties and subject to the discretion of the judge. Having conducted proceedings remotely for the past two years, we know they are an effective tool in promoting judicial efficiency, access to justice[1], and can be a significant savings for parties. However, in some cases, they can also cause undue delays and "zoom fatigue" for judges[2], so judicial discretion is key to managing these proceedings.

Many uncontested hearings that come before the Probate Courts require fewer than 5 minutes before the judge. In larger counties[3], parties and attorneys must navigate downtown, find and pay for parking, walk to the courthouse and wait through security lines in order to appear for these very brief hearings. It is easy to conclude that remote proceedings save the communities we serve time and money. In addition, attorneys can move from hearing to hearing around the state easily without having to travel, thus making their practices more efficient and cost-effective for their clients.

An unanticipated effect of remote proceedings is increased participation by parties in guardianships, mental health proceedings, and even show cause for compliance. Proposed wards in guardianships almost never appear in-person for their own hearing. However, we have seen marked increase participation via remote access by those whose capacity and rights are being determined. Surprisingly, even those who are cited to appear to show cause for noncompliance appear in greater numbers remotely giving the court the opportunity to help them get back into compliance or determine that a removal is necessary.

We realize the benefits of remote proceedings are not without their complications. Lack of access to technology and unfamiliarity or difficulties with technology can delay

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[1] *The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021: A Look at Remote Hearings, Legal Technology, and Access to Justice*, Thompson Reuters Institute, 2021. The study found 77% of judges surveyed felt access to justice increased or stayed the same with virtual proceedings.

[2] *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload Final Report*, December 2020, the National Center for State Courts, Court Consulting Division, and the State Justice Institute.

[3] Harris County Probate Court One reports having heard 5,595 uncontested hearings for the two year COVID period from March 2020 to February 2022.

hearings. Judges must also manage their remote systems and become troubleshooters for participants, which requires greater attention that can lead to judicial fatigue[4]. For these reasons, we believe judges must have final discretion to determine whether and how to proceed with a remote appearance or proceeding.

The continuation of remote proceedings benefits the courts and the public, and has become irretrievably intertwined in the modern administration of justice. It is our hope that new rules will be established quickly so that we may continue without interruption.

Sincerely,

Guy Herman

Guy Herman
Presiding Statutory Probate Judge

[4] *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload Final Report*, December 2020, the National Center for State Courts, Court Consulting Division, and the State Justice Institute.

Tab D

The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload

FINAL REPORT

December 2021

COURT CONSULTING DIVISION | **NATIONAL CENTER FOR STATE COURTS**

NCSC National Center for State Courts

SJI State Justice Institute

This document has been prepared under an agreement between the National Center for State Courts and the Texas Office of Court Administration pursuant to grant number SJI-P-012 from the State Justice Institute. The points of view and opinions offered in this report do not necessarily represent the official policies or position the State Justice Institute.

The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload

December 2021

NATIONAL CENTER FOR STATE COURTS | COURT CONSULTING DIVISION

Project Staff

Brian Ostrom, Ph.D., Project Director

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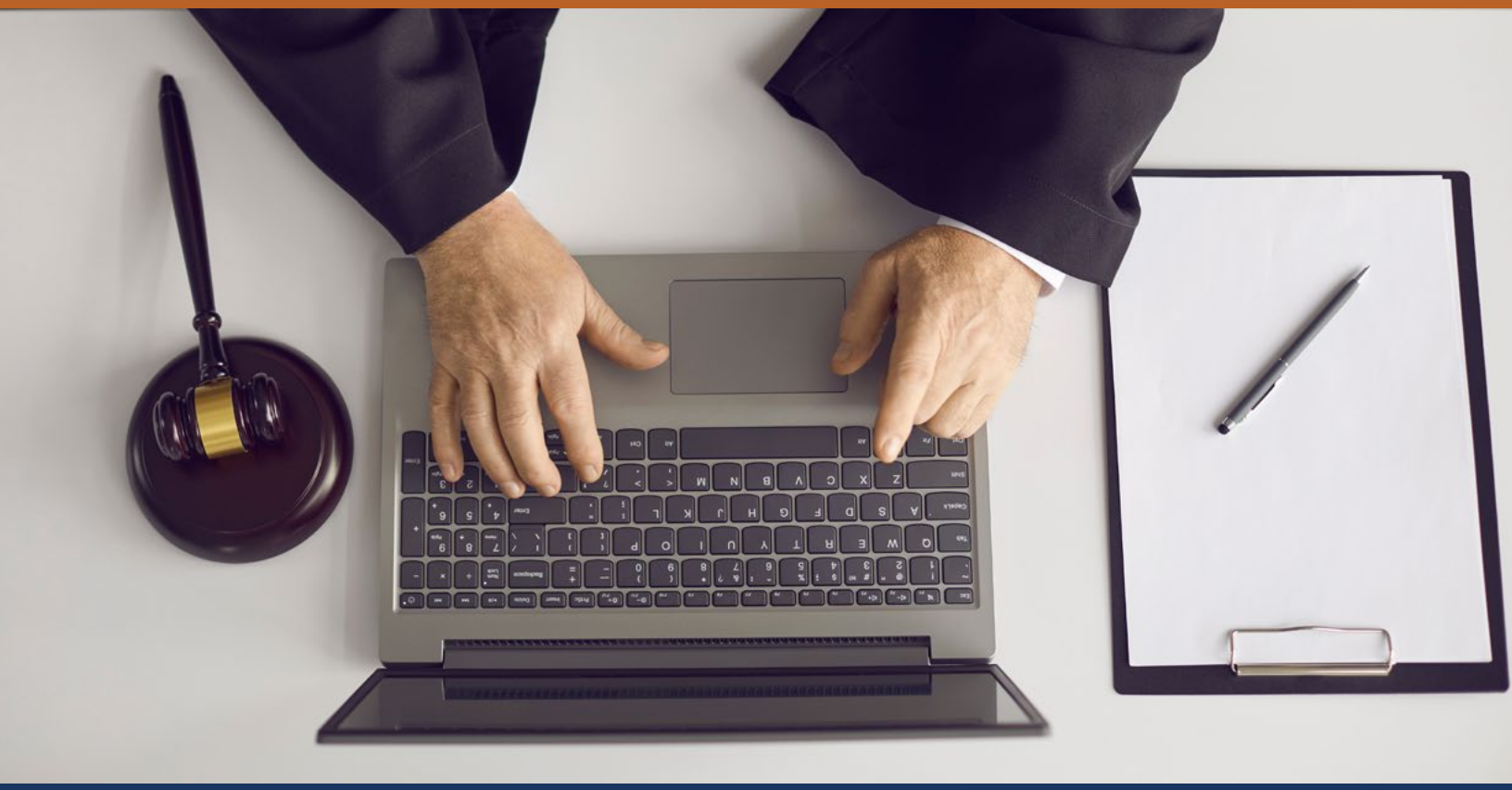
Acknowledgments

The authors wish to acknowledge the invaluable contributions of the many judicial officers who participated in this project from the counties of Brewster, Collin, Dallas, Lubbock, Tom Green, Travis, Uvalde/Real, and Webb. An undertaking of this nature is not possible without the assistance of the dedicated members of the Texas judiciary who gave their valuable time to this project.

Over the course of this 12-month study, we were fortunate to draw on the support of a distinguished advisory committee. The Texas Judicial Needs Assessment Committee, composed of judges and judicial officers from across the state, informed many of the decisions underlying this study and will guide the upcoming statewide study of judicial workload.

We extend a special note of thanks to David Slayton, Jeffrey Tsunekawa, and Sheri Woodfin from the Office of Court Administration and Michelle White from the State Justice Institute for their guidance, hard work, and dedication in steering this project to a successful completion. We are also extremely grateful to our NCSC colleague Erika Bailey for her careful review of this report.

Table of Contents



Executive Summary

During the early months of the COVID-19 pandemic, the Texas state courts moved quickly to implement remote court hearings, in many cases to ensure ongoing access to the courts.

To date, little research has been conducted regarding the impact of implementing remote hearings on courts and court users. Being able to systematically measure differences in hearing length relative to in-person hearings and other consequences of remote hearings is essential for state court decision makers seeking to determine the extent to which remote hearings should be maintained post-pandemic.

The current project involves an analysis of a sample of eight Texas court jurisdictions to empirically investigate the implementation of remote hearings on the efficiency of judicial workload practices and to explore potential benefits, such as improved access to and quality of justice delivered through the courts. The participating judges tracked their work time for a three-week period in April 2021, indicating whether hearings were conducted in-person or remotely. During this time period, approximately 85% of all hearings were conducted remotely, and, as of December 2021, many Texas courts continue to hold most hearings in this manner. NCSC conducted three focus groups with a subset of participating judges to explore the results of the study.

Findings

Overall, this study found remote hearings tend to take about one-third longer (34%) than when hearings are held in-person. That is, on average, a hearing that takes about 30 minutes in-person takes about 40 minutes remotely. To explore the implications of these findings, NCSC staff held a series of three focus groups with 15 judges who fully participated in the time study. The main purpose of the focus groups was to gather judicial perspective on a range of issues related to court workload that involves both remote and in-person hearings. Several themes emerged from this study.

Hearing length. The time study indicated that remote hearings take longer than in-person hearings. Judges generally confirmed that their experience aligned with the study findings that remote hearings take longer and that the increased time is largely the result of technical issues, lack of preparation by parties, fewer default judgments due to the accessibility of attending hearings remotely, and increased numbers of parties in hearings.

Benefits of remote hearings. Texas judges reported that holding remote hearings has definite benefits for expanding access to justice for many litigants, despite taking somewhat longer on average. One major advantage to litigants is the added convenience of not needing to take time off work, locate transportation, or find childcare. In some jurisdictions, remote practice allows litigants, including those who are self-represented, to schedule hearings at specific times (or within short time windows). This practice provides court users greater precision and flexibility in scheduling a court appearance. Remote hearings may also expand access to courts for witnesses, victims, experts, and other court stakeholders who live in remote locations or who fear for their safety in court. Likewise, there is the opportunity for wider participation in many types of family-related cases, especially divorce, child welfare, and child protective services cases.

Challenges of remote hearings. Texas judges identified several technology-related problem areas in line with national patterns. A primary concern is the "digital divide," the issue that people may have uneven access to the technology needed to participate in remote hearings (e.g., lack of a computer or internet access). Relatedly, litigants may have limited experience using online videoconferencing, causing delays in court proceedings. Trouble navigating the technology can deepen when inexperienced court users need to submit documents or use visual aids. Texas judges also reported having mixed success with the remote-hearing platform when cases involved interpreters. Because the Texas judges believe the use of remote hearings will remain a part of court practice going forward, they clearly recognize the need for ongoing attention to creative and inclusive solutions to access issues.

Proceedings that lend themselves to remote hearings. Judges were asked whether certain types of cases or types of hearings are more or less suited for remote hearings. Texas judges agreed that the type of case is less relevant than the type of hearing—in most instances. Generally speaking, remote hearings function most effectively with hearings that are short in nature and limited in scope, such as setting trial dates, status hearings, permanency hearings, discovery hearings, motions hearings of various types, self-represented divorce dockets (especially when parties have completed agreements), and non-evidentiary or non-witness cases. Additionally, in terms of case types that work well for remote dockets, judges indicated the type of matters that affect people's ability to get on with their lives, such as many probate proceedings, child protective services, and other family law cases, work well.

Impact of remote hearings on judges. Across the three focus groups, as well as during introductory discussions with judges conducted before the time study, the consensus is that remote proceedings will continue for the foreseeable future. Judges reported that, while remote hearings can be exhausting, they are beneficial to litigants in many ways and allow for broader inclusion of interested parties than in-person hearings. However, courts should also focus on ways to reduce judicial stress and "Zoom fatigue" when handling remote proceedings.

Implications of Findings and Recommendations

This exploratory study has revealed there are both benefits and challenges associated with the current case-processing practices used in handling hearings remotely. The need for ongoing attention to reducing technology problems was a recurrent theme during the Texas focus groups, one corroborated by other recent studies conducted elsewhere around the country.

A primary benefit of remote hearings is the opportunity to significantly improve the court experience for court users in select types of hearings and cases. Remote hearings are often more convenient because they allow for more precise scheduling and reduce obstacles to attending related to such issues as transportation, childcare, and work schedules. According to most judges and attorneys interviewed and surveyed across a variety of studies conducted since the pandemic began, remote hearings will be an ongoing reality in courts across the country.

Aside from technological concerns, courts will need to address other challenges with pre-hearing preparation associated with the swift move to remote practices. Texas judges noted a major focus in court administration involves improving the efficiency of remote hearings, including better use of judicial officer time, improved scheduling and notice of remote proceedings, and workable methods to respond to individual users' questions.

Recommendations

1. Judicial leadership should generate guidelines regarding how best to determine when a court proceeding should be conducted in-person or remotely.

2. Judges and court administration should determine the most effective way to schedule hearings that provide for the greatest efficiency in the court, while also being mindful of litigants' time.

3. Remote court participants will benefit from clearly delineated instructions and expectations for hearings.

4. Court systems should develop clearly written (and other formats) instructions for remote proceedings on courtroom decorum and expectations of litigants, including timeliness, dress code, and appropriate places from which to log into a hearing.

5. Before any hearing, the court should ensure that all required paperwork and agreements between parties have been appropriately completed.

6. Courts should not assume that all parties have access to the proper equipment (e.g., computers, tablets, smart phones) necessary to participate in remote court proceedings. If individuals do not have access to the appropriate technology, courts should make such equipment available to court users in a safe and easily accessible location.

7. When interpreters are used, the court should ensure that the non-English-speaking litigant's attorney has briefed the interpreter on the case and how to use the communication system.

8. Court systems should find ways to preempt judicial burnout from holding lengthy sets of back-to-back remote hearings. Judges should be encouraged to take regular breaks during and between hearings.

9. Since remote hearings appear to be permanent, court systems should consider hiring "technical bailiffs" or additional court staff responsible for setting hearing links, scheduling parties, contacting parties before the hearings, and addressing technical issues that arise during remote hearings.

I. Introduction

During the early months of the COVID-19 pandemic, the Texas state courts moved quickly to implement remote court hearings, in many cases to ensure ongoing access to the courts. On March 19, 2020, the Supreme Court of Texas and Texas Court of Criminal Appeals jointly issued Emergency Order 3 (20-944; 20-008) relating to court closures due to the pandemic.[1] The orders stated that "courts must not conduct non-essential proceedings in person contrary to local, state, or national directives, whichever is most restrictive, regarding maximum group size."

There are currently approximately 1,500 Texas trial courts actively using Zoom to conduct remote hearings.[2] While state court leadership anticipates that the virtual delivery of court services will remain an integral part of court business practices in the years to come, many important yet unanswered questions remain about the impact on judicial workload.

Understanding the impact of remote hearings on judicial time and case management practices relative to in-person hearings is essential for state court decision makers to determine the extent to which remote hearings will be maintained post-pandemic. The current analysis is intended to assist in the design and conduct of the statewide workload assessment study that will be conducted in Texas in the fall of 2022. It is also hoped that the findings from the current study will aid other states as they weigh the value of the use of virtual versus in-person delivery of court services.

The current project involves an analysis of a sample of Texas courts to empirically investigate the implementation of remote hearings on judicial workload, as well as to explore potential benefits and challenges to this evolving style of work. This is not a traditional weighted caseload study in which the amount of time judges spend on different types of cases is measured and a judicial needs model is developed; rather, it is an exploratory effort to determine the differences between remote versus in-person hearings, in terms of both elapsed time for each and the judicially perceived strengths and weaknesses of these two modalities of court hearings.

1 https://www.txcourts.gov/media/1449339/209044.pdf

2 The Texas Judicial Branch purchased Zoom licenses for each judge early in the pandemic.

II. Time Study Participants

This limited-scope study was initially intended to include judicial officers from six jurisdictions of varying sizes (e.g., two large, two midrange, and two smaller). In the end, eight jurisdictions, including 52 judges, took part in the time study. Participating judges tracked and entered the time they spent on their judicial officer duties during the three-week period spanning April 12 through April 30, 2021. The participating jurisdictions and the number of judges from each county who participated are shown in Figure 1.

FIGURE 1:
Texas Jurisdictions and Number of Judges Included in the Limited-Scope Study on Hearing Types

Jurisdiction	Number of Judges Who Participated
Brewster County (Small)	1
Collin County (Large)	8
Dallas (Large)	1
Lubbock County (Midrange)	2
Tom Green County (Midrange)	6
Travis County (Large)	21
Uvalde/Real County (Small)	3
Webb County (Midrange)	10
Total: 8 counties	**52**

III. Developing the Study's Parameters

Before commencing the current study comparing remote to in-person court hearings, the National Center for State Courts (NCSC) began planning a statewide weighted caseload study for trial court judges in Texas. The statewide study was suspended due to the COVID-19 pandemic. During the first meeting of the statewide study's advisory committee, a set of 31 separate case types were selected, for which case weights are to be developed. The committee also identified four case-related event categories to distinguish judicial work at different points in the life of a case (e.g., pretrial, jury trial).

Given the more tightly focused nature of the current project, the NCSC team worked with the Texas Office of Court Administration (OCA) staff to collapse the case types into fewer categories for ease of data tracking and to expand the case event categories to differentiate whether hearings were conducted in-person or remotely.

Case Type Categories

The case type categories for the current study consisted of 12 categories shown in Figure 2; each case type was defined in the glossary provided to the study's participants. Appendix A provides a description of each of the 12 case types.

FIGURE 2:
Texas Case Types by Category

Case Type
Felony A
Felony B
Misdemeanor
Injury/Damage with Motor Vehicle
Injury/Damage no Motor Vehicle
Contract
Other Civil
Divorce
Other Family Law
Modifications/Enforcements
Delinquency
Child Protective Services

Case-Related and Non-Case-Related Judicial Events

Disaggregating case-related work into meaningful events allowed NCSC staff to measure the amount of time spent by judges on hearings conducted at each stage of the court process. For the statewide study, the advisory committee identified four main event categories, shown in Figure 3 (Appendix B provides the definition of events). To determine the differences between in-person hearings and remote hearings, events were further broken down by the hearing modality (in-person vs. remote), for a total of eight distinct events.

FIGURE 3:
Texas Case-Related Events

Pretrial activities: IN-PERSON
Pretrial activities: REMOTE
Bench trial activities: IN-PERSON
Bench trial activities: REMOTE
Jury trial activities: IN-PERSON
Jury trial activities: REMOTE
Posttrial activities: IN-PERSON
Posttrial activities: REMOTE

NCSC also collected information on non-case-specific activities, such as continuing education and judges' meetings, that are not directly related to a particular case, but are nonetheless essential to a judge's work. These activities, defined as non-case-related activities, are presented in Figure 4; Appendix C provides the definitions. For the current project, NCSC compared the average amount of time associated with this work in early 2021 to the amount of time spent on non-case-specific work measured in the last statewide workload assessment study conducted by NCSC in 2007. In the previous time study, the data showed between 2 and 2.5 hours per day were dedicated to non-case-related work. In the current study, this time was reduced to 1.75 hours per day, presumably due to judges' attending fewer meetings and engaging in less community outreach during the pandemic.

FIGURE 4:
Texas Non-Case-Related Events

Non-case-related administration
General legal research
Judicial education and training
Committees, meetings, and related time
Community activities and public outreach
Work-related travel
Vacation, sick leave
Lunch and breaks
Technology-related work or issues
Time study data tracking and reporting
Non-case-related specialty court activities

IV. Average Hearing Times: In-Person versus Remote

At the heart of this inquiry is whether there are differences in the average time spent by judges in handling in-person and remote hearings. To answer this question, a three-week time study was conducted in which judges from the participating jurisdictions, including district court judges and judges from the county courts at law, tracked their time by case type and event. Data were collected using an online data collection instrument where judges entered discrete blocks of time spent on a particular type of case, event, and hearing modality. NCSC computed the average amount of time associated with remote and in-person hearings, by hearing event category and case type.

During the time study period, most proceedings in the participating courts were conducted remotely. In aggregate, 86% of the total time reported was identified as remote work, compared to 14% in-person. Another way to look at the data is by individual time entry to estimate the amount of time a judge spent on a remote or in-person hearing, with each entry representing a single block of work.[3] When calculated, a similar pattern emerged, with 85% of individual time entries being conducted remotely compared to 15% in-person.[4]

Recall, judges were asked to record their time by case type and event category. They indicated whether they were working on pretrial events (e.g., arraignment, pretrial motions, scheduling conference); bench trial activities (i.e., all activity related to a trial where the judge is finder of fact); jury trial activities (i.e., all activity related to a trial where a jury is the finder of fact); or post-disposition events (e.g., sentencing revocation, guardianship review). This data collection strategy allowed NCSC staff to examine a wide range of case types and distinguish at what point in the life of a case the work was being done.

Using the time study data, NCSC staff computed the average times for in-person and remote pretrial events for each case type. This approach was adopted because while the participating jurisdictions' case management systems were able to provide an accurate count of the number

3 Participants were not instructed to enter each hearing as an individual event; however, participants did enter time in discrete event categories. For example, a judge might enter 20 minutes for a single arraignment or 60 minutes for three arraignments. Internal consistency by each judge in recording practice is assumed in this analysis. Focus group responses by participating judges provided strong support for this assumption.

4 In total, 1.25 million minutes of judicial time was collected during the time study.

of cases filed during the time study period, the systems did not track the number or type of hearings held. In addition, the case management data did not include information on manner of disposition (e.g., bench trial, jury trial) or whether an event occurred post-disposition. That is, counts do not exist of the number of bench or jury trials held during the study or the number of post-disposition events. These limitations restricted NCSC analysis to pretrial activity, as that occurs in all cases filed. Consequently, NCSC focused on the amount of time judges spent on pretrial matters in both remote and in-person environments.

In addition, it is likely that the measure of "pretrial event" time is aligned with individual "pretrial hearing" time for the case types examined. This assumption was tested and generally verified in two ways. First, the length of the time entries recorded by active judicial participants were calculated. Of the approximately 1,700 individual pretrial event times entered during the time study, about two-thirds were 30 minutes or less, in line with expected individual pretrial hearing length.

Second, focus groups were conducted in October with a sample of the participating judges. When judges were asked about their method for entering data, they tended to corroborate that in many cases hearing times were entered for each hearing, so that one time entry represents a single hearing. Of equal importance, all judges confirmed that they used a consistent method in entering time during the study. That is, they either entered time by individual hearing or they grouped similar hearings together as a single block of time (e.g., three hearings of the same type took a total of 60 minutes). This suggests time data were collected in individually consistent fashion among participating judges, thereby allowing for direct comparison between remote and in-person proceedings. In the remainder of this document, we will refer to remote and in-person pretrial "hearings," although we recognize that the time estimates will somewhat overstate the actual length of an individual hearing.

Figure 5 provides the average pretrial hearing times and the number of hearings examined for remote and in-person hearings by case type. In addition, the figure shows the percentage difference in time between remote and in-person hearings. For example, for Felony A (Person) cases, in-person hearings take an average of 40 minutes and remote hearings average 53 minutes, a difference of 34%.

FIGURE 5:
Pretrial Hearing Times and Number of Hearings by Case Type

	ESTIMATED HEARING TIMES			NUMBER OF HEARINGS	
Pre-trial Hearing	**In-Person**	**Remote**	**Percentage Difference**	**In-Person**	**Remote**
Felony A (Person)	40	53	1.34	42	124
Felony B (Property)	31	40	1.27	51	138
Injury Damage w/ Vehicle	26	45	1.73	16	104
Injury Damage - No Vehicle	68	73	1.07	12	52
Contract	13	58	4.43	5	117
Other Civil	48	80	1.69	36	226
Divorce	30	65	2.16	28	195
Other Family Law	59	72	1.22	26	224
Modifications/Enforcements	64	47	0.73	17	107
Delinquency	94	104	1.11	4	71
Child Protective Services	102	132	1.29	9	82
Overall Average	**52**	**70**	**1.34**	**246**	**1,440**

Discussion

The analysis shows that remote hearings take longer than in-person hearings for 10 of the 11 case types examined. As can be seen, the difference in time between the two hearing modalities varies by case type. Overall, remote hearings tend to take about one-third longer (34%) than when hearings are held in-person.

Figure 5 also shows the number of hearings upon which the time estimates are based. While the study was limited in scope, the results do draw on a sizable overall number of hearings. Of course, given the time period in which the study was conducted, the majority of hearings were held remotely (85%). This means that for some case types, such as Contract, the sample of in-person hearings is small and suggests caution in extrapolating the results to all Contract cases. However, for most of the other case types the sample sizes are sufficient for placing reasonable confidence in the results.

To explore the implications of these findings, NCSC staff held a series of three focus groups with 15 judges who fully participated in the time study. The main purpose of the focus groups was to gather judicial perspectives on a range of issues related to court workload that involve both remote and in-person hearings. A unanimous belief was that the use of remote court proceedings will continue. The focus groups also agreed that all judges and court staff need efficient and effective processes to ensure court users receive equal access to justice regardless of how proceedings are held.

Specific topics included:

1. Hearing length.
2. Benefits of remote hearings for court users.
3. Challenges of remote hearings for court users.
4. Hearing types best suited for remote hearings.
5. The impact of remote hearings on judicial stress.

These topic areas are discussed below.

1. Hearing length.

Texas judges generally were not surprised with the findings showing that remote hearings take longer than those conducted in-person. This result fits with their perceptions from handling both types of hearings. When asked why, judges were quick to say the increased time is largely the result of technical issues from hearing participants, such as difficulty logging onto the Zoom platform, connectivity problems related to limited bandwidth, or difficulty sharing screens or uploading documents and exhibits. In many instances, resolution of technological issues fell to judges or court staff, who are not trained to address them. Regardless, judges and court staff have undertaken these additional tasks as part of their regular duties, even though it adds stress and reduces the time available for handling their remaining caseload.

This finding aligns with results from a recent study of Child Abuse and Neglect cases conducted in September 2020 by the Nevada Court Improvement Program (CIP).[5] The study found that four of the five types of hearings examined took longer when conducted remotely. On average, remote hearings took about 39% longer. This finding is similar to what was found in the current study

5 A. Summers and S. Gatowski, *Nevada Court Improvement Program Remote Hearings Study* (2020). The study collected data on 123 hearings from five judicial districts and included 58 remote hearings and 65 in-person hearings.

for Texas judges handling Child Protective Services cases (Child Abuse and Neglect cases): remote hearings were 29% longer. As in Texas, the additional time in Nevada (relative to in-person hearings) was found to be largely due to technology-related issues. [6]

A comparable study of Abuse and Neglect cases conducted by the Utah Court Improvement Program in October 2021 also found that remote hearings take longer than in-person hearings.[7] In this case, remote hearings were about 80% longer, with the primary reason for lengthier proceedings being technology related.

2. Benefits of remote hearings for court users.

Texas judges reported that holding remote hearings has definite benefits for many litigants, despite taking somewhat longer on average. One major advantage is the added convenience of not needing to take time off work, locate transportation, or find childcare. In some jurisdictions, remote practice allows litigants, including those who are self-represented, to schedule hearings at specific times (or within short time windows). This practice provides court users greater precision and flexibility in scheduling a court appearance. Remote hearings may also expand access to courts for witnesses, victims, experts, and other court stakeholders who live in remote locations or who fear for their safety in court. Likewise, there is the opportunity for wider participation in many types of family-related cases, especially Divorce, Child Welfare, and Child Protective Services cases.

For example, one judge stated that "many pro se cases lend themselves to Zoom dockets. A lot of times we have issues like non-service or other issues that take a small amount of time to figure out and do not require everyone to come to court." Another judge stated, "It is emotionally easier for the parties to get through a divorce if they are not in the same room. Divorces are still a drain, and participants even break down remotely, but it is easier to get through." This same judge indicated that, before the pandemic, only 25% of self-represented Divorce cases had all the documents necessary to proceed on their case at the originally scheduled hearing. During the pandemic, the judge began providing forms for the litigants to complete before their remote court hearing, so on the day of the hearing the parties have a completed agreement before the hearing begins. Since this change was made, nearly 90% of the self-represented divorce litigants appear prepared and ready to resolve their cases.

6 Technology delays occurred in 21% of remote hearings, compared to 3% of in-person hearings; delay time ranged from one to five minutes, with an average of two minutes (p. 5).

7 A. Summers and S. Gatowski, *Virtual Hearing Study—Utah* (2021). The study collected data on 158 hearings from four judges and included 80 remote hearings and 78 in-person hearings.

Judges across the board indicated that attendance at remote hearings for Civil and Family cases tends to be higher, reducing the number of default judgments that occur when one party does not appear for a hearing. A similar pattern of higher appearance rates was also noted for Criminal cases, with a consequent reduction in failures to appear (FTAs).

Relatedly, especially in family-related cases, more parties (e.g., immediate and extended family members) often appear for remote hearings. Texas judges stated that a benefit of broader attendance is the opportunity to explain the hearing process and provide opportunities for all interested parties to be heard more fully. There is some anticipation that the increased participation will reduce post-judgment disputes. Of course, as more people participate in hearings, the length of the hearings will also increase, but the quality of those hearings is also likely improved.

The Nevada CIP focus groups also found that the depth and breadth of discussion occurring in remote hearings was greater than that during in-person hearings, thus increasing the hearing length. The Nevada study noted that people who are less likely to attend an in-person court hearing, such as foster parents and kinship caregivers, are more likely to appear at remote proceedings because having a guaranteed login time is less disruptive to their schedules.

These findings echo a recently published report in which NCSC interviewed family court judges across the country.[8] The judges indicated that parents attended remote hearings more frequently than in-person hearings, with the increase in participation attributed to "the convenience of not having to travel or find parking, not having to take time off from work, and the less intimidating atmosphere of the virtual courtroom." Additionally, the report noted that incarcerated parents can participate in hearings more often due to the increased number of remote connections offered by jails and prisons and the elimination of transportation barriers.

Of particular importance, the increased involvement of parties likely improves their perceptions of procedural fairness, as research has demonstrated that simply having a voice in a proceeding improves one's experience of fairness.[9] As noted by the UK Judicial College, "the process, rather than merely the result (of remote hearings) is a significant consideration in terms of the delivery of real justice. An individual is more likely to accept an adverse conclusion where it has been arrived at after a process which has been transparently just, where the needs of all have been considered, and where they have felt engaged in the process and the outcome is explained."[10] Such attention to enhanced procedural fairness has the benefit of better acceptance of court decisions, a more positive view of the courts, and greater compliance with court orders.

8 National Center for State Courts, *Study of Virtual Child Welfare Hearings Impressions from Judicial Interviews*, (June 2021), p. 2.

9 J. Bowers and P. H. Robinson, "Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility," *Wake Forest Law Review* 47 (2012): 47.

10 UK Judicial College, Good Practice for Remote Hearings, p. 1.

Judges also reported that remote hearings are generally viewed positively by attorneys. These views are confirmed by a June 2020 survey of Texas attorneys conducted by the Texas Office of Court Administration that found over 73% of respondents indicated remote hearings are effective, with only 12% indicating they are ineffective. The focus group participants said attorney support is particularly strong for out-of-town counsel, or in larger counties where attorneys often must travel long distances to get to court. In addition, remote proceedings have made scheduling easier and avoided unnecessary delays, especially in uncontested matters, like case status updates.

This perspective is confirmed in a study conducted by the Berkeley Research Group (BRG) in the summer of 2021 on the psychological impacts of remote hearings on legal professionals. During interviews, the authors found that the experience of remote hearings on attorneys, arbitrators, and expert witnesses has been largely positive for all parties involved. Further, those interviewed indicated that there are many efficiencies (for legal professionals) to be gained by holding court hearings remotely, especially where it concerns the time and cost of travel associated with expert witnesses. This study also found that "the relaxed setting of familiar surroundings such as the home office has had a noticeable psychological impact on expert witnesses and placed them at ease, which in turn allows for more considerate answers to the benefit of the court."[11]

Texas judges noted three additional benefits of remote hearings related to more efficient use of resources, including better managing limited courtroom space, reducing the need to travel to different courthouses, and improving utilization of scarce court reporters, interpreters, and pro bono legal representatives. As to the first two issues, when judges share courtrooms or must travel between court locations, their ability to schedule hearings is obviously limited to the days that judge is assigned to a specific courtroom. In many rural parts of Texas, judges travel between multiple courthouse locations to hold in-person proceedings. This style of riding circuit can mean a judge may only visit some locations every other week or even once a month, thereby reducing access. Since holding hearings remotely does not require the use of a physical courtroom, there is more flexibility in scheduling hearings, and proceedings can be held in a more timely fashion regardless of location.

As to the third issue, judges reported the ability to use court reporters, interpreters, and pro bono lawyers who are not physically located in the courtroom because they can participate in the hearing via Zoom. This ability makes efficient use of scarce resources and further expands the ability to hold more hearings than if the participants were required to be in the same physical location as the judge.

11 C. Bao, A. Masser, and S. Puchkov, *The Psychological Impact of Remote Hearings* (2021), p. 6.

3. Challenges of remote hearings for court users.

As noted above, judges stated that technology-related issues are the primary source of longer hearing times for remote proceedings. Texas judges identified several technology problem areas in line with national patterns.[12] A primary concern is the "digital divide," or the issue that people may have uneven access to the technology needed to participate in remote hearings (e.g., lack of a computer or internet access). While judges reported that most litigants are able to participate in hearings via video and audio and in greater numbers than during in-person hearings due to other barriers, there remain litigants who experience access issues related to technology. Relatedly, litigants may have limited experience using online videoconferencing, causing delays in court proceedings. Trouble navigating the technology can deepen when inexperienced court users need to submit documents or use visual aids. Because the Texas judges believe remote hearings will remain a part of court practice going forward, they clearly recognize the need for ongoing attention to creative and inclusive solutions to access issues.

Another concern voiced by some Texas judges is that remote hearings as currently operating may not make the best use of judicial time. One example is that the structure of remote hearings reduces some of the more informal discussions among opposing counsel that can occur with in-person hearings. Negotiations that occur before a hearing can clarify and sometimes resolve issues without direct judicial involvement. However, this opportunity is often lost with remote hearings, and some judges find they must expend time discussing these issues with the parties during the hearing itself. One judge relayed that she was holding a hearing on a divorce case, and that the parties agreed on all but one issue, which could have been resolved without judicial involvement before the hearing. Instead, she needed to negotiate the issue during the hearing, which unnecessarily increased the hearing time. Some judges indicated that they had remedied this issue by admitting lawyers and litigants to the virtual courtroom and placing them in "breakout rooms" that function similarly to in-person meeting space.

Accessibility for non-English speakers during remote proceedings was another challenge, with several judges stating they had mixed levels of success with cases involving the need for interpreters. Some judges indicated that the interpreter function in Zoom is not ideal for courts and is difficult to use. One issue is that some parties in need of interpreter services lack access to the technology required to participate both visually and with audio. Another issue is that to use the interpreter function, all parties must be logged into the hearing through the Zoom app, as opposed to following a link to the hearing. If parties have not properly logged in to their remote hearing, the interpreter function is not available for parties who attend by phone only.

12 *See* https://www.ncsc.org/newsroom/public-health-emergency/pandemic-and-the-courts-resources for a variety of resources created by NCSC and the CCJ-COSCA Rapid Response Team (RRT) to help state courts deal with challenges presented by the pandemic.

Further concerns expressed by Texas judges on this topic revolve around accommodating interpreter breaks during remote hearings. To preserve quality, interpreters need substantial breaks every 30-40 minutes. When problems occur, interpreters must spend part of their limited time helping their client resolve technology issues, reducing the time available for the hearing itself.

As the above examples illustrate, whether the specific issue is litigant access to technology, interaction between attorneys, or coordination with interpreters, the larger challenge of "pre-hearing preparation" remains a primary concern for remote hearings. Not surprisingly, a central theme among Texas judges is the need for greater attention to improving the efficiency of remote hearings, with the goals of better using judicial officer time, preserving access to justice, accommodating the needs of litigants, and overcoming obstacles to equal participation. One suggestion is using some form of preliminary contact (e.g., phone call, text message) between court staff and parties to learn about special needs in advance of the remote hearing, explain the process to be used, and point to existing resources developed by the court to facilitate meaningful participation. This approach has been used effectively in the United Kingdom, where court staff schedule pre-hearing conferences with the litigants or counsel in the days before the hearing.

4. Hearing types best suited for remote hearings.

Judges were asked whether there are certain types of cases or types of hearings that are more or less suited to the use of remote hearings. One theme was the essential need for judges to be able to conduct certain types of cases remotely if courts are closed or severely limited in their in-person proceedings. These are cases related to personal liberty or personal safety, such as bail hearings, domestic violence cases, or emergency child custody matters.

As courts move beyond mandatory COVID closures, the focus groups identified proceedings that remain amenable to remote hearing technology and procedures. Texas judges agreed that the type of case is less relevant than the type of hearing—in most instances. Generally speaking, remote hearings function most effectively with short hearings that are limited in scope, such as setting of trial dates, status hearings, permanency hearings, discovery hearings, motions hearings of various types, summary judgments, self-represented divorce dockets (especially when parties have completed agreements), and non-evidentiary or non-witness cases.

Additionally, in terms of case types that work well for remote dockets, judges indicated the type of matters that affect people's ability to get on with their lives, such as many Probate proceedings, Child Protective Services, and other Family law cases.

Though jury trials have successfully been conducted remotely in Texas, and it is reported that jurors especially like this format, the collective view among focus group participants is that jury trials are more effectively held in-person. Similarly, problem-solving courts, such as drug courts, are better suited to in-person hearings, though some have been handled remotely during the past 18 months.

Several judges indicated that it is not necessarily the type of hearing or the type of case that matters when determining whether to hold a hearing in-person or remotely; sometimes, the nature of the case or the makeup of the parties determines the most appropriate platform. For example, one judge who hears Child Protective Service cases argued that she often triages families' needs by having service providers available in the courtroom to address the needs of family members, such as substance abuse or mental health needs. While these professionals can be scheduled to attend a remote hearing, not having them physically present limits their ability to provide immediate assistance. Another judge relayed an incident in which a family member was yelling profanities during a remote hearing, and it was easier to mute that person remotely than to physically remove them from the courtroom.

Overall, the focus groups were supportive of Texas judicial leadership developing guidelines clarifying the types of hearings that would presumptively be held remotely. This approach would encourage general uniformity in practice throughout the state. However, as noted in the examples above, the judges would also like to preserve some discretion in selecting the type of venue to best address the needs and circumstances of particular litigants.

5. Impact of remote hearings on judicial stress.

Across the three focus groups, the consensus is that remote proceedings will continue for the foreseeable future. Currently, most Texas judges are responsible for all or most aspects of remote hearings, including setting up links, addressing technical issues, teaching parties how to use the hearing platform, and ensuring control of the hearings. Judges reported feeling more exhausted when conducting remote hearings. As one judge indicated, "I definitely get more exhausted by doing virtual hearings. As a judge, I am constantly *on*; but my performance and focus is just different. Holding remote hearings all day is very exhausting physically. But there is a perception that people need to see and feel they have had their day in court and that they are getting what they paid for."

A related factor is the ease of more tightly scheduling remote hearings. The move to remote hearings has changed court-scheduling practices in important ways. In the past, many courts would schedule a morning and afternoon in-person docket for a set number of hours. The judge would handle all matters scheduled for each block of time. Typically, gaps would appear during the session (e.g., party non-appearance), and the judge would get a series of short breaks during the day. With remote proceedings, many courts have moved to tighter scheduling of individual matters in 15- or 30-minute time-certain "appointments" (similar to a doctor's office). Many Texas judges report they now have a more individualized and tightly structured daily calendar than in the past, with the associated cost of fewer breaks throughout the day. They also note that the ease of virtual appearance in remote hearings makes it easier to quickly fill gaps in a daily docket that might emerge if a previously scheduled matter is postponed.

Of course, the converse to more individualized scheduling is greater convenience for litigants and attorneys. Rather than sitting through a three-hour morning docket waiting for their case to be called, a specific time slot means court users can more easily plan their day. For this reason, there will be interest in maintaining these new scheduling practices, making it incumbent on judges to adjust mentally and physically to new ways of doing business. A recent AJA white paper discusses the importance of mindfulness in judicial decision making and how that can affect procedural justice.[13] While this paper focused on in-person proceedings, the same concepts apply to dealing with "Zoom fatigue." The stressors noted by Texas judges make the practice of mindfulness and self-care especially important during remote hearings. The use of decision aids or checklists is presented as a simple, yet effective, tool that can be used to be more mindful.

Implications of Findings and Recommendations

This exploratory study has revealed there are both benefits and challenges associated with the current case-processing practices used in handling hearings remotely. Driven largely by technology-related issues, the time study data collected from participating Texas judges show that remote pretrial hearings take an average of about 34% longer than similar in-person hearings. The need for ongoing attention to reducing technology problems was a recurrent theme during the Texas focus groups, one corroborated by other recent studies conducted in Nevada and Utah.

A primary benefit of remote hearings is the opportunity to significantly improve the court experience for court users in select types of hearings and cases. As noted, remote hearings are often more convenient because they allow for more time-certain scheduling and reduce obstacles to attending, such as transportation, childcare, and work schedules. By improving the court experience, the perception and reality is that the quality of justice is improved.

According to most judges and attorneys interviewed and surveyed across a variety of studies conducted since the pandemic began, remote hearings will be an ongoing reality in courts across the country. Aside from technological concerns, courts will need to continue to address other challenges with pre-hearing preparation associated with the swift move to remote practices. Texas judges noted a major focus in court administration is continuing attention to improving the efficiency of remote hearings, including better using judicial officer time, improved scheduling and notice of remote proceedings, and workable methods to respond to individual users' questions.

13 P. Casey, K. Burke, and S. Leben, "Minding the Court: Enhancing the Decision-Making Process," *International Journal for Court Administration* 5, no. 1 (2013): 45–54. DOI: http://doi.org/10.18352/ijca.8.

If the reliance on remote hearings is expected to be a reality for courts going forward, there is an unquestioned need for additional research to provide guidance to courts regarding how to make the process more efficient and effective for all participants, including judges. While some court administrators and individual judges have found ways to improve the process of conducting remote hearings, many of the topics covered in this exploratory analysis deserve further investigation, including:

- Which hearing types best lend themselves to being conducted remotely?
- Are there specific case types that are more efficiently and effectively conducted remotely?
- Are there best practices that contribute to more effective remote hearings?
- What can be done to decrease judicial burnout resulting from conducting virtual hearings?
- What are the experiences of court users, such as litigants, families, attorneys, and expert witnesses, participating in remote hearings?
- What technological assistance should be available to judges and court staff to ensure seamless remote hearings?

Recommendations

1. State and local judicial leadership should generate guidelines for determining when a court proceeding should be conducted in-person or remotely. These guidelines should include the type of docket, the subject matter of the hearing, the parties who will appear at the proceeding, and the potential legal consequences of the final adjudicative decision. For example, traffic dockets, in which a large volume of cases are likely to be heard, may lend themselves well to remote hearings; conversely, cases involving jailable offenses, evidentiary material, or criminal jury trials might be better heard in trial court. Judges also indicated that the personalities involved, or specific litigant situations, might also affect the decision regarding in-person versus remote hearings. For example, in a divorce case in which the parties are not amicable, it might be more effective to hold the hearing remotely.

2. Court systems and judges should determine the most effective way to schedule hearings that provide for the greatest efficiency in the court, while also being mindful of litigants' time. Court users should be able to expect similar experiences across courtrooms, so scheduling considerations should be determined consistently.

3. Remote court participants will benefit from clearly delineated instructions and expectations for their hearings. Not all court participants may have the necessary reading skills to comprehend the information, so this information should be provided through multiple media, including in writing and through video, such as YouTube. A survey conducted in Australia indicated that there were several aspects of the court experience that could be improved. More than a quarter of court users wanted to be better informed about when their matter would start and how long it would take. They wanted to understand what was expected of them and what the next steps would be.[14] In the UK, some courts are also contacting the parties before their court hearing to ensure that they understand how to log into the hearing, how to navigate the platform in which the hearing is being conducted, what the hearing will entail, what is expected of them, what documents they will need to have and in what format, and any additional information they need for the hearing, so that they have an opportunity to have any questions answered.[15] The documentation should include basic steps of how to connect to the platform, individual identifiers that are required, and the mechanics of using the platform's software.

4. Court systems should develop clear instructions for remote proceedings on courtroom decorum and expectations of litigants, including timeliness, dress code, and appropriate places from which to log into a hearing. The instructions should be made available in both written and video format, and they could even include a checklist of items to address. Courts should also develop workable methods to respond to individual users' questions.

5. Before any hearing, the court should ensure that all required paperwork and agreements between parties have been appropriately completed. For example, if couples seeking a divorce are expected to attend the hearing with completed agreement documents, this should be clearly communicated before the hearing; if completed documents are not provided to the court by a date certain, the hearing should not be held. Courts should explore technology platforms that simplify this experience.

6. Courts should not assume that all parties have access to the proper equipment (computers, tablets, smart phones) allowing them to participate in remotely held court proceedings. Similarly, courts should consider the technical expertise of parties before scheduling remote hearings. All courts should provide safe and easily accessible computer systems for court users to attend remote hearings.

14 From Court User Satisfaction Survey, Family Court of Australia, Federal Circuit Court of Australia, Richard Foster, Chief Executive Officer, 2014, https://www.courtexcellence.com/__data/assets/pdf_file/0018/6093/user-satisfaction-survey.pdf)

15 Personal experience by David Slayton, Vice President of the NCSC Court Consulting Division, based on consulting experience in the UK.

7. When interpreters are used, the court should ensure that the non-English-speaking litigant's attorney has briefed the interpreter on the case and how to use the communication system. The court should ensure that all parties know how to log in to the system (for example, in Zoom, they need to be on a certain channel).

8. Court systems should find ways to preempt judicial burnout arising from holding consecutive remote hearings. Judges should be encouraged to take regular breaks during and between hearings.

9. Since remote hearings appear to be a permanent part of the justice system, court systems should consider hiring "technical bailiffs" or other court staff. These positions would be responsible for setting hearing links, scheduling parties, and addressing technical issues that arise during remote hearings. These positions could also be responsible for communicating with parties before the hearings to ensure that everyone knows what to expect during their hearings, has all the proper documentation available for the hearings, and has an opportunity to have any questions answered.

Appendices

Appendix A: Texas Remote Hearing Study Case Type Categories

1. **Felony Group A** – Murder, homicide, attempted murder, assaultive offenses (Ch. 22, Penal Code), aggravated robbery/robbery, indecency with or sexual assault of a child, family violence assault.

2. **Felony Group B** – Automobile theft, burglary, drug sale or manufacture, drug possession, felony DWI, theft, all other felonies.

3. **Misdemeanor** – All misdemeanors, including DWI first or second offense, theft, theft by check or similar sight order, possession of marijuana or other drugs, family violence assault, other assault, traffic offenses, SWLS/DWLI, other misdemeanors.

4. **Injury or Damage Involving Vehicle** – Injury or damage involving a motor vehicle.

5. **Injury or Damage – Other than Vehicle** – Injury or damage other than from a vehicle, malpractice, and product liability.

6. **Contract – Other** – Accounts, consumer/commercial debt, contracts, and notes.

7. **Other Civil** – Tax cases, condemnation, civil cases relating to criminal matters, other civil cases, real property, administrative law, and government cases.

8. **Divorce** – Divorce with children, divorce without children.

9. **Other Family Law Matters** – IV-D Paternity, IV-D support order established, parent-child – no divorce, protective orders, non-divorce family cases, other family matters.

10. **Modifications and Enforcements** – Modifications and enforcements related to custody or other matters.

11. **Delinquency** – Juvenile delinquency cases.

12. **Child Protective Services** – Child protective services cases.

Appendix B: Texas Remote Hearing Study Case-Related Activity Categories and Definitions

1. **Pre-Disposition/Non-Trial Disposition: In Court** – Includes all IN COURT on-bench and off-bench activity related to pretrial proceedings and non-trial dispositions. In probate cases, includes uncontested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to pre-disposition and non-trial disposition activities.

2. **Pre-Disposition/Non-Trial Disposition: Remote** – Includes all REMOTE on-bench and off-bench activity related to pretrial proceedings and non-trial dispositions. In probate cases, includes uncontested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to pre-disposition and non-trial disposition activities. This also includes time required to set up links, establish communication, etc.

3. **Bench Trial: In Person** – includes all IN-PERSON bench trial activity, including:
   - Bench trial: counted as a trial when the case is called (includes all time related to in-trial activities). Includes criminal trials, civil trials, contested divorces, contested adjudicatory or disposition hearings in juvenile cases, contested probate matters, etc.;
   - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted; and
   - Sentencing hearing following trial.

4. **Bench Trial: Remote** – includes all REMOTELY CONDUCTED bench trial activity, including:
   - Bench trial: counted as a trial when the case is called (includes all time related to in-trial activities). Includes criminal trials, civil trials, contested divorces, contested adjudicatory and/or disposition hearings in juvenile cases, contested probate matters, etc.;
   - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted;
   - Sentencing hearing following trial; and
   - Time required to set up for trial.

5. **Jury Trial: In Person** – Includes all IN-PERSON on-bench and off-bench activity related to a bench or jury trial or another contested proceeding that disposes of the original petition in the case. In probate cases, includes contested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to trials. Includes sentencing following a bench or jury trial. Some examples of trial activities include:
    - Jury trial: counted as a trial when a jury is empaneled. Includes jury selection, arguments and evidence, jury deliberation, jury polling, announcement of verdict;
    - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted; and
    - Sentencing hearing following trial.

6. **Jury Trial: Remote** – Includes all REMOTELY CONDUCTED on-bench and off-bench activity related to a bench or jury trial or another contested proceeding that disposes of the original petition in the case. In probate cases, includes contested proceedings to appoint a fiduciary or to order supervision of a trust. Includes all off-bench research and preparation related to trials. Includes sentencing following a bench or jury trial. Some examples of trial activities include:
    - Jury trial: counted as a trial when a jury is empaneled. Includes jury selection, arguments and evidence, jury deliberation, jury polling, announcement of verdict;
    - Any work by the judicial officer related to research, case review, writing findings of fact and conclusions of law on specific cases that have gone to trial is counted;Sentencing hearing following trial; and
    - Scheduling and technical set-up.

7. **Post-Disposition Activities: In Person** – Includes all IN-PERSON on-bench and off-bench activity that occurs after the entry of judgment on the original petition in the case. In probate cases, includes all activity after a fiduciary is appointed or trust supervision is ordered. Includes all off-bench research and preparation related to post-disposition activity. Does not include trials de novo.

8. **Post-Disposition Activities: Remote** – Includes all REMOTELY CONDUCTED activity that occurs after the entry of judgment on the original petition in the case. In probate cases, includes all activity after a fiduciary is appointed or trust supervision is ordered. Includes all off-bench research and preparation related to post-disposition activity. Does not include trials de novo.

Appendix C: Texas Remote Hearing Study Non-Case-Related Activity Categories and Definitions

a. Non-Case-Related Administration

Includes all non-case-related administrative work such as:

- Staff meetings
- Judges' meetings
- Personnel matters
- Staff supervision and mentoring
- Court management

b. General Legal Research

Includes all reading and research that is ***not*** related to a particular case before the court.

Examples include:

- Reading journals
- Reading professional newsletters
- Reviewing appellate court decisions

c. Judicial Education and Training

Includes all educational and training activities such as:

- Judicial education
- Conferences

Includes travel related to judicial education and training.

d. Committee Meetings, Other Meetings, and Related Work

Includes **all work related to and preparation for** meetings of state and local committees, boards, and task forces, such as:

- Community criminal justice board meetings
- Bench book committee meetings
- Other court-related committee meetings

Includes travel related to meetings.

e. Community Activities and Public Outreach

Includes all public outreach and community service that is performed in your official capacity as a judge. This category does not include work for which you are compensated through an outside source, such as teaching law school courses, or personal community service work that is not performed in your official capacity as a judge.

Examples of work-related community activities and public outreach include:

- Speaking at schools about legal careers
- Judging moot court competitions

Includes travel related to community activities and public outreach.

f. Work-Related Travel

Includes only travel between courts during the business day. Time is calculated from the primary office location as determined by the Texas Supreme Court to the visited court.

Do not include commuting time from your home to your primary office location. Record travel time from your primary office location to judicial education and training, committee meetings, or community activities and public outreach in the applicable category. This is an account of minutes spent on travel only.

g. Vacation, Sick Leave, and Holidays

Includes all time away from work due to vacation, personal leave, illness or medical leave, and court holidays.

h. Lunch and Breaks

Includes all routine breaks during the working day.

i. Non-Case-Related Specialty Court Activity

Includes all work related to specialty courts that does not include meeting in-person or remotely with specialty court participants.

j. Technology-Related Work/Issues

Includes all time spent addressing technology-related issues that do not involve litigants.

k. NCSC Time Study

Includes all time spent filling out time study forms and entering time study data using the Web-based form.


National Center for State Courts
1971

Tab E

The Supreme Court of Texas

CHIEF JUSTICE
NATHAN L. HECHT

JUSTICES
DEBRA H. LEHRMANN
JEFFREY S. BOYD
JOHN P. DEVINE
JAMES D. BLACKLOCK
J. BRETT BUSBY
JANE N. BLAND
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NADINE SCHNEIDER

February 17, 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 Evidence 503(b)(1)(C). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amending Texas Rule of Evidence 503(b)(1)(C) to allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Part of the proposal was already discussed by the Committee at its December 11, 2015 meeting. The Committee should review and make recommendations, particularly regarding the proposed addition of "related."

Texas Rule of Evidence 803(16). In the attached memorandum, the State Bar Administration of Rules of Evidence Committee proposes amending Texas Rule of Evidence 803(16) to limit the hearsay exclusion's ancient documents exception to documents created before electronically stored information was widely used. The Committee should review and make recommendations.

Texas Rule of Appellate Procedure 6.5(d). In the attached memorandum, the State Bar Court Rules Committee proposes exempting non-lead counsel from Texas Rule of Appellate Procedure 6.5's withdrawal requirements if lead counsel continues representation. The Committee should review and make recommendations.

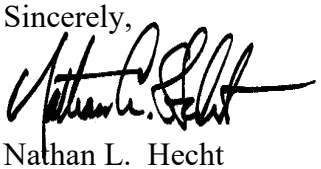
Rules for Identifying Potential Disqualification and Recusal Issues. Texas Rules of Appellate Procedure 38, 52, 53, and 55 are designed to capture the information needed for disqualification and recusal purposes by requiring that petitions and briefs contain the basic information about a case, including the identity of "all" counsel. The Committee should study and

make recommendations on how to strengthen the requirement of disclosure on parties and counsel at the outset so courts will have better information to make informed, reasoned decisions on disqualification and recusal. The Committee should consider whether the Court should:

- amend Rules 38, 52, 53, and 55 to clarify that "all" counsel means both current and former counsel at all levels of a proceeding;
- amend Rules 38, 52, 53, and 55 to clarify that the requirement to list the "names" of all counsel includes all firm names at which they practiced during their representation;
- amend other rules, like those governing the notice of appeal and the docketing statement in the courts of appeals, to require disclosure earlier and more often; and
- impose a duty to amend and supplement.

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

Sincerely,



Nathan L. Hecht
Chief Justice

Attachments

MEMORANDUM

From: Administration of Rules of Evidence Committee (AREC)

To: State Bar of Texas (SBOT)
Supreme Court of Texas
The Texas Supreme Court Advisory Committee (SCAC)

Date: November 29, 2021

Re: Recommendation to amend Tex. R. Evid. 503(b)(C) to remove requirement of a "pending action"

RECOMMENDATION

AREC recommends amending Rule 503 to include "anticipated" litigation as follows:

503. Lawyer-Client Privilege

(b) Rules of Privilege.

(1) General Rule. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a related pending or anticipated action or that lawyer's representative, if the communications concern a matter of common interest in the ~~pending~~ action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

This would allow communications with counsel for other parties in related actions that are not yet filed to remain privileged. Though the Rule uses the words "common interest," it does not provide a broad common-interest protection (discussed below), as the communication must be made to a lawyer or their representative, and does not reach communications among *parties* who share the common interest.

BACKGROUND

In September 2015, AREC submitted a recommendation to SCAC to expand Rule 503(b)(1)(C) to cover "anticipated" litigation. Prior to that recommendation, interested SBOT Committees were given the opportunity to provide input and all responding Committees expressed support for the change.

On December 11, 2015, SCAC approved of the proposed AREC recommendation by a vote of 25 to 7. However, to date this recommendation has not been adopted and incorporated into the rules of evidence.

In May 2021, AREC voted to submit the above recommended rule change. The SBOT Administrative Committee reviewed the recommendation and had questions about including "related" in the change. AREC again reviewed the recommendation, and in September 2021, again voted to submit this recommended change.

DISCUSSION

Texas' current "allied litigant privilege" is a variation of the "common interest doctrine."[1] *See* Tex. R. Evid. 503(b)(1)(C); *see also In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 52 (Tex. 2012) (discussing Texas' "allied litigant" privilege). It protects communications "to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." *In re XL Specialty Ins. Co.*, 373 S.W.3d at 52. The pending action requirement means that "no commonality of interest exists absent **actual litigation**." *Id*. (emphasis added).

By omitting the pending action requirement, the privilege is extended to communications with another party's attorney even if litigation is not yet filed. This change would aid in more efficient case management and scheduling, and remove any potential procedural tactic of filing suit (or delaying suit) for the sole purpose of shielding (or hindering) common-interest communications. This would also bring Texas law into conformity with Fifth Circuit law.[2] Finally, the anticipated action requirement should, as a practical matter,

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[1] The "common interest doctrine" allows separately represented parties with common legal interests to share information with each other and their respective attorneys without destroying the attorney-client privilege. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS Restatement (Third) of the Law Governing Lawyers § 76 (2000) ("(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication. (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them.").

[2] The Fifth Circuit recognizes the common interest privilege when there is pending litigation or a palpable threat of litigation at the time of the communication. *In re Santa Fe Int'l Corp.*, 272 F.3d 705,

impose a temporal limitation to tie unfiled related actions to their respective statutes of limitations.

SBOT's Administrative Committee has asked whether "related" should be included in the recommended change, as the term is undefined and could be considered vague. AREC has reviewed this issue and does not believe a definition is required.

"Related" and "unrelated" are used multiple times within the TRE without definition. *See, e.g.,* Tex. R. Evid. 901(6)(B) (example of authenticating telephone conversation includes evidence the call was made a business' number and was related to business reasonably transacted over the phone), 902(9) (commercial paper and related documents are self authenticating), 1004(e) (original writing, recording, or photograph is not required if it is not closely related to a controlling issue"). The word, in various forms, is also used throughout Texas statutes. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 42.001(5) (definition of "litigation costs" by referring to money and obligations "directly related to the action"); Tex. Probate Code § 33.002 (Action Related to Probate Proceeding in Statutory Probate Court).

The Rule's common-interest requirement also acts to bookend, or flank, the Rule 503(b)(C) privilege. This ensures both that the pending or anticipated actions are related, and that the communication concerns a matter of common interest. It would protect, for example:

- Communications among (1) counsel for a physician in an administrative action before the Texas Medical Board involving patient care, and (2) separate counsel for that physician in a suit by a patient against the physician.
- Communications among (1) counsel for a senior government employee in a criminal case involving acts against "whistleblower" employees; and (2) counsel for that same employee in a whistleblower civil suit; and (3) counsel for that employee in unemployment or occupational licensing administrative proceedings. These separate criminal, civil, and administrative actions may involve the same facts and witnesses, but will also involve different parties—and are all clearly related.
- Communications among counsel for insurers in separate actions involving the same agent or insured.

711 (5th Cir. 2001). A "palpable threat of litigation" means an actual, imminent, or directly foreseeable lawsuit. *Id.* at 714 (quoting district court opinion). If communications are made to protect from possible, but not imminent, civil or criminal action, then the common interest doctrine does not apply. *U.S. v. Newell*, 315 F.3d 510, 525-26 (5th Cir. 2002). Additionally, the communication must be made to *further* the common interest. *BCR Safeguard Holding, LLC v. Morgan Stanley Real Estate Advisor, Inc.*, 614 F. App'x 690, 704 (5th Cir. 2015). If a document evinces a conflict of interest between the two parties, then the common interest doctrine will not apply to shield the document from disclosure under the common interest doctrine. *Id.*; *see also U.S. v. Schwimmer*, 892 F.2d 237, 240-44 (2nd Cir. 1989) (discussing common interest privilege and applying common interest rule to information given by defendant to CPA hired by co-defense counsel to serve joint defense interests).

- Communications among counsel for an insurer in a declaratory judgment action involving coverage, and counsel for the same insurer in a suit against it by a policyholder.

The term "related" in AREC's Recommendation clearly includes actions with overlapping facts, claims, witnesses, or parties. Beyond these clear examples, courts are well equipped to analyze the facts at issue in making a determination as to whether separate actions are related.

/s/ *Angie Olalde*
2021-22 Chair, AREC

MEMORANDUM

To: Texas Supreme Court Advisory Committee (SCAC)

From: Angie Olalde, Chair of State Bar of Texas Administration of Rules of Evidence Committee (AREC)

Re: AREC's recommendation to amend TRE 803(16) on ancient documents to align with amendments to the federal ancient documents hearsay exception

Date: September 10, 2021

Summary

Currently, Texas Rule of Evidence 803(16) excepts from the hearsay rule "A statement in a document **that is at least 20 years old** and whose authenticity is established." Tex. R. Evid. 803(16) (emphasis added).

In 2017,the Federal Rules of Evidence were amended to change the 20-year requirement to a date certain:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (16) Statements in Ancient Documents. A statement in a document **that was prepared prior to January 1, 1998** and whose authenticity is established.

Fed. R. Evid. 803(16) (emphasis added). This was done to address the risk that the hearsay exception for ancient documents could be used as a vehicle for admitting unreliable electronically stored information (ESI). *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803.

AREC recommends amending TRE 803(16) to be consistent with FRE 803(16). This means the exception is no longer tied to a 20-year age limit, but instead focuses on documents created before ESI was widely used.

Background and AREC's Work

ESI has become prevalent since Google first started in 1998. Many fear that the proliferation of unreliable emails, tweets, texts, blogs, web postings and more could be admissible under the ancient documents exception.

AREC and its subcommittee that studied this issue researched and considered several issues, and including the following information:

1. Is Rule 803(16) used often enough to keep, or should we abrogate it?

A quick review of Texas cases shows this rule is still used quite often for trespass to try title cases, wills, products liability, mineral rights cases, and even an occasional criminal case. The case law extends from the time of the common law rule to 2020. Thus, AREC does not recommend removing the rule. The Federal Rule Committee reached the same conclusion after receiving more than 200 comments against abrogation of the rule. In some instances, it is the only way to prove a fact. "As a practical matter, there is usually no other way to prove heirship of a person who died in 1836 than by the recitations in ancient documents." *Zobel v. Slim,* 576 S.W.2d 362, 365 (Tex. 1978).

2. Should the rule remain unchanged to allow ESI over 20 years old to be exempted as ancient documents?

AREC considered whether ESI would actually pose an issue if admitted under a hearsay exception.

While the condition of traditionally ancient documents such as deeds or wills can be examined to analyze authenticity, that type of review is not available for ESI, which by its nature is electronically stored. Other problems with ESI include the fact that the *content* of a computer-created document can be easily modified, even unintentionally (for example, moving a file from one location to another could alter an electronic document's metadata). Thus, situations could arise where ESI was created more than 20 years ago, but arguments could ensue over whether it has been modified in such a way as to remove it from the ancient documents exception. Additionally, a traditional written document is generally limited to several sheets of paper, while ESI can include a much greater quantity of information, making it more difficult to ascertain whether all parts of proffered ESI may meet the ancient documents exception.

Finally, it is advisable to have similar application of this rule in federal and Texas state courts. A few states that have adopted the federal version have mentioned the avoidance of forum shopping as a reason for being in harmony with federal courts.

3. Could we change the language of Rule 803(16) to exempt "hardcopy" documents that are 20 years or older?

The Federal Rules Advisory Committee considered this idea and rejected it. The Committee noted that the distinction between ESI and hardcopy would be fraught with questions and difficult to ascertain. Scanned copies of old documents? Digitized versions of an old book? *See* Comm. Note to 2017 Amendment of Fed. R. Evid. 803 (explaining "A party will often offer hardcopy that is derived from ESI. Moreover, a good deal of old information in hardcopy has been digitized or will be so in the future. Thus, the line between ESI and hardcopy was determined to be one that could not be drawn usefully.").

4. Will excluding non-ESI documents written after 1998 be a problem?

In many cases, documents produced after January 1, 1998 will be preserved electronically and typically will not face the same issues of admitting a rare hardcopy document. For hardcopy documents created after January 1, 1998, their statements could still be admitted under other exceptions to the hearsay rule, such as for records kept in the course of a regularly conducted business activity under TRE 803(6). As our contemporary medium of communication is largely electronic, as opposed to written letters, AREC recommends this amendment, and that it conform to the federal rule's January 1, 1998 date. *See, e.g., id.* ("The Committee understands that the choice of a cut-off date has a degree of arbitrariness. But January 1, 1998 is a rational date for treating concerns about old and unreliable ESI. And the date is no more arbitrary than the 20-year cutoff date in the original rule.").

AREC'S Recommendation

We recommend Texas Rule of Evidence 803(16), the ancient documents hearsay exception, be amended to match its federal counterpart, as follows:

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

…

(16) Statements in Ancient Documents. A statement in a document that was prepared prior to January 1, 1998 ~~is at least 20 years old~~ and whose authenticity is established.

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 6.5(d)

I. Exact Language of Existing Rule

Rule 6. Representation by Counsel

6.1. Lead Counsel

(a) *For Appellant*. Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.

(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

6.2. Appearance of Other Attorneys

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

6.3. To Whom Communications Sent

Any notice, copies of documents filed in an appellate court, or other communications must be sent to:

(a) each party’s lead counsel on appeal;

(b) a party’s lead counsel in the trial court if:

(1) that party was represented by counsel in the trial court;

(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion*. A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel*. If an attorney substitutes for a withdrawing attorney, the motion to withdraw need not comply with (a) but must state only the

substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

II. Proposed Amendments to Existing Rule

Rule 6. Representation by Counsel

6.1. Lead Counsel

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(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

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(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

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(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel or Withdrawal of Non-Lead Counsel*. If an attorney substitutes for a withdrawing ~~attorney~~lead counsel, or if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court, the motion to withdraw need not comply with (a) but, if substitution of counsel is sought, must state ~~only~~ the substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

Texas Rule of Appellate Procedure 6.5(a) requires a lawyer to jump through many hoops in order to withdraw from representing a party in an appellate court. The withdrawing lawyer must include in the motion to withdraw a list of current deadlines and settings in the case, the party's name and last known address and telephone number, a statement that a copy of the motion was delivered to the party; and a statement that the party was notified in writing of the right to object to the motion.

Rule 6.5(d) exempts a withdrawing lawyer from these requirements if the client will continue to be represented by counsel in the appellate court by way of substitution. However, situations arise in which a client will continue to be represented by counsel in the appellate court other than by substitution. For example, when a partner and associate at the same law firm appear in an appellate court on a client's behalf, and later the associate moves to a different firm, the

associate's withdrawal from the representation will not deprive the client of the partner's continued representation. In this common circumstance, requiring the withdrawing associate to meet the requirements of Rule 6.5(a) creates an unnecessary burden of time and expense for parties, counsel, and appellate courts.

To eliminate these unnecessary portions of withdrawal motions, the proposed changes to Rule 6.5(d) would exempt a withdrawing attorney from the requirements of Rule 6.5(a) if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court. This exemption would be in addition to the current exemption for when another attorney is substituting for a withdrawing lead counsel.

The other aspects of Rule 6.5(d) are unchanged. For example, if substitution of counsel is sought, the motion to withdraw must state the substitute attorney's name, contact information, and State Bar number. In addition, Rule 6.5(d) still requires the withdrawing attorney (whether or not seeking substitution) to comply with Rule 6.5(b), requiring delivery of the motion to withdraw to the party either in person or by certified and first-class mail to the party's last known address. The provisions in Rule 6.1(c) for designating new lead counsel also remain unchanged.

Tab F

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: March 9, 2022

Re: February 17, 2022 Referral Relating to TRAP 6.5(d) Motion to Withdraw

I. Matter referred to subcommittee

The Court's February 17, 2022 letter referred the following matter to the Appellate Rules Subcommittee:

> **Texas Rule of Appellate Procedure 6.5(d).** In the attached memorandum, the State Bar Court Rules Committee proposes exempting non-lead counsel from Texas Rule of Appellate Procedure 6.5's withdrawal requirements if lead counsel continues representation. The Committee should review and make recommendations.

II. The Court Rules Committee Proposal

The proposal from the State Bar Court Rules Committee is attached in full. The proposed change is very limited. It permits a less onerous motion to withdraw when the attorney withdrawing from the appeal is not lead counsel. Currently, TRAP 6.5 requires counsel seeking to withdraw on appeal to:

- 6.5(a)—file a motion stating (1) a list of current deadlines and settings in the case; (2) the party's name and last known address and telephone number; (3) a statement that a copy of the motion was delivered to the party; and (4) a statement that the party was notified in writing of the right to object to the motion.

- 6.5(b)—serve the motion on the party.

- 6.5(c)—if the motion is granted, notify the party of any additional deadlines not stated in the motion.

The State Bar Court Rules Committee proposal would no longer require the information in 6.5(a) and 6.5(c) if the withdrawing attorney is not lead counsel in the case.

A. Proposed changes to TRAP 6.5(d) from the Court Rules Committee

(d) *Exception for Substitution of Counsel or Withdrawal of Non-Lead Counsel*. If an attorney substitutes for a withdrawing ~~attorney~~lead counsel, or if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court, the motion to withdraw need not comply with (a) but, if substitution of counsel is sought, must state ~~only~~ the substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

B. Reasons for the change as proposed by the Court Rules Committee

"Texas Rule of Appellate Procedure 6.5(a) requires a lawyer to jump through many hoops in order to withdraw from representing a party in an appellate court. The withdrawing lawyer must include in the motion to withdraw a list of current deadlines and settings in the case, the party's name and last known address and telephone number, a statement that a copy of the motion was delivered to the party; and a statement that the party was notified in writing of the right to object to the motion.

Rule 6.5(d) exempts a withdrawing lawyer from these requirements if the client will continue to be represented by counsel in the appellate court by way of substitution. However, situations arise in which a client will continue to be represented by counsel in the appellate court other than by substitution. For example, when a partner and associate at the same law firm appear in an appellate court on a client's behalf, and later the associate moves to a different firm, the associate's withdrawal from the representation will not deprive the client of the partner's continued representation. In this common circumstance, requiring the withdrawing associate to meet the requirements of Rule 6.5(a) creates an unnecessary burden of time and expense for parties, counsel, and appellate courts.

To eliminate these unnecessary portions of withdrawal motions, the proposed changes to Rule 6.5(d) would exempt a withdrawing attorney from the requirements of Rule 6.5(a) if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court. This exemption would be in addition to the current exemption for when another attorney is substituting for a withdrawing lead counsel."

III. Recommendation

The Appellate Rules Subcommittee unanimously recommends adoption of the change as proposed by the State Bar Court Rules Committee for the reasons stated by that committee.

STATE BAR OF TEXAS COURT RULES COMMITTEE
PROPOSED AMENDMENT TO
TEXAS RULE OF APPELLATE PROCEDURE 6.5(d)

I. Exact Language of Existing Rule

Rule 6. Representation by Counsel

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(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

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(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

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(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion*. A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel*. If an attorney substitutes for a withdrawing attorney, the motion to withdraw need not comply with (a) but must state only the

substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

II. Proposed Amendments to Existing Rule

Rule 6. Representation by Counsel

6.1. Lead Counsel

(a) *For Appellant*. Unless another attorney is designated, lead counsel for an appellant is the attorney whose signature first appears on the notice of appeal.

(b) *For a Party Other Than Appellant*. Unless another attorney is designated, lead counsel for a party other than an appellant is the attorney whose signature first appears on the first document filed in the appellate court on that party's behalf.

(c) *How to Designate*. The original or a new lead counsel may be designated by filing a notice stating that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. If a new lead counsel is being designated, both the new attorney and either the party or the former lead counsel must sign the notice.

6.2. Appearance of Other Attorneys

An attorney other than lead counsel may file a notice stating that the attorney represents a specified party to the proceeding and giving that attorney's name, mailing address, telephone number, fax number, if any, email address, and State Bar of Texas identification number. The clerk will note on the docket the attorney's appearance. When a brief or motion is filed, the clerk will note on the docket the name of each attorney, if not already noted, who appears on the document.

6.3. To Whom Communications Sent

Any notice, copies of documents filed in an appellate court, or other communications must be sent to:

(a) each party's lead counsel on appeal;

(b) a party's lead counsel in the trial court if:

(1) that party was represented by counsel in the trial court;

(2) lead counsel on appeal has not yet been designated for that party; and

(3) lead counsel in the trial court has not filed a nonrepresentation notice or been allowed to withdraw;

(c) a party if the party is not represented by counsel.

6.4. Nonrepresentation Notice

(a) *In General*. If, in accordance with paragraph 6.3(b), the lead counsel in the trial court is being sent notices, copies of documents, or other communications, that attorney may file a nonrepresentation notice in the appellate court. The notice must:

(1) state that the attorney is not representing the party on appeal;

(2) state that the court and other counsel should communicate directly with the party in the future;

(3) give the party's name and last known address and telephone number; and

(4) be signed by the party.

(b) *Appointed Counsel*. In a criminal case, an attorney appointed by the trial court to represent an indigent party cannot file a nonrepresentation notice.

6.5. Withdrawal

An appellate court may, on appropriate terms and conditions, permit an attorney to withdraw from representing a party in the appellate court.

(a) *Contents of Motion*. A motion for leave to withdraw must contain the following:

(1) a list of current deadlines and settings in the case;

(2) the party's name and last known address and telephone number;

(3) a statement that a copy of the motion was delivered to the party; and

(4) a statement that the party was notified in writing of the right to object to the motion.

(b) *Delivery to Party*. The motion must be delivered to the party in person or mailed — both by certified and by first-class mail — to the party at the party's last known address.

(c) *If Motion Granted*. If the court grants the motion, the withdrawing attorney must immediately notify the party, in writing, of any deadlines or settings that the attorney knows about at the time of withdrawal but that were not previously disclosed to the party. The withdrawing attorney must file a copy of that notice with the court clerk.

(d) *Exception for Substitution of Counsel or Withdrawal of Non-Lead Counsel*. If an attorney substitutes for a withdrawing ~~attorney~~lead counsel, or if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court, the motion to withdraw need not comply with (a) but, if substitution of counsel is sought, must state ~~only~~ the substitute attorney's name, mailing address, telephone number, fax number, if any, and State Bar of Texas identification number. The withdrawing attorney must comply with (b) but not (c).

6.6. Agreements of Parties or Counsel

To be enforceable, an agreement of parties or their counsel concerning an appellate court proceeding must be in writing and signed by the parties or their counsel. Such an agreement is subject to any appellate court order necessary to ensure that the case is properly presented.

Notes and Comments

Comment to 1997 change: Former Rules 7 and 57 are merged and substantially revised. Former Rule 8 regarding agreements of counsel is included here as subdivision 6.6 and the requirement that an agreement be filed and included in the record is deleted.

III. Brief Statement of Reasons for Requested Amendments and Advantages Served by Them

Texas Rule of Appellate Procedure 6.5(a) requires a lawyer to jump through many hoops in order to withdraw from representing a party in an appellate court. The withdrawing lawyer must include in the motion to withdraw a list of current deadlines and settings in the case, the party's name and last known address and telephone number, a statement that a copy of the motion was delivered to the party; and a statement that the party was notified in writing of the right to object to the motion.

Rule 6.5(d) exempts a withdrawing lawyer from these requirements if the client will continue to be represented by counsel in the appellate court by way of substitution. However, situations arise in which a client will continue to be represented by counsel in the appellate court other than by substitution. For example, when a partner and associate at the same law firm appear in an appellate court on a client's behalf, and later the associate moves to a different firm, the

associate's withdrawal from the representation will not deprive the client of the partner's continued representation. In this common circumstance, requiring the withdrawing associate to meet the requirements of Rule 6.5(a) creates an unnecessary burden of time and expense for parties, counsel, and appellate courts.

To eliminate these unnecessary portions of withdrawal motions, the proposed changes to Rule 6.5(d) would exempt a withdrawing attorney from the requirements of Rule 6.5(a) if the withdrawing attorney is not lead counsel and lead counsel continues to represent the party in the appellate court. This exemption would be in addition to the current exemption for when another attorney is substituting for a withdrawing lead counsel.

The other aspects of Rule 6.5(d) are unchanged. For example, if substitution of counsel is sought, the motion to withdraw must state the substitute attorney's name, contact information, and State Bar number. In addition, Rule 6.5(d) still requires the withdrawing attorney (whether or not seeking substitution) to comply with Rule 6.5(b), requiring delivery of the motion to withdraw to the party either in person or by certified and first-class mail to the party's last known address. The provisions in Rule 6.1(c) for designating new lead counsel also remain unchanged.

Tab G

The Supreme Court of Texas

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

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.

Tab H

Zamen, Shiva

From: Richard Orsinger <richard@ondafamilylaw.com>
Sent: Friday, March 11, 2022 3:01 PM
To: Zamen, Shiva
Cc: aestevez77@yahoo.com
Subject: Agenda for 3-25-2022 SCAC meeting
Attachments: Pages from 2021-10-25 Referral letter and email re TRCP 163 nonsuit and dismissal.pdf; 2021-12-07 Subcommittee report on TRCP 162.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Shiva:

Regarding the Agenda for the March 25, 2022 SCAC meeting, Subcommittee on Rules 15 through 165a could prepared to present the following: (1) Update on TRCP 76a; (2) Update on TRCP 162.

1. Rule 76a update. My suggestion would be to present two items as background information regarding the ongoing work evaluating TRCP 76a: (i) a description of sealing practices in Federal courts compared to Rule 76a; and (ii) The Sedona Conference proposal (December 2021) of a uniform rule for filing ESI and sealing records in Federal district court.

These are not action items. They are important background information to the issue of whether portions of Rule 76a should be changed, or whether an appellate rule for sealing records should be adopted by the Texas Supreme Court.

If our meeting agenda is crowded, we can definitely put this off to a later date, or to the date when recommendations are being made by the subcommittee. However, if there is time in the Agenda this would be good topics to delve into at the March 25 meeting, so that committee members can have these ideas percolating through their thoughts in advance of seeing recommendations about Rule 76a.

2. Rule 162. At the last SCAC meeting, the Subcommittee submitted the attached report, recommending a fix requested by Judge Robert Schaffer for lawyers non-suiting personal injury cases involving minors instead of submitting settlement for court approval. The subcommittee report addressed but did not make recommendations on discontinuities between nonsuit and dismissal. Here was our "official" recommendation:

> We would suggest the following change to the second paragraph of Rule 162:
>
> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court**. Any dismissal pursuant to this rule involving a next of friend shall not be effective unless approved by the Court pursuant to Rule 44.** Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

This fix does not work if the suit is non-suited without dismissal. It may be that insurance companies would always require a take-nothing judgment before they pay a claim by a minor. However, non-institutional defendants may not be so cautious.

Non-suit is also addressed in TRCP 91a, DISMISSAL OF BASELESS CAUSES OF ACTION, and I am not aware of any attempt to consider the interplay between Rule 162 and Rule 91a.

The Subcommittee could bring forward recommendations regarding dismissal vs. nonsuit. This is not an urgent topic, so it can be put on any future agenda if time is needed for other items on the agenda for the March 25, 2022 meeting, or if the Court is uninterested in further discussion of Rule 162.

Thanks.

Richard R. Orsinger

Chair, Subcommittee on Rules 15-165a

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

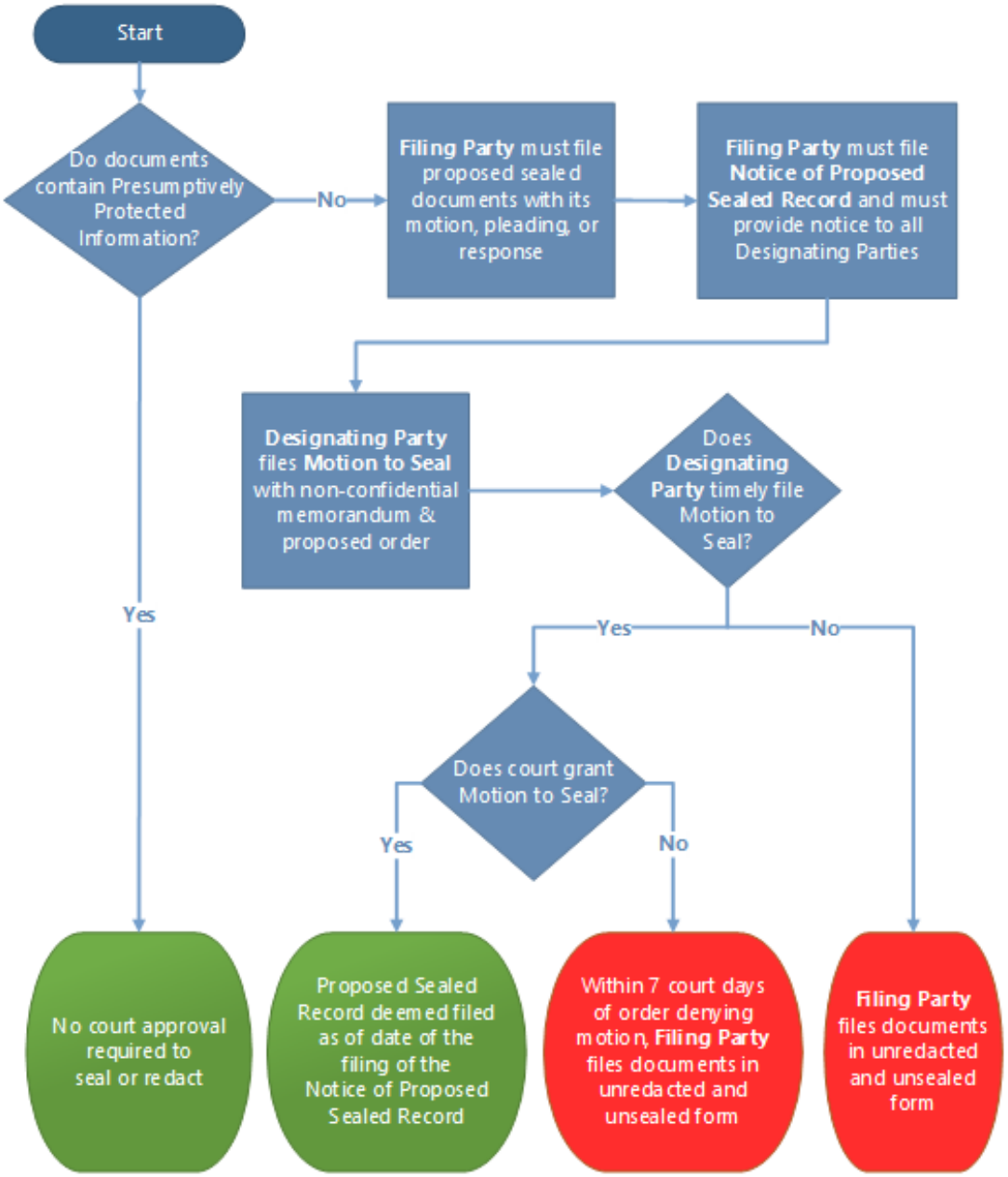
granting or denying a sealing request. TRCP 76a.6 requires an order sealing or unsealing to state "the specific reasons for finding and concluding whether the standard for sealing has been met."

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

Tab I1



[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 I2

wgs

The Sedona Conference

Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal

A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WG1)

December 2021
Public Comment Version
Submit comments by February 5, 2022, to
comments@sedonaconference.org

The Sedona Conference Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal

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PUBLIC COMMENT VERSION

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Preface

Welcome to the December 2021 Public Comment Version of The Sedona Conference *Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal ("Commentary")*, a project of The Sedona Conference Working Group 1 on Electronic Document Retention and Production (WG1). This is one of a series of Working Group commentaries published by The Sedona Conference, 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 mission of The Sedona Conference is to move the law forward in a reasoned and just way.

The intent of this *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). 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.

The *Commentary* was a topic of dialogue at the Working Group 1 2020 Annual Meeting and 2021 Midyear Meeting and was published for member comment earlier this year. This public comment version reflects the valuable input provided by Working Group members.

On behalf of The Sedona Conference, I thank drafting team leaders Bethany Caracuzzo, Tony Petruzzi, and Jodi Munn Schebel for their leadership and commitment to the project. I also recognize and thank drafting team members Zachary Caplan, Karen Mitchell, Maria Salacuse, and Jeff Schaefer for their dedication and contributions, and Steering Committee liaisons Ross Gotler, Heather Kolasinsky, Timothy Opsitnick, the Hon. Andrew Peck, and Martin Tully for their guidance and input. I also wish to recognize the Hon. Maria Audero, the Hon. Cathy Bissoon, and the Hon. Timothy Driscoll for their contributions as Judicial Advisors.

Please note that this version of the *Commentary on the Need for Guidance and Uniformity in Filing ESI and Records Under Seal* is open for public comment through February 5, 2022, and suggestions for improvement are very welcome. After the deadline for public comment has passed, the drafting team will review the public comments and determine what edits are appropriate for the final version. Please submit comments by email to comments@sedonaconference.org.

In addition, we encourage your active engagement in the dialogue. Membership in The Sedona Conference Working Group Series is open to all. The Series includes WG1 and several other Working Groups in the areas of international electronic information management, discovery, and disclosure; patent remedies and damages; patent litigation best practices; trade secrets; data security and privacy liability; and other "tipping point" issues in the law. The Sedona Conference hopes and anticipates that the output of its Working Groups will evolve into authoritative statements of law, both as it is and as it should be. Information on membership and a description of current Working Group activities is available at https://thesedonaconference.org/wgs.

Craig Weinlein
Executive Director
The Sedona Conference
December 2021

Table of Contents

I. INTRODUCTION

As any practitioner in federal court knows, there is a lack of uniformity as to the process for sealing confidential documents and electronically stored information (ESI). Federal Rule of Civil Procedure 5.2 provides concrete and repeatable rules for sealing personal information, including social security, tax-ID and financial account numbers, as well as birth dates and the names of minors, but guidance from the rules as to sealing stops there. If a party wants to use a produced confidential document in support of a motion for summary disposition, for example, the process it must follow is almost entirely governed by local rules. And those rules are so varied that not only do they differ from district to district,[1] but also differ between districts within the same state.[2]

Frequently, those rules place the burden to seal a document on the party that did not designate the document as containing confidential information, and in many cases disagrees with that designation. Under traditional sealing rules, the filing party must move to seal confidential documents appended to or referenced in a motion. However, if the filing party did not produce the confidential documents, the filing party has no knowledge as to the reason(s) why any individual confidential document was designated as such by the producing party. Thus, not only does the filing party lack foundation upon which to base a motion to seal, it may not even agree that the confidential documents deserve to be sealed. This results in an impracticable situation in which, by application of local sealing rules, the filing party must file a motion to seal documents that it may actually oppose. As a result, the filed motion to seal is oftentimes perfunctory and lacking in meaningful content. So that the court can properly weigh whether the confidential documents meet the requirements to be sealed,[3] this *Commentary* posits that it should be the designating party's burden to file a declaration in support of sealing, because the designating party is uniquely situated and appropriately motivated to describe the nature and basis of each confidential document. Only upon such proper foundation can the court determine whether the documents or information at issue should be sealed from public view.

To rectify this problem, this *Commentary* proposes the use of a Notice of Proposed Sealed Record, which is filed with the underlying motion, pleading, or response, and identifies the

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1 For example, in the Northern District of New York, all documents sought to be sealed must be sent to the court for in camera review in .pdf format through an email to the assigned judge, and served on all counsel. See N.D.N.Y. L.R. 83.13(6). However, in the Central District of California, sealed documents must be filed electronically. See C.D. Cal. L.R. 79-5.

2 An order to seal in the Western District of Texas lasts unless otherwise directed by the Court. *See* W.D. Tex. L.R. 5.2(d). However, in the Northern District of Texas, an order to seal paper documents is deemed unsealed 60 days after final disposition of the case, unless a party seeking to maintain the order to seal files a motion for relief before expiration of the time period. *See* N.D. Tex. L.R. 79.4.

3 The substantive standard to be used by a court in considering whether a document should be sealed in whole or in part is an entirely different matter from the procedure addressed by the Proposed Model Rule and is not addressed by this *Commentary* or the Proposed Model Rule, which is procedural only. Applicable standards include the common law right of access, the right of access under the First Amendment, and Federal Rule of Civil Procedure 26(c)(1)(G), which permits a party to seek protection, on a showing of good cause, from "annoyance, embarrassment, oppression, or undue burden or expense" as to "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way[.]" For ease of reference and to provide background on the applicable standard for sealing and the split among the federal circuits as to the proper standard to be applied, an Appendix Case Law Summary is attached to this *Commentary*.

confidential documents referenced in or appended to that motion, pleading, or response. 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. The Proposed Model Rule also addresses other inconsistencies and differences between the local sealing rules, including setting a uniform and reasonable time frame to file a motion to seal, proper notice to be provided to non-parties whose confidential documents are subject to a Notice of Proposed Sealed Record, and how sealed and redacted records are to be filed by the parties and disposed of by the court. The proposed Notice form also aids courts, litigators, non-parties, and the public by using a clear and consistent docketing entry signaling that a motion to seal has been filed.

These changes, like the others proposed in this *Commentary* and its Proposed Model Rule, are designed to not only bring uniformity to the process of filing documents and ESI under seal, but to be a fair and efficient method to deal with the sealing and redacting of ESI and documents so that the parties can focus on the litigation while conserving the resources of the court. To effect these goals, this *Commentary*: (1) recommends a consistent process for filing ESI and documents under seal, considering the attendant burdens for sealing on parties, non-parties, and the court; and (2) provides guidance and best practices to practitioners on ESI and document sealing, including the steps required to do so and potential pitfalls to avoid in the process.

In addition to this Introduction, this *Commentary* includes two other sections:

- Section II is the Proposed Model Rule, with Proposed Notice form;

- Section III is an annotated version of the Proposed Model Rule containing practice tips for complying with the Proposed Model Rule, discussion of the factors considered by the drafting team and inconsistencies presented by the multiple differing local federal rules, and a process flowchart illustrating the practical application of the Proposed Model Rule.

Finally, the Appendix includes a circuit-by-circuit case law summary analyzing federal law on the standards for sealing of ESI and documents, with attachments. Attachment A depicts, in a chart format, whether and how each federal circuit defines a "judicial record," and Attachment B identifies whether a public right of access exists for nondispositive motions in each federal circuit.

By providing a uniform process, including a single set of rules for sealing documents in civil litigation and a standardized form for providing notice of the filing of sealed documents, this Proposed Model Rule, if enacted, should ease the burden on litigants and the court alike, and lead to a more equitable process for all.

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.

FORM NOTICE OF PROPOSED SEALED RECORD

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF

_____ *
Plaintiff, *

v. **Case No.** _____
*

_____ *
Defendant.

NOTICE OF PROPOSED SEALED RECORD

The undersigned hereby provide Notice of a Proposed Sealed Record, setting forth below the ECF Number(s) of the document(s) to be sealed, the identity of the designating party or non-party, whether an objection to sealing is anticipated, and whether a prior sealing Order exists.

ECF No.	Designating Party	Objection Anticipated	Prior ECF No.	Prior Order Date
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		
		--Select--		

If no prior Order exists, proposed reason for redacting or sealing:

I hereby certify that on this date I electronically filed this Notice and the documents identified above with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record, and that for any non-parties, I will serve copies of this Notice and the documents identified above in conformance with Fed. R. Civ. P. 5 and applicable Local Rules.

_____ _____

Date

Signature

Party Represented

Printed Name and Bar Number

Address

Email Address

Telephone Number

Fax Number

PRINT

III. ANNOTATED PROPOSED UNIFORM MODEL RULE FOR THE SEALING AND REDACTING OF INFORMATION FILED WITH A FEDERAL COURT

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.

> ❖ ***COMMENT***
>
> Standing alone, the fact that a Record contains Confidential Information is not enough to justify sealing or redaction, nor is the existence of a Protective Order permitting "Confidential" or similar designations.[4] Records submitted under seal or in redacted form pursuant to this Model Rule cannot remain under seal without a court order determining such sealing or redacting is proper, except for Presumptively Protected Information (See definition at 1.0(F) and Model Rule 2.0) or as required by Federal Rules of Civil Procedure 5.2.[5]

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[4] The federal courts have long recognized different standards for maintaining the confidentiality of documents that are exchanged in discovery versus documents filed with the court. For example, the Third Circuit recently reiterated that once documents are filed with a court "there is a presumptive right of public access to pretrial motions of a non-discovery nature, whether preliminary or dispositive, and the material filed in connection therewith." *In re* Avandia Mktg. Sales Practices & Prod. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019); *see also*, *for example*, Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006). Parties and attorneys practicing in federal courts—particularly in courts in the Third Circuit—should be aware of these decisions encouraging increased judicial scrutiny of proposed under seal filings.

[5] The definition of Presumptively Protected Information under the Proposed Uniform Model Rule is broader than that covered in Federal Rule of Civil Procedure 5.2. Note, however, that some courts will not allow filing of redacted materials except to the extent permitted by the Federal Rules of Civil Procedure. *See, for example*, D.N.J. Electronic Case Filing Policies and Procedures (As Amended April 3, 2014), Section 10, https://www.njd.uscourts.gov/sites/njd/files/PoliciesandProcedures2014.pdf ("Unless otherwise provided by federal law, nothing may be filed under seal unless an existing order so provides or Local Civil Rule 5.3 is complied with.").

> The proposed Model Rule does not seek to set forth any guideline or guidance as to what information is properly sealed or redacted; it only provides a procedure for doing so.
>
> When this Model Rule refers to redacted documents, it means redactions for purpose of public filing, not redactions that already exist on the document as part of production (e.g., redactions for privilege).

(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, drivers' 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).

> ❖ ***COMMENT***
>
> This new definition and the provisions that follow in Section 2.0 for redaction of Presumptively Protected Information are intended to augment Federal Rule of Civil Procedure 5.2 and provide streamlined protection from disclosure for a broader group of materials than currently are set forth in Rule 5.2. The definition covers information that is defined elsewhere, such as PII and PHI.

(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.[6] 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.

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[6] In considering the proper term for this document, this *Commentary* looked to the terms used by the varying circuits, which include "record," "judicial record," "document," "judicial document," "item," or "material." This document is to be distinguished from a document that becomes a part of the court file in a case (*see* 1.0(C)), but instead is meant to identify the document sought to be sealed or redacted pursuant to this Rule.

> ❖ ***COMMENT***
>
> The Model Rule proposes that a streamlined process of redaction is appropriate only to protect Presumptively Protected Information, and therefore does not require the procedure set forth in Model Rule 3.0 for filing Presumptively Protected Information under seal. Although the proposed Model Rule does not require prior court approval for the filing of Presumptively Protected Information, it does not preclude a party from challenging the filing or a non-party from intervening under Federal Rule of Civil Procedure 24(b) to challenge the sealing or redacting of any Record, including Presumptively Protected Information.

(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.

> ❖ ***COMMENT***
>
> Unless redaction is required by Federal Rule of Civil Procedure 5.2, the Model Rule does not obligate a Filing Party to redact Presumptively Protected Information when it has received documents or ESI in an unredacted form from the Designating Party. In that case, the party or entity producing materials that contain Presumptively Protected Information should bear the burden of protecting such information from disclosure. However, the Model Rule does not supersede any legal requirement that imposes a duty to protect any such information from disclosure.

(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.

> ❖ ***COMMENT***
>
> The Model Rule provides that a Filing Party need not defend a Designating Party's redactions of Presumptively Protected Information as a result of filing the redacted materials as received. Indeed, a Filing Party may object to or challenge those redactions. The justification for making the redactions remains the Designating Party's burden.

(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.___".

> ❖ ***COMMENT***
>
> Section 2.0(A) of the Model Rule requires that redactions of Presumptively Protected Information be "no greater than required to protect" disclosure. This provision states this obligation in a more specific manner to prevent the application of redactions in an overly broad manner that conceals not only the Presumptively Protected Information, but also conceals the type of information being redacted. This occurs, for example, when a redaction on a form conceals a Social Security Number, but also extends to conceal that what is being redacted *is* a Social Security Number, such as the header of the box containing the Social Security Number. Those applying redactions must be instructed not to conceal anything beyond the Presumptively Protected Information itself.

(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").

> ❖ ***COMMENT***
>
> Many document review and software platforms that provide the ability to embed redactions on document images also have redaction format options that allow "text redactions" as well as traditional blackout or whiteout

redactions. The use of text redactions to provide a basis for and give context to redactions on the face of a document is preferred to blackout or whiteout redactions of Presumptively Protected Information. If technology does not permit, or if the filing party is pro se and does not have the capabilities to provide textual redactions, the party may use any reasonable method available to redact the Presumptively Protected Information.

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.

❖ ***COMMENT***

This Rule permits a Filing Party to file a Record under seal conditionally while a court ruling on the issue is pending. The Model Rule focuses on the procedure for filing under seal and not the substantive requirements for sealing Records. Nothing in the Rule shall be interpreted to restrict any rights to intervene under Federal Rule of Civil Procedure 24(a) or (b).

(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 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 ___").

❖ ***COMMENT***

These sections of the Model Rule discuss the process for filing Records under seal using the CM/ECF system. The Proposed Sealed and/or Redacted Records are filed ***just one time***, concurrently with the motion, pleading, or response to which the Proposed Sealed or Redacted Record are referenced. The Proposed Sealed or Redacted Record will be referenced by ECF docket number in both the Notice of Proposed Sealed Record and motion to seal, and is not to be attached to the Notice, the motion to seal, or any declaration filed in support. The purpose of this requirement is to prevent repetitious filings, reduce the burden on the courts, and lessen the likelihood of inconsistent sealed or redacted filings. See Model Rule 3.0(C) and (D) and discussion below. The Notice is to be filed after the underlying motion, pleading, or response, so that the Notice may referenced the Proposed Sealed or Redacted Records by docket number.

The Form Notice that this *Commentary* has devised and proposes be uniformly used for efficiency and consistency contains a dropdown feature to identify whether there are any known objections to the proposed Sealed Records. The functionality of this dropdown feature, unfortunately, is not available when the Form is incorporated within these materials. Available options include: Yes, No, and Unknown.

This *Commentary* understands that some district courts require that documents requested to be filed under seal or redacted be submitted in hard-copy ("paper") form.[7] This *Commentary* elects to require the use of ECF to adopt modern filing requirements and alleviate the burden on courts to manage paper files or external media containing such files. This *Commentary* also considered that requiring another submission in paper form adds an extra layer of complexity and security for the parties and the court, and therefore removed such a requirement from this Model Rule. This *Commentary* acknowledges a court may still want a paper copy of sealed or redacted Records in limited circumstances, or may need to require paper copies in the instance of filers who have not been approved as ECF users in the case, and so included 3.0(B)(4)(b) in the Model Rule.[8] As another example, recent CM/ECF data breach issues have caused jurisdictions around the country to issue specific guidance on filing highly sensitive documents in paper form or via other secure means.[9]

The Model Rule also requires the use of placeholder slip sheets in place of the sealed Record to make it easier to track the Record, and to consistently identify it by the same exhibit number from the time the Record is filed with the original motion, pleading, or response that cites to Sealed or Redacted Records, through the filing of the Notice of Proposed Sealed Record by the Filing Party (*see* 3.0(C)), and in the motion to seal and supporting declaration later filed by the Designating Party, which seeks to keep the information protected (*see* 3.0(D)). Placeholder slip sheets are commonly used by other courts.[10]

Grouping Sealed and Redacted Documents Together In One Docket Entry: Current CM/ECF filing capabilities require filers to group all redacted or sealed documents together in a single docket entry. This is because current CM/ECF capabilities do permit e-service of sealed documents (though all courts do not currently use

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7 *See*, *for example*, C.D. Cal. L.R. 79-5.2.1(b); *see also*, W.D.N.Y., L.R. 5.3; E.D. Pa. L.R. 5.1.2; W.D. Pa. CM/ECF Manual. Other courts permit a choice of either manual or ECF filing. *See*, *e.g.*, N.D. Cal. L.R. 79-5. While other courts require that such documents be filed only via ECF. *See* E.D. Tex. L.R. CV-5(a)(7)(D); N.D.N.Y. L.R. 5.3(a) (former L.R. 83.13(6)); and D. Del. Electronic Case Filing CM/ECF User Manual XIV.C.

8 *See, for example*, N.D.N.Y. L.R. 5.3(a) (former L.R. 83.13) (requiring a motion to seal to be via ECF, but also requiring that "copies of all documents sought to be sealed be provided to the Court, for its in camera consideration, as an attachment in .pdf form to an email to the judge").

9 *See Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records* (Jan. 6, 2021), U.S. COURTS, https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court.

10 *See* N.D.N.Y. L.R. 5.3 (former L.R. 83.13(6)).

this functionality), but only if the documents are grouped together in a single docket entry. For example, a filing of sealed documents or unredacted versions of documents would look like this:

1	COMPLAINT filed by Plaintiff Allison Apple (Smith, Joe) (Filed on 03/01/2021)(Entered: 03/01/2021)
2	NOTICE of MOTION to dismiss filed by XYC Corporation (Attachments: # 1 MEMORANDUM in Support, # 2 Proof of Service, # 3 Proposed Order) (Jones, Jessica) (Filed on 04/30/2021)(Entered: 04/30/2021)
3	DECLARATION of Jessica Jones in support of 2 MOTION to dismiss filed by XYZ Corporation (Attachments: #1 Redacted Exhibit No. 1; # 2 Sealed Exhibit No. 2; # 3 Redacted Exhibit No. 3; # 4 Sealed Exhibit No. 4, # 5 Exhibit No. 5, # 6 Exhibit No. 6, # 7 Exhibit No. 7)(Jones, Jessica) (Filed on 04/30/2021)(Entered: 04/30/2021)
4	PROPOSED SEALED DOCUMENTS for 3 Declaration of Jessica Jones filed by XYZ Corporation (Attachments: #1 Unredacted Version of Exhibit No. 1; # 2: Sealed Exhibit No. 2; # 3 Unredacted Version of Exhibit No. 3; # 4 Sealed Exhibit No. 4) (Jones, Jessica) (Filed on 04/30/2021)(Entered: 04/30/2021)
5	NOTICE OF PROPOSED SEALED Records filed by XYZ Corporation (Jones, Jessica)(Filed on 04/30/2021) (Entered: 04/30/2021)

In the above example, party XYZ Corporation filed a motion to dismiss (ECF No. 2) and is filing exhibits in support. (ECF Nos. 3, 4). All the documents in ECF No. 3 are filed publicly. ECF Nos. 3-1 and 3-3 are redacted versions of Proposed Redacted Records. ECF Nos. 3-2 and 3-4 are the cover slip sheets for two documents filed under seal. ECF Nos. 3-5, 3-6, and 3-7 are exhibits not subject to any sealing or redacting requests and are simply filed in the public view.

All the documents filed in ECF No. 4 are filed under seal, away from public viewing until the motion to seal can be ruled upon. ECF Nos. 4-2 and 4-4 are unredacted versions of ECF 3-2 and 3-4. ECF Nos. 4-3 and 4-5 are unsealed versions of the entirely sealed ECF Nos. 3-3 and 3-5. The proper classification of these filings within a court's CM/ECF system will differ by local rules and ECF filing guidelines. A possible option would be to file these under the option "Exhibit."

By grouping these Proposed Sealed and Redacted Records together, filers can use the CM/ECF system to e-serve the unsealed and unredacted versions on relevant parties and registered ECF non-parties, rather than having to separately serve them via a different mechanism. This *Commentary* understands that while not all courts use this ECF functionality to permit e-service of unsealed and unredacted

versions of Proposed Sealed or Redacted Records, many districts do.[11] It is the hope that increased ECF functionality will, in the future, not require that all Proposed Sealed and Redacted Records be grouped together in one docket entry.

In the example above, ECF No. 5 is the Notice of Proposed Sealed Record, which is a form that is to be filed immediately after any motion, pleading, or response seeking to file sealed or redacted documents, which is discussed below. See Comment re. Model Rule 3.0(C), below, and Notice of Proposed Sealed Record form, above.

(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.

❖ ***COMMENT***

This *Commentary* acknowledges that not all courts currently use the full functionality of the CM/ECF system. The CM/ECF system does have the functionality to permit parties to view Sealed and Redacted Records in their entirety, as well as to "serve" them via the CM/ECF notification system to registered users, while maintaining those Records as blocked from public view.[12]

(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

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11 *See, for example*, District of Minnesota L.R. 5.6 and its Sealed Civil User's Manual.

12 *See, for example*, District of Minnesota, Sealed Civil User's Manual (Updated Sept. 28, 2021), https://www.mnd.uscourts.gov/sites/mnd/files/Sealed_Civil_Users_Manual.pdf, at p. 11, providing users with the ability to choose which parties can view unsealed and unredacted version of documents filed out of the public view; *see also* District of Rhode Island, Filing Instructions Civil Motion to Seal, https://www.rid.uscourts.gov/sites/rid/files/documents/cmecf/CivilMotiontoSealFilingInstructions.pdf (same); *see also Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records* (Jan. 6, 2021), U.S. COURTS, https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court.

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.

> ❖ ***COMMENT***
>
> See discussion on Model Rule 3.0(D), below. While this *Commentary* proposes that the Model Rule be uniformly applied, courts and judges may still have certain individual preferences, which practitioners should be familiar with, including checking standing orders, practical guides, scheduling orders, the judge's webpage, and ECF filing instructions.

(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.

> ❖ ***COMMENT***
>
> The Notice of Proposed Sealed Record is similar to the District of Maryland's process, requiring the filing of a Notice of Filing Exhibit or Attachment Under Seal.[13] The purpose of requiring that the Filing Party submit only a Notice of Proposed Sealed Record when filing documents either in redacted form or entirely under seal is to properly place the burden of supporting the sealing of all or part of a Record from the public file on the Designating Party, rather than on the Filing Party. This *Commentary* recognizes that often a party may need to submit documents to a court that another party (or non-party) has designated as Confidential. As a result, that party is required to move

[13] *See* District of Maryland, Sealed Civil Documents, https://www.mdd.uscourts.gov/content/sealed-civil-documents, https://www.mdd.uscourts.gov/sites/mdd/files/forms/NoticeofFilingofDocumentUnderSeal.pdf. The Northern District of California provides what it calls a "special" procedure for when one party wishes to e-file a document designated confidential by another party, but, in reality, that procedure simply requires that the Filing Party also include information in its declaration in support of the motion to seal identifying that party designated the information as Confidential. *See* Northern District of California, E-Filing Under Seal in Civil Cases, Special Note, https://www.cand.uscourts.gov/cases-e-filing/cm-ecf/e-filing-my-documents/e-filing-under-seal/. This *Commentary* believes this does not adequately place the burden on the Designating Party.

to seal the documents, despite not having itself designated the documents as Confidential.

This *Commentary* envisions the Notice itself to be succinct and pro forma and has drafted a fillable Form Notice to accompany the Proposed Model Rule for litigants to use. *See* Notice of Proposed Sealed Record form, above.

(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.

❖ ***COMMENT***

The Notice of Proposed Sealed Record contains a section for the Filing Party to identify the reason for redacting or sealing identified records. The *Commentary* envisions that such reason simply may be that the Designating Party designated the records as confidential. Otherwise, if the Filing Party is the Designating Party, a more fulsome description for the proposed reason for sealing may be provided.

(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).

❖ ***COMMENT***

Under this section, a Filing Party would file the Notice of Proposed Sealed Record immediately after the pleading, motion, opposition, or response that includes redacted or fully sealed documents. See, for example, Eastern District of Texas Local Rule CV-5(a)(7)(C) and example in Section 3.0(B) above. This *Commentary* proposes that a form be used for greater efficiency and consistency. See Notice of Proposed Sealed Record form. Requiring that the Notice of Proposed Sealed Record be filed immediately after the underlying brief or pleading makes it easy to locate on the docket for both courts and practitioners and allows the Filing Party to identify the Sealed or Redacted Record by ECF number that has been generated. The Notice should be filed as a separate ECF docket entry.

Under many courts' current procedures, the same Sealed or Redacted Record may be filed multiple times in the same action. Model Rule 3.0(C)(3) obviates the need to repeatedly file a motion to seal every time the Sealed or Redacted Record is introduced if the court has already ruled on it being sealed or redacted. In such a circumstance, the Filing Party need only file the Notice of Proposed Sealed Record in compliance with the Model Rule and identify by ECF Docket number and date the prior court decision that orders the sealing or redaction of the Record. The Notice that this *Commentary* proposes allows the Filing Party to indicate whether it is aware of any objection to the filing of the document under seal. See Notice of Proposed Sealed Record form.

The documents proposed to be filed under seal, whether fully sealed or in partially redacted form, are <u>not</u> to be attached to the Notice of Proposed Sealed Record. Both redacted/sealed and unredacted/complete versions of the documents at issue will be filed only once, by the Filing Party with the underlying motion, pleading, or response to which they pertain, in compliance with Model Rule 3.0(B)(3).

Example 1: Filing Party A is filing a motion for summary judgment and seeks to file under seal, as Exhibits 1—6, documents that Filing Party A has previously deemed Confidential. Filing Party A would attach the Exhibits 1—6 in sealed and unsealed form ***only*** to its motion for summary judgment, grouping sealed and redacted documents in one docket entry, and the slip sheets for the sealed documents and redacted versions in the public view grouped in a separate docket entry. See example of and discussion re. Rule 3.0(B)

above. The public docket would contain slip sheet placeholders for each Sealed Record. Filing Party A would, immediately after filing its motion for summary judgment, file a Notice of Proposed Sealed Record. The Notice, which is proposed to be a fillable form, identifies Exhibits 1—6 as documents it is conditionally filing under seal by their ECF docket numbers, generally describing the documents in the Notice form: "ECF Nos. ___ are business records Filing Party A produced in this litigation and previously designated Confidential pursuant to the Stipulated Protective Order entered in this case, ECF No. ___".

Example 2: Filing Party B is filing an opposition to a motion for summary judgment and must file several of its exhibits, Exhibits 7—12, under seal because they were produced by another party who has designated the documents Confidential under the Confidentiality Order entered in the case. Filing Party B neither produced nor designated the records Confidential. Filing Party B would attach Exhibits 7—12, in both sealed and unsealed forms grouped together in compliance with Rule 3.0(B)(4) and current CM/ECF capabilities, ***only*** to its opposition, not to its Notice of Proposed Sealed Record. Filing Party B would, immediately after filing its opposition and exhibits in the docket, file a Notice of Proposed Sealed Record form, identifying Exhibits 7—12 as documents it is filing under seal by their ECF docket numbers, generally describing the documents: "ECF Nos. ___ are business records produced by Designating Party X in this litigation that Designating Party X has designated Confidential pursuant to the Stipulated Protective Order entered in this case, ECF No. __."

Example 3: Filing Party C is filing a motion in limine seeking to preclude another party's expert from testifying on certain matters contained within the expert's report. Small portions of the expert's report have been deemed Confidential, as they contain the Designating Party's financial information that it does not wish its competitors to see. While the expert's report is relevant to the motion in limine and therefore must be filed, the confidential financial information can be redacted out, leaving the rest of the report available to public viewing. Filing Party C would file the redacted expert report publicly and the unredacted complete version of the expert's report under seal, as a separate docket entry, ***only*** with its motion in limine, and not with its Notice of Sealed Record. Immediately after filing its motion in limine, Filing Party C would file a Notice of Sealed Records identifying the Confidential Information that Filing Party C redacted out of the Record by page and line number, for example: "Page 4, lines 10-20 are

redacted, as they contain financial information that Designating Party has designated as Confidential."

Example 4: Filing Party D is filing an opposition to a motion to exclude its expert. One of Filing Party D's exhibits is the expert's report, which contains redacted portions that were the subject of a prior motion to seal that was granted by the court earlier in the action. Filing Party D would file the redacted expert report publicly and the unredacted complete version under seal, as a separate docket entry, ***only*** with its opposition to the motion to exclude. Immediately after filing its opposition to the motion to exclude, Filing Party D would file Notice of Proposed Sealed Record identifying on the form the Confidential Information that Filing Party D redacted out by ECF Docket No. and page and line citation, and identify in the Notice the prior court order which approved the redaction of the expert report by date and ECF docket number. The Designating Party would not need to file another motion to seal the report, since the redactions were previously approved by the court.

See also exemplar ECF docket entries in section 3.0(B) above.

(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).

❖ ***COMMENT***

This section aims to ensure the filing party gives proper notice to any non-party Designating Parties that Confidential material is being submitted under seal and to give the non-party the opportunity to file a motion to seal and prevent the public dissemination of such Confidential information. Most of the time, this notice to non-parties may be accomplished via email to their counsel, but Rule 3.0(B)(5) also provides mechanisms for service on or by pro se filers or who may be a Designating Party.

(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).

❖ ***COMMENT***

This procedure places the burden of supporting a request to seal or redact information on the party who produced the document and who therefore has an interest in, and basis for, protecting it from public disclosure. This *Commentary* finds that most of the current sealing rules place the burden to defend redactions and Confidentiality designations on the party that seeks to file the documents under seal, without considering that the Filing Party may not be the Designating Party and may therefore have no interest in sealing the Records (or may be averse to their sealing). This *Commentary* anticipates that shifting the burden of sealing the documents to the Designating Party will reduce overdesignation of information and documents as Confidential.

This *Commentary* also finds it important to limit the number of submissions under seal to the court. After considering various local rules, this *Commentary* proposes that the motion to seal and supporting memorandum and declaration should, wherever possible, be filed in the public view and not under seal. This *Commentary* contends that Designating Parties can adequately describe the document and the nature of the Confidential Information contained in it without the need to provide Confidential Information in the motion to seal itself.[14] While some courts require that a declaration in support of a motion to

[14] *See, for example,* W.D. Tex. L.R. 5.2(b) (motions and pleadings under seal are "disfavored"), and (c) (while motions to seal are first filed under seal "the court expects parties to draft sealing motions to seal in a manner that does not disclose confidential information" because "the sealing motion may subsequently be unsealed by court order.").

seal also be sealed, this proposed Model Rule seeks to limit the number of documents that are sealed from public view and requires that the declaration not be sealed or redacted.

While the Model Rule does not have a meet-and-confer requirement, local rules, standing orders, and stipulated protective orders entered into between the parties may require parties to meet and confer before the filing of any motion, and conferring is always a best practice.[15] Even if the court handling a given case does not have such a requirement, it may help to include in the motion to seal whether the motion is unopposed/uncontested.

When designating documents and information as Confidential, all parties should avoid overdesignation, as moving to seal likely increases case costs over time.[16] This also applies to deposition and hearing transcripts as well as to motions and pleadings. Parties should review transcripts to designate only necessary portions of testimony as Confidential, if possible, rather than designating an entire transcript as Confidential. Parties also should do their best to frame motions, declarations, and pleadings to avoid the quotation or recitation of sealable or Confidential Information, which lessens the likelihood that the underlying motion must be sealed.

(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.

❖ ***COMMENT***

Recognizing that a Designating Party once in receipt of a Notice of Proposed Sealed Record must act quickly to defend its Confidential

[15] *See, for example*, D.N.J. L.R. 5.3(c)(2) ("Not later than 21 days after the first filing of sealed materials, the parties shall confer in an effort to narrow or eliminate the materials or information that may be the subject of a motion to seal.").

[16] *See, for example*, N.D. Cal. L.R. 79-5(b), requiring that all requests to seal "be narrowly tailored."

information and designations, this *Commentary* considered the number of days that the Designating Party should have to file a Motion to Seal, and considered including up to 14 days and as little as three days for such filing.[17] Ultimately, this *Commentary* opts to use the deadline of the response brief for the underlying filing as the target date, because such date is tied directly to the underlying filing and will ensure that sealing progresses promptly, avoids confusion and the possibility that a hearing on a motion to seal will be scheduled after the hearing on the underlying motion (if applicable), and avoids multiple deadlines related to the same motion (if applicable) for courts.

If the motion to seal is not timely filed by the Designating Party, the Filing Party must timely file the Confidential Information in unredacted or unsealed form pursuant to this Model Rule. See Model Rule 3.0(F)(1).

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

❖ ***COMMENT***

The Model Rule requires that a proposed order must be served with every motion to seal, as is currently required in most courts.[18] This *Commentary* has not proposed the substance or basis for the order, as 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.[19] See Appendix: Standards for Sealing Records.

In many instances, the number of documents to be sealed and redacted are numerous, and many cases involve multiple motions to seal. Parties should consider submitting a proposed order that, in addition to complying with local rules and standing orders, clearly sets forth what is sealed or redacted for future reference and citation.

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[17] *See, for example*, Northern District of California, E-Filing Under Seal in Civil Cases, Special Note, https://www.cand.uscourts.gov/cases-e-filing/cm-ecf/e-filing-my-documents/e-filing-under-seal/, which requires the designating party to submit a declaration "establishing that all of the designated material is sealable" within four days of the filing of the moving party's administrative motion to seal.

[18] *See* N.D.N.Y. L.R. 5.3(a) (former L.R. 83.13(6)) (requiring proposed order).

[19] Having been tasked with proposing a purely procedural rule, this *Commentary* does not propose the substantive findings a court must make before permitting sealing or redacting a record from public view, if at all. *See, for example*, Kondash v. Kia Motors Am., Inc., 767 F. App'x 635, 637 (6th Cir. 2019) (citation omitted) (setting forth substantive standard that must be met for documents to be filed under seal, on a document-by-document basis).

(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.

> ❖ ***COMMENT***
>
> This provision derives from similar requirements employed by some federal courts.[20] Such courts require records to be resubmitted after a motion to seal is granted.[21] Further, this provision is intended to lessen the burden on the parties and the clerk as to the resubmission of records under seal pursuant to court order. If an order has been entered sealing Records, resubmission should not be required. But if the order modifies the portions of the records to be sealed, then the applicable order must specify resubmission as to affected records.[22]

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 on all parties in the case and upon any Designating Party that is a non-party in accordance with the service requirements in this Rule.

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20 *See* N.D. Tex. L.R. 79.3(b)(2) and E.D. Tex. L.R. 5(a)(7)(C).

21 *See*, *for example*, E.D.N.Y. "Steps for E-filing Sealed Documents – *Civil Case*", at ¶ 2.

22 *See also* W.D. Tex. L.R. CV-5.2(d).

❖ ***COMMENT***

Courts differ widely on the disposition of sealed records at the conclusion of a case. Many local rules are silent.[23] Some courts have rules that automatically unseal records after a certain time period.[24] It is always a best practice to check Local Rules.

While this *Commentary* understands that courts may have an interest in unsealing Records on their dockets, the alternatives explored were considered burdensome and could present several unique problems. For example, this *Commentary* considered options like the California Northern District rules, which require automatic unsealing of records after a certain time period unless a motion was filed to extend the sealing. However, since one of the goals of the proposed Model Rule is to lessen the burden on the courts and parties, the automatic unsealing of records was not included because it may not satisfy this goal. Such a rule might generate more court filings by parties seeking to keep records permanently under seal, and courts would have to track the established sealed period. Upon expiration of the sealed period, a court might need to manually unseal each individual document, because the electronic case filing system does not have an automated process to unseal documents. This proposed Rule also expressly acknowledges that a member of the public or non-party may move to unseal or unredact a document at any time.

This *Commentary* also considered applying a specified time period for sealing. A shorter time period (such as six months, one year, or two years) may lead to many motions, especially for larger litigation that can continue for several years. A longer time period for the automatic unsealing of records (such as 10 years) poses other problems and burdens. For example, after 10 years, a party that has a serious need to keep records sealed may not be able to locate and provide notice to all interested parties and non-parties. In either scenario, the court would also be burdened with tracking the expiration of the sealing order.

Other courts require a party to state the period of time the party seeks to have records maintained under seal.[25] This *Commentary* rejects the use of such process because it does not lessen the burden on courts to track such a deadline and take action to unseal records.

The Model Rule was designed to protect records that should remain sealed, while providing public access to records should there be an interest in the records. The proposed Model Rule protects the interests of all parties and non-parties while significantly lessening the burden on the courts.

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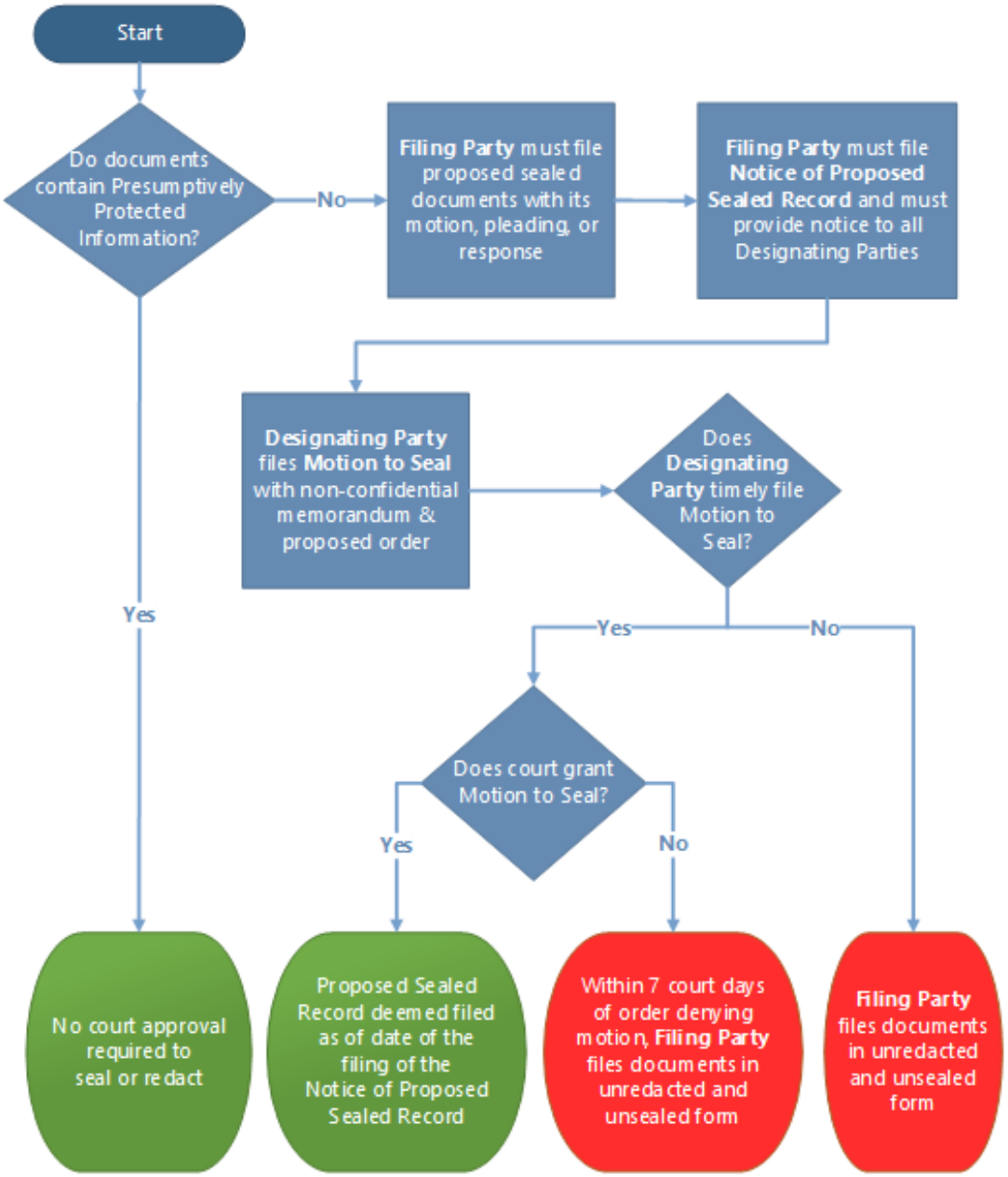
[23] The Model Rule in this section is similar to Local Rule 5.3 found in the Western District of New York; *see also* S.D. Miss. L.R. 79(f) and N.D. Miss. L.R. 79(f).



[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).

IV. APPENDIX: STANDARDS FOR SEALING IN FEDERAL COURTS

Presumptive Right of Access to Judicial Records

"[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[26] The right to access is based on the public's "desire to keep a watchful eye on the workings of public agencies."[27] This right derives from common law, the First Amendment, or both. Distinct from these rights is Rule 26(c) of the Federal Rules of Civil Procedure, which permits courts to protect documents and information exchanged during discovery. As detailed below, courts differ in their application of the common law and First Amendment and their definition of whether a particular document to be sealed is indeed a "judicial record." The procedures to be followed for sealing documents also differ.[28]

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[26] Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

[27] *Id.*, 435 U.S. at 598. *See also In re* Providence Journal Co., 293 F.3d 1, 9 (1st Cir. 2002) (quotation omitted) ("Courts have long recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.'"); United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1048 (2d Cir. 1995) (quotation omitted) ("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 public to have confidence in the administration of justice."); Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988) ("As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud."); Columbus-Am. Discovery Grp. v. Atlantic Mut. Ins. Co., 203 F.3d 291, 303 (4th Cir. 2000) ("Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case. It is hardly possible to come to a reasonable conclusion on that score without knowing the facts of the case."); SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) (citation omitted) ("Public access [to judicial records] 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."); Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) ("the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding."); IDT Corp. v. eBay, 709 F.3d 1220, 1222 (8th Cir. 2013) (citing *Nixon*, 435 U.S. at 597) ("This right of access bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings and 'to keep a watchful eye on the workings of public agencies.'"); Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1096 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 38 (Oct. 3, 2016) (quoting *Amodeo II*, 71 F.3d at 1048) ("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 public to have confidence in the administration of justice.'"); United States v. Hickey, 767 F.2d 705, 708 (10th Cir. 1985) ("The right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes."); Romero v. Drummond Co., 480 F.3d 1234, 1245 (11th Cir. 2007) (citation and internal citation omitted) ("the common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process.").

[28] The drafters of this *Commentary* reviewed Appellate Rules, Local District Court Rules, and ECF rules and found little uniformity on procedures for sealing.

A. Common Law Right of Access

The common law public right of access, unlike a Rule 26(c)[29] inquiry by comparison, begins with a presumption in favor of public access.[30] The common law right of access "antedates the Constitution" and it attaches to both judicial proceedings and records, in both criminal and civil cases.[31] This common law right, however, is not absolute, but is left to the "sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[32] 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.[33]

B. First Amendment Right of Access

The Supreme Court has held that the First Amendment guarantees the public and the press the right of access to criminal trials.[34] Although the Supreme Court has not specifically extended the First Amendment right of public access to civil proceedings,[35] many courts have done so.[36] The constitutional right of access, however, has been found to have a more limited scope in civil context than it does in the criminal.[37] In limiting the public's access to civil trials where the First Amendment applies, 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.[38] A party seeking the removal of a document from the public eye bears the burden of establishing that there is good cause that

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29 Hereinafter, all references to "the Rule" or "Rules" shall refer to the Federal Rules of Civil Procedure unless expressly stated otherwise.

30 *In re* Avandia Mktg., Sales Practices and Prods. Liab. Litig., 924 F.3d 662, 670 (3d Cir. 2019).

31 *Id.*, at 672.

32 *Nixon*, 435 U.S. at 598–99.

33 *Id.*

34 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

35 *Id.* at n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.").

36 *See, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) ("A presumption of openness inheres in civil as well as criminal trials."). *See also* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984) (asserting that "the First Amendment does secure to the public and to the press a right of access to civil proceedings"); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (holding that the "rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case"); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983) (" The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial."); *In re* Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984) ("we agree with the Sixth Circuit that the policy reasons for granting public access to criminal proceedings apply to civil cases as well.").

37 Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001) (citing Newman v. Graddick, 696 F.2d 796, 800–01 (11th Cir. 1983)).

38 *Publicker*, 733 F.2d at 1070 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982); *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179).

disclosure will work a clearly defined and serious injury to the party seeking closure, and the injury must be shown with specificity.[39]

C. Federal Rule 26(c)

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."[40] 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."[41] The trial court has complete discretion over the entry of document protective orders. [42]

A protective order is "intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings." Rule 26(c) requires that "a party wishing to obtain an order of protection over discovery material must demonstrate that 'good cause' exists for the order of protection."[43] "Good cause" is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure; the injury must be shown with specificity.[44] The burden of justifying the confidentiality of each document sought to be covered by a protective order remains on the party seeking the order.[45] 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.[46]

While a protective order entered under Rule 26 generally governs the exchange of confidential information during discovery, it does not typically protect confidential information from ultimately being filed in the public record, as that is a determination for a court to make, often on a document-by-document basis.[47]

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39 *Publicker,* 733 F.2d at 1071*; see also In re* Avandia Mktg., Sales Practices and Prods. Liab. Litig., 924 F.3d 662, 673 (3d Cir. 2019), quoting *Publicker*.

40 Fed. R. Civ. P. 26(c)(1).

41 *Chicago Tribune*, 263 F.3d at 1307–08 (citing *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987)).

42 Seattle Times v. Rhinehart, 467 U.S. 20, 36 (1984) (Rule 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.").

43 Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994), quoting FED. R. CIV. P. 26(c).

44 *Publicker*, 733 F.2d at 1070.

45 Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied,* 484 U.S. 976 (1987).

46 *Chicago Tribune*, 263 F.3d at 1313 (citing Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985)).

47 *See* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("[T]here is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other . . . Secrecy is fine at the discovery stage, before the material enters the judicial record . . . At the adjudication stage, however, very different considerations apply.").

D. Overview of Circuit Case Law

(i) First Circuit

In the First Circuit there are "two related but distinct presumptions of public access to judicial proceedings and records" under both the common law right and the First and Fourteenth Amendments.[48]

Under the common law analysis,[49] "judicial records" are those "materials on which a court relies in determining the litigants' substantive rights."[50] "[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies."[51] Such materials are distinguished from those that "relate[ ] merely to the judge's role in management of the trial."[52] Materials filed with the court relating only "'to the judge's role in management of the trial' and which 'play no role in the adjudication process'" are excluded from the common law presumption of access.[53] For example, the First Circuit classifies civil discovery motions and the materials filed with them as falling within this category, holding that the common law right to public access does not apply to such materials.[54] The First Circuit applies the Rule 26(c) "good cause" standard when deciding whether to protect such documents from disclosure.[55] "A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements."[56]

For documents that do play a role in the adjudication process and to which the presumption of access therefore applies, common law applies the "compelling need" standard: "only the most compelling reasons can justify non-disclosure of judicial records that come within the common-law right of access."[57]

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48 United States v. Kravetz, 706 F.3d 47, 52 (1st Cir. 2013).

49 "While the two rights of access [common law versus First Amendment] are not coterminous, courts have employed much the same type of screening in evaluating their applicability to particular norms." *In re* Providence Journal, 293 F.3d 1, 10 (1st Cir. 2002) (internal citation omitted).

50 *Id.* at 9–10, quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).

51 F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 409 (1st Cir. 1987).

52 *In re* Boston Herald, Inc., 321 F.3d 174, 189 (1st Cir. 2003) (quoting *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408).

53 *Kravetz*, 706 F.3d at 54 (quoting *In re Boston Herald, Inc.*, 321 F.3d at 189; *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408).

54 *Kravetz,* 706 F.3d at 56 (citing *Anderson*, 805 F.2d at 11–13).

55 *Anderson*, 805 F.2d at 7.

56 *Id.* at 19.

57 *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (quoting *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983)); *see also, e.g.*, Panse v. Shah, 201 F. App'x. 3, 3 (1st Cir. 2006) ("Sealing is disfavored as contrary to the presumption of public access to judicial records of civil proceedings. It is justified only for compelling reasons and with careful balancing of competing interests.") (citations omitted).

The First Circuit considers the privacy rights of parties to be a compelling reason justifying the sealing of a document from the public eye.[58]

In determining if the First Amendment right of access applies, the First Circuit applies the Supreme Court's *Press-Enterprise II* "experience and logic" test, which asks (1) whether the document is one that has historically been accessible to the press and the public; and (2) whether public access plays a significant positive role in the functioning of the particular process the record concerns.[59] Upon undertaking this analysis, but before sealing a judicial document, the First Circuit mandates that the court issue "particularized findings"[60] and that where some portions of a document may be sealed, "redaction remains a viable tool for separating this information from that which is necessary to the public's appreciation of [the court's order]."[61]

(ii) Second Circuit

The Second Circuit recognizes both the common law right of access as well a qualified First Amendment right.[62] Like the First Circuit, not all court documents are considered "judicial documents," and "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access[]" under the common law.[63]

A "judicial document" or "judicial record" (a term used interchangeably) is a filed item that is "relevant to the performance of the judicial function and useful in the judicial process."[64] The presumption of the right of access is "at its zenith" where documents "directly affect an adjudication, or are used to determine litigants' substantive legal rights," and is at its weakest where a document is neither used by the court nor "presented to the court to invoke its powers or affect its decisions."[65] However, a document is "judicial" not only if the judge actually relied on it, but also if the "judge *should* have considered or relied upon [it] but did not."[66] Such documents "are just as deserving of disclosure as those that actually entered into the judge's decision."[67] Documents submitted to the court exist on a "continuum," spanning those that play a role in "determining

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58 *Standard Fin. Mgmt. Corp.*, 830 F.2d at 411 ("[P]rivacy rights of participants and third parties are among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records."); *Kravetz*, 706 F.3d at 63 (quoting *In re Boston Herald*, 321 F.3d at 190 (Medical information is, as intimated above, "universally presumed to be private, not public.")).

59 *Kravetz*, 706 F.3d at 53–54 (quoting Press-Enterprise Co. v. Superior Court of Calif. for Riverside Cty. (*Press-Enterprise II*), 478 U.S. 1, (1986)).

60 *Kravetz*, 706 F.3d at 61.

61 *Id.* at 63.

62 Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 91 (2d Cir. 2004).

63 United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995); U.S. CONST. amend. I; Trump v. Deutsche Bank AG, 940 F.3d 146 (2d Cir. 2019) (rejecting the Third Circuit's determination that any document physically on file with a court is a "judicial record" and aligning more with the First Circuit).

64 Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006).

65 Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 142 (2d Cir. 2016).

66 *Id.* at 140, n.3, quoting *Lugosch*.

67 *Id.*

litigants' substantive rights," which are afforded "strong weight," to those that play only a "negligible role in performance of Article III duties . . . such as those passed between the parties in discovery," which lie "beyond the presumption's reach."[68]

The most common judicial records are those submitted in connection with a request for summary adjudication. "[D]ocuments submitted to a court for its consideration on a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches . . . ."[69] Documents submitted in support of a motion to dismiss likewise are subject to a presumption of access since they relate to a merits-based adjudication.[70] In contrast, there is no presumption of access to "documents that play no role in the performance of Article III functions, such as those passed between the parties in discovery."[71]

Once the court determines that the document is in fact a judicial document and the strength of the presumption that attaches to that document, the "court must 'balance competing considerations against it,'" such as "'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'"[72] Motions to seal documents must be "carefully and skeptically review[ed] . . . to insure that there really is an extraordinary circumstance or compelling need" to seal the documents from public inspection.[73]

Under the First Amendment, the Second Circuit applies the Supreme Court's *Press-Enterprise II* "experience and logic" test.[74] Once the court finds that a qualified First Amendment right of access to certain judicial documents exists, documents may still be sealed, but only if "specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[75] As an example of the application of this test, the Second Circuit has held that attorney-client privilege can be a compelling reason to defeat the presumption of a right of access to judicial documents submitted in opposition to motions.[76] The Second Circuit urges district courts to expeditiously determine whether a document submitted to the court is a judicial document, to avoid impairing the First Amendment rights of a party or the public.[77]

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68 United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1049–50 (2d Cir. 1995).

69 Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019).

70 Shetty v. SG Blocks, Inc., No. 20-cv-00550-ARR-SMG, 2020 WL 3183779, at *10 (E.D.N.Y. June 15, 2020) (citing *Lugosch*, 435 F.3d at 121).

71 S.E.C. v. TheStreet.com, 273 F.3d 222, 232 (2d Cir. 2001); *see also Brown*, 929 F.3d at 50.

72 *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

73 Video Software Dealers Ass'n v. Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994).

74 *Lugosch*, 435 F.3d at 120.

75 *In re* N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987).

76 *Lugosch*, 435 F.3d at 125.

77 *Id.* at 127. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Paulsen v. County of Nassau, 925 F.2d 65, 68 (2d Cir. 1991) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). *Lugosch*, 435 F.3d at 127.

(iii) Third Circuit

The Third Circuit recognizes a common law and First Amendment right of access.[78] Under a common law inquiry, whether the right of access applies to a particular document or record "turns on whether that item is considered to be a 'judicial record.'"[79] A "judicial record" is a document that "has been filed with the court . . . or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings."[80] Once a document becomes a judicial record, a presumption of access attaches.[81]

The Third Circuit does not distinguish between material filed in connection with a motion for summary judgment and material filed for any other purpose.[82]

At common law, a party wishing to rebut the strong presumption of public access has the burden "to show that the interest in secrecy outweighs the presumption."[83] The movant must show "that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure."[84] The court in its determination must articulate compelling and countervailing interests to be protected, make specific findings on the record about the effects of disclosure, and provide an opportunity for third parties to be heard.[85] The court should conduct a "document-by-document review" of the contents of the materials sought to be sealed.[86] "[B]road allegations of harm, bereft of specific examples or articulated reasoning, are insufficient" to overcome the strong presumption of public access.[87]

While the Third Circuit has recognized that the right of public access enjoyed under the First Amendment as historically applied to criminal trials also applies to civil proceedings,[88] it also acknowledges that, still, "[t]he First Amendment right of access requires a much higher showing

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78 *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 669 (3d Cir. 2019).

79 *Id.*, 924 F.3d at 672 (quoting *In re* Cendant Corp., 260 F.3d. 183 at 192 (3d Cir. 2001).

80 *In re Avandia Mktg.*, 924 F.3d at 672. While filing clearly establishes a document as a judicial record in the Third Circuit, absent a filing a document may still be construed as a judicial record if a court interprets or enforces the terms of the document. *In re Cendant*, 260 F.3d at 192.

81 *See id.* at 192–93.

82 *In re Avandia*, 924 F.3d at 672–73; *see also* Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 164 (3d Cir. 1993) ("We see no reason to distinguish between material submitted in connection with a motion for summary judgment and material submitted in connection with a motion for preliminary injunction . . . .").

83 Bank of Am. Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343 (3d Cir. 1986).

84 *In re Avandia*, 924 F.3d at 672 (quoting Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d. Cir. 1994)).

85 *In re Avandia*, 924 F.3d at 672–73 (citing *In re Cendant Corp.*, 260 F.3d at 194).

86 *In re Avandia*, 924 F.3d at 673.

87 *In re Cendant Corp.*, 260 F.3d at 194.

88 *See* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984).

than the common law right [of] access before a judicial proceeding can be sealed."[89] In this respect, the Third Circuit follows the "experience and logic" test, just as in the First and Second Circuits.[90]

(iv) Fourth Circuit

In the Fourth Circuit, the right of public access to judicial documents "derives from two independent sources: the First Amendment and the common law," and accordingly, the Fourth Circuit applies two tests when considering whether any specific document may be filed under seal (or unsealed).[91] Because the common law and First Amendment invoke different standards for assessing the right of access, the district court must identify which is the source of the right of access before balancing the claimed interests.[92]

Under the common law test, when a party asks to seal judicial records, trial courts within the Fourth Circuit "must determine the source of the right of access with respect to each document," and then "weigh the competing interests at stake."[93] The court must also (1) give the public notice and a reasonable opportunity to challenge the request to seal; (2) "consider less drastic alternatives to sealing"; and (3) if it decides to seal, make specific findings and state the reasons for its decision to seal over the alternatives.[94] Under the First Amendment test, like the First, Second, and Third Circuits discussed above, the Fourth Circuit similarly follows the "experience and logic" test.[95]

"Judicial records" in the Fourth Circuit are documents filed with the court that "play a role in the adjudicative process, or adjudicate substantive rights."[96] As examples, motions for summary judgment and the documents attached to those motions are judicial records, even if the attached documents were discovery documents previously covered by a protective order.

Unlike the other Circuits, the Fourth Circuit has not explicitly resolved whether discovery motions and materials attached to discovery motions are judicial records.[97] Some district courts, however, have predicted that the Fourth Circuit will find no public right of access to discovery motions and related exhibits, and that consequently, such documents may be sealed.[98]

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89 *In re Cendant Corp.*, 260 F.3d at 198 n.13.

90 *In re Avandia*, 924 F.3d at 673.

91 *In re* United States for an Order Pursuant to 18 U.S.C. Section 2703(D), 707 F.3d 283, 290 (4th Cir. 2013).

92 Va. Dep't of State Police v. Washington Post, 386 F.3d 567, 576 (4th Cir. 2004); Co. Doe v. Pub. Citizen, 749 F.3d 246, 266 (4th Cir. 2014); Under Seal v. Under Seal, 230 F.3d 1354 (4th Cir. 2000) (remanding in part because district court failed to identify source of public's right of access).

93 *Va. State Police*, 386 F.3d at 576.

94 *Id.*; Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253–54 (4th Cir. 1988).

95 In re United States, 707 F.3d at 291.

96 *Id.* at 290 (citing *Rushford*, 846 F.2d at 252).

97 *In re United States*, 707 F.3d at 290.

98 *See, e.g.*, Kinetic Concepts, Inc. v. Convatec Inc., 1:08CV00918, 2010 WL 1418312, at *9 (M.D.N.C. Apr. 2, 2010) ("the Fourth Circuit has used language that suggests that no public right of access attaches [to discovery motions]").

(v) Fifth Circuit

The Fifth Circuit has held that along with the First Amendment right, there is a right of public access derived from common law that creates a presumption of access, but the right is also not absolute.[99] The decision is made on a case-by-case basis.[100] The decision is left to the sound discretion of the district courts as required by *Nixon*, and the Fifth Circuit consistently requires district courts to explain decisions to seal or unseal a document.[101]

While there is a common law presumption in favor of public access, the Fifth Circuit does not characterize the public access presumption as "strong" or to require a strong showing of proof.[102]

The Fifth Circuit has not generally defined the term "judicial record."[103]

More recently, however, the Eastern District of Texas, in determining whether to grant the parties' unopposed motions to seal documents filed in connection with discovery motions, articulated three categories of court materials: (1) materials that relate to dispositive issues in the case; (2) materials that relate to nondispositive issues in the case, and in particular, materials filed in connection with discovery disputes unrelated to the merits of the case; and (3) materials such as discovery that are exchanged between the parties and not made part of a court filing.[104] Under this framework, the court found that where materials relate to dispositive issues in a case, the party moving to seal the materials bears the burden to make a "compelling showing of particularized need to prevent disclosure."[105] On the other hand, the "good cause" standard of Rule 26(c) applies to materials that relate to nondispositive issues in the case, which includes materials filed in connection with discovery disputes unrelated to the merits of the case.[106] Finally, materials that are

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99 S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993); Belo Broad. Corp. v. Clark, 654 F.2d 423, 429 (5th Cir. 1981).

100 Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr., 913 F.3d 443, 450 (5th Cir. 2019) (citing United States v. Sealed Search Warrants, 868 F.3d 385, 390 (5th Cir. 2017)).

101 *Sealed Search Warrants*, 868 F.3d at 395; *e.g.*, *Van Waeyenberghe*, 990 F.2d at 849; United States v. Holy Land Found. for Relief and Dev., 624 F.3d 685, 690 (5th Cir. 2010).

102 *Vantage Health Plan*, 913 F.3d at 450; *see Belo*, 654 F.2d at 434 (holding that the presumption, "however gauged in favor of public access to judicial records" is only one of the interests to be weighed. This presumption applies so long as a document is a judicial record. *See Van Waeyenberghe,* 990 F.2d at 849.

103 *See* Bradley on behalf of AJW v. Ackal, 954 F.3d 225, 227 (5th Cir. 2020) (holding that sealed minutes are judicial records) (citing *In re United States*, 707 F.3d at 290 (stating that it is commonsensical that judicially authored or created documents are judicial records)); *Van Waeyenberghe*, 990 F.2d at 849 (holding that once a settlement agreement is filed in the district court, it becomes a judicial record).

104 Robroy Indus.-Tex., LLC v. Thomas & Betts Corp., No. 2:15-CV-512-WCB, 2016 WL 325174, at *2 (E.D. Tex. Jan. 27, 2016).

105 *Id.* (citing Ctr. for Auto Safety v. Chrysler Group, LLC, 809 F.3d 1092 (9th Cir. 2016)).

106 *Robroy* (citing Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 164–65 (3d Cir. 1993); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986)).

exchanged between the parties but not filed with the court are not subject to the public interest in open judicial proceedings.[107]

The Eastern District of Texas applied this framework in *Script Security Solutions, LLC v. Amazon.com, Inc.*[108] In *Script Security Solutions*, the defendant moved to redact confidential information from a hearing transcript but failed to satisfy either the "compelling showing of particularized need" standard or the less-stringent "good cause" standard.[109] While the Eastern District of Texas cited *Center for Auto Safety v. Chrysler Group*[110] to support applying the "compelling reasons" standard to materials that relate to dispositive issues in the case, it did not specifically incorporate the Ninth Circuit's "tangentially related" language. *Center for Auto Safety* expressly rejected a mechanical application of the dispositive and nondispositive classifications as a way to decide which standard should apply to determine whether the documents should be sealed. However, it seems that the Eastern District of Texas still maintained the more rigid dispositive and nondispositive motion distinction, because the court in *Script Security Solutions* implied that it would incorporate the Ninth Circuit's less rigid distinctions when it said it would likely apply the "compelling reasons" test to the motion to redact portions of a hearing transcript.[111] This issue has not been fully addressed, however, as neither case has been heard by the Fifth Circuit, and thus this issue remains unsettled in the Fifth Circuit.[112]

(vi) Sixth Circuit

The Sixth Circuit recognizes that the long-established legal tradition under the common law of the presumptive right of the public to inspect and copy judicial documents and files goes back to the Nineteenth Century.[113] "Only the most compelling reasons can justify non-disclosure of judicial records."[114] The Sixth Circuit has also recognized that the right of public access enjoyed under the First Amendment applies to civil proceedings.[115]

Although the Sixth Circuit has not explicitly defined "judicial record," district courts within the Sixth Circuit have cited the Second Circuit's *Lugosch v. Pyramid Co. of Onondaga*[116] decision that a

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107 *Robroy* (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984)).

108 No. 2:15-CV-1030-WCB, 2016 WL 7013938, at *2 (E.D. Tex. Dec. 1, 2016).

109 *Id.*

110 809 F.3d 1092, 1099 (9th Cir. 2016). See "Ninth Circuit," *infra*, for further discussion of *Center for Auto Safety*.

111 Script Security Solutions, 2016 WL 7013938, at *2.

112 *Id.*

113 *In re* Knoxville News-Sentinel Co, 723 F.2d 470, 474 (6th Cir. 1983) (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) and collecting cases).

114 *In re Knoxville News*, 723 F.2d at 476.

115 Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1177 (6th Cir. 1983) ("The Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial.").

116 435 F.3d 110, 119 (2d Cir. 2006).

judicial document is one that is "relevant to the performance of the judicial function and useful in the judicial process."[117]

Like other Circuits, the Sixth Circuit recognizes that the right to public access is "not absolute."[118] A party seeking to seal records must show that: (1) a compelling interest in sealing the records exists; (2) that the interest in sealing outweighs the public's interest in accessing the records; and (3) that the request is narrowly tailored.[119] "To do so, the party must 'analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations.'"[120] The party seeking to seal the records bears a "heavy" burden; simply showing that public disclosure of the information would, for instance, harm a company's reputation is insufficient.[121] Instead, the moving party must show that it will suffer a "clearly defined and serious injury" if the judicial records are not sealed.[122]

When sealing court records, courts in the Sixth Circuit "must set forth specific findings and conclusions 'which justify nondisclosure to the public.'"[123] District courts must consider "each pleading [to be] filed under seal or with redactions and to make a specific determination as to the necessity of nondisclosure in each instance" and must "bear in mind that the party seeking to file under seal must provide a 'compelling reason' to do so and demonstrate that the seal is 'narrowly tailored to serve that reason.'"[124] If a district court "permits a pleading to be filed under seal or with redactions, it shall be incumbent upon the court to adequately explain 'why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary.'"[125] Moreover, the compelling reasons for nondisclosure of judicial documents must be expressly stated on the record.[126] Moreover, a party to an action cannot waive the public's First Amendment right to access.[127]

(vii) Seventh Circuit

The Seventh Circuit recognizes both a common law and First Amendment right to inspect public records.[128]

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117 *See, e.g.*, Snook v. Valley OB-GYN Clinic, P.C., 14-CV-12302, 2014 WL 7369904, at *2 (E.D. Mich. Dec. 29, 2014); Thompson v. Deviney Constr. Co., 216-CV-03019-JPM-DKV, 2017 WL 10662030, at *2 (W.D. Tenn. Dec. 15, 2017).

118 *In re Knoxville News*, 723 F.2d at 474 (quoting *Nixon*, 435 U.S. at 598).

119 Kondash v. Kia Motors Am., Inc., 767 F. App'x 635, 637 (6th Cir. 2019) (citation omitted).

120 *Id.* (citation omitted).

121 *Id.*; Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016).

122 *Id.* at 307.

123 Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co., 834 F.3d 589, 594 (6th Cir. 2016) (citation omitted).

124 *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939–40 (6th Cir. 2019) (quoting *Shane Grp.*, 825 F.3d at 305).

125 *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 940 (quoting *Shane Grp.*, 825 F.3d at 306).

126 *Rudd Equip.*, 834 F.3d at 595 (citing Tri-Cty. Wholesale Distribs., Inc. v. Wine Grp., Inc., 565 F. App'x. 477, 490 (6th Cir. 2012)).

127 *Rudd Equip.*, 834 F.3d at 595.

128 Courthouse News Serv. v. Brown, 908 F.3d 1063, 1068–69 (7th Cir. 2018), *cert. denied*, 140 S. Ct. 384 (2019).

"Judicial records" are "materials submitted to the court that 'affect the disposition' of the case and are not subject to a statute, rule, or privilege that justifies confidentiality."[129] This may include discovery material filed with the court that actually influences or underpins a judicial decision.[130] However, not every document filed with the court is part of the "judicial record."[131] Instead, the "judicial record" includes only materials that actually formed the basis of the parties' dispute and the district court's resolution.[132]

Courts weigh the First Amendment right of access, balancing the interests of the public against injury to the party seeking to seal judicial records, reconciling harm with newsworthiness.[133] The Seventh Circuit requires a showing of a "compelling interest in secrecy" to rebut the presumption of a right of access.[134] "The interest in secrecy is weighed against the competing interests case by case."[135] Additionally, a court may not solely rely on designations of confidentiality made by the parties.[136] Examples of a compelling interest in secrecy include trade secrets, the identity of informers, attorney-client privilege, state secrets, and the privacy of children.[137]

Even when a compelling interest in secrecy exists, courts must act with precision to seal as little information as necessary and are instructed to choose redactions rather than seal entire documents whenever possible.[138] However, the Seventh Circuit has contemplated that in cases involving "thousands of documents," there is no objection to a court crafting a broader order that seals information designated by the parties as highly sensitive if (1) the parties act in good faith in designating documents as confidential, and (2) any party or interested member of the public can challenge the order.[139]

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129 United States v. Curry, 641 F. App'x. 607, 609 (7th Cir. 2016) (unpublished), quoting City of Greenville v. Syngenta Crop Protection, LLC, 764 F.3d 695, 697 (7th Cir. 2014).

130 Baxter Int'l., Inc., v Abbott Labs., 297 F.3d 544, 545 (7th Cir. 2002).

131 Goesel v. Boley Inter. (H.K.) Ltd., 738 F.3d 831, 833 (7th Cir. 2013).

132 *Id.* (quoting *Baxter*, 297 F.3d at 548).

133 Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993).

134 Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002) (citing Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999); Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997); Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994)).

135 *Jessup,* 277 F.3d 926 (citing Cent. Nat'l Bank v. U.S. Dep't of Treasury, 912 F.2d 897, 900 (7th Cir. 1990)). This showing must be articulated on the record. *In re* Associated Press, 162 F.3d 503, 510 (7th Cir. 1998) ("upon entering orders which inhibit the flow of information between the courts and the public, district courts should articulate on the record their reasons for doing so," quoting Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994)).

136 *See* Star Sci., Inc. v. Carter, 204 F.R.D 410, 416 (S.D. Ind. 2001); *see also Citizens First Nat'l Bank*, 178 F.3d at 945.

137 *Jessup*, 277 F.3d at 928; *see also* Mitze v. Saul, 968 F.3d 689, 692 (7th Cir. 2020).

138 *Mitze*, 968 F.3d at 692.

139 Citizens First Nat'l Bank, 178 F.3d at 946.

(viii) Eighth Circuit

The Eighth Circuit recognizes a common law right to access records but has "not decided whether there is a First Amendment right of public access to the court file in civil proceedings."[140] This common law right of access is not absolute; it "requires a weighing of competing interests."[141] A district court must balance "the degree to which sealing a judicial record would interfere with the interests served by the common-law right of access against the salutary interests served by maintaining confidentiality of the information sought to be sealed."[142] The weight afforded to the presumption of access is determined by role of the material at issue.[143]

While the Eighth Circuit has not explicitly defined the term "judicial record," the District of Minnesota has concurred with the Fourth and D.C. Circuits that judicial records are "documents that are relevant to and integrally involved in the resolution of the merits of a case."[144] Applying the principles from *Littlejohn v. BIC Corp.*,[145] the court in *Wood v. Robert Bosch Tool Corp.*[146] held that exhibits identified in the defendant's post-trial motion to seal were not judicial records and were protected from public access. In addition, the Third Circuit does not appear to view nondispositive motions and exhibits to be included in the right of access.[147]

Unlike some circuits, the Eighth Circuit does not recognize a "strong presumption" of public access to judicial records.[148] Instead, the Eighth Circuit appears to defer to the judgment of the trial court.[149] Although the Eighth Circuit has not provided explicit guidance, district courts in the Circuit[150] have employed a six-factor test to determine whether a party has overcome the presumption in favor of publication: (1) the need to public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests

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140 IDT Corp. v. eBay, 709 F.3d 1220, 1224 (8th Cir. 2013).

141 Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990).

142 *IDT Corp.*, 709 F.3d at 1223.

143 *Id.*, at 1223–24.

144 Sorin Grp. USA, Inc. v. St. Jude Med. S.C., Inc., 14-CV-04023 (JRT/HB), 2019 WL 2107282, at *3 (D. Minn. May 14, 2019), quoting Krueger v. Ameriprise Fin., Inc., CV 11-2781 (SRN/JSM), 2014 WL 12597948, at *9 (D. Minn. Oct. 14, 2014), *aff'd*, 11-CV-02781 SRN/JSM, 2015 WL 224705 (D. Minn. Jan. 15, 2015).

145 851 F.2d 673 (3rd Cir. 1988).

146 No. 4:13CV01888 PLC, 2016 WL 7013034, at *7 (E.D. Mo. Nov. 30, 2016).

147 *See IDT Corp.*, 709 F.3d at 1223 (stating that "other than discovery motions and accompanying exhibits" the modern trend is to treat pleadings as presumptively public).

148 *In re* Bair Hugger Forced Air Warming Devices Prods. Liab. Litig., No. 15-MD-2666 (JNE/DTS), 2020 WL 4035548, at *1 (D. Minn. July 17, 2020) (quoting United States v. Webbe, 791 F.2d 103, 105 (8th Cir. 1986)).

149 Wood v. Robert Bosch Tool Corp., No. 4:13CV01888 PLC, 2016 WL 7013034, at *5 (E.D. Mo. Nov. 30, 2016) (quoting Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990).

150 For example, the District of Minnesota has found that the party seeking to have to information sealed must show that there is a "compelling reason" to overcome the public's right to access judicial records. Hudock v. LG Elecs. U.S.A., Inc., No. 0:16-CV-1220-JRT-KMM, 2020 WL 2848180, at *1 (D. Minn. June 2, 2020).

asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.[151] The presumption of access is high when the judicial record may be used by the public "to evaluate the reasonableness and fairness of the judicial proceedings."[152]

(ix) Ninth Circuit

In the Ninth Circuit, a strong presumption of access, based in both the common law and the First Amendment, attaches to court records.[153] The presumption of access to judicial proceedings "flows from an 'unbroken, uncontradicted history rooted in the common law that justice must satisfy the appearance of justice.'"[154]

A "judicial document" is any item filed with a court that is "relevant to the judicial function and useful in the judicial process."[155] In the Ninth Circuit, this has been interpreted to exclude documents filed in connection with discovery matters. Documents obtained in discovery are treated differently. Despite its "strong preference for public access," "the right to inspect and copy judicial records is not absolute," and the Ninth Circuit has "carved out an exception" for sealed materials attached to a discovery motion unrelated to the merits of a case.[156] Under this exception, a party need only to satisfy the less exacting "good cause" standard from Rule 26(c)(1) to seal such documents from public view.[157]

On the other hand, a party seeking to seal a judicial record bears the burden of overcoming the strong presumption of access by meeting the "compelling reasons" standard, a "stringent standard" that permits sealing only when a court finds a compelling reason and articulates the factual basis for the ruling, without relying on hypothesis or conjecture.[158] What constitutes a "compelling reason" is "best left to the sound discretion of the trial court."[159]

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[151] Bader Farms, Inc. v. Monsanto Co., No. 1:16-CV-00299-SNLJ, 2021 WL 289265, at *2 (E.D. Mo. Jan. 28, 2021); Nagel v. United Food & Comm. Workers Union, No. 18-CV-1053 (WMW/ECW), 2020 WL 6145111, at *2 (D. Minn. Oct. 20, 2020); *see also* Sorin Grp. USA, Inc. v. St. Jude Med. S.C., Inc., 14-CV-04023 (JRT/HB), 2019 WL 2107282, at *3 (D. Minn. May 14, 2019) (quoting Doe v. Exxon Mobile Corp., 570 F. Supp. 2d 49, 52 (D.D.C. 2008) and United States v. Hubbard, 650 F.2d 293, 318 (D.C. Cir. 1980)).

[152] *Sorin Grp.*, 2019 WL 2107282, at*4.

[153] Courthouse News Serv. v. Planet, 947 F.3d 581, 589 (9th Cir. 2020) ("We have long presumed a First Amendment 'right of access to court proceedings and documents'"); *see also* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1098, 1101 (9th Cir. 2016); Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003) ("Following the Supreme Court's lead, 'we start with a strong presumption of access to court records.'").

[154] *Courthouse News*, 947 F.3d at 589 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573–74 (1980)).

[155] *Courthouse News*, 947 F.3d at 592 (citing *Judicial Document*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

[156] *Ctr. for Auto Safety*, 809 F.3d at 1096–97 (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978)).

[157] *Ctr. for Auto Safety,* 809 F.3d at 1097 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) and Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986)).

[158] *Ctr. for Auto Safety*, 809 F.3d at 1096–97 (quoting Kamakana v. City & Cnty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006).

[159] *Ctr. for Auto Safety*, 809, F.3d at 1097 (quoting *Nixon*, 435 U.S. at 599).

As an extension of these principles, when deciding what test to apply to a motion to *unseal* a particular court filing—the presumptive "compelling reasons" standard or the "good cause" exception—the Ninth Circuit has "sometimes deployed the terms 'dispositive' and 'non-dispositive,'" referring to the type of motion to which the documents are appended. However, in the wake of *Center for Auto Safety,* the Ninth Circuit expressly rejects a mechanical application of the dispositive and nondispositive classifications as a means of deciding which standard should apply to determine whether documents should be sealed. Rather, considerations of the public's right of access turns on "whether the [underlying] motion is more than tangentially related to the merits of a case."[160] This standard provides necessary flexibility, because some nondispositive motions, such as motions in limine, "are strongly correlative to the merits of a case," and thus warrant application of the higher standard to seal.[161] Such balancing also allows the court to recognize the "special role" that protective orders play. It does not make sense to render a district court's protective order useless simply because a party attached a sealed discovery document to a nondispositive motion.[162] In such circumstances, the "good cause" standard to seal applies.[163]

(x) Tenth Circuit

The Tenth Circuit recognizes a common law right of access to judicial records.[164] The Tenth Circuit, however, has repeatedly declined to address whether a First Amendment right of access exists for civil trials.[165]

Aligning with most circuits, the Tenth Circuit considers the interest of the public in judicial proceedings as "presumptively paramount."[166] To overcome this presumption, a party must establish that disclosure "will work a clearly defined and serious injury."[167] "'[T]he parties must articulate a real

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160 *Ctr. for Auto Safety*, 809 F.3d at 1099.

161 *Id.*

162 *Id.* at 1097–98.

163 *Id. Compare with* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135–36 (9th Cir. 2003), in which the Ninth Circuit applied the "compelling reasons" test as to whether documents attached to a motion for summary judgment should be sealed; *see also Kamakana*, 447 F.3d at 1178–80.

164 Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007).

165 Parson v. Farley, 352 F. Supp. 3d 1141, 1152, n. 5 (N.D. Okla. 2018), *aff'd*, No. 16-CV-423-JED-JFJ, 2018 WL 6333562 (N.D. Okla. Nov. 27, 2018); United States v. McVeigh, 119 F.3d 806, 814 (10th Cir. 1997); United States v. Roberts, 88 F.3d 872, 882–83 (10th Cir. 1996). *But see* Angilau v. United States, No. 2:16-00992-JED, 2017 WL 5905536, at *8 (D. Utah Nov. 29, 2016), *aff'd*, No. 216CV00992JEDPJC, 2018 WL 1271894 (D. Utah Mar. 9, 2018) (contested documents that have been submitted as supporting material in connection with motions for summary judgment are considered judicial documents under the common law and there is a qualified "First Amendment right of access to documents submitted to the court in connection with a summary judgment motion." *See also* Brigham Young Univ. v. Pfizer, Inc., 281 F.R.D. 507, 511 (D. Utah 2012) (quoting Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 124 (2d Cir. 2006).

166 Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1980) (citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 602 (1978)).

167 Harte v. Burns, No. 13-2586-JWL, 2020 WL 1888823, at *2 (D. Kan. Apr. 16, 2020); United States v. Walker, 761 F. App'x. 822, 834 (10th Cir. 2019); Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124, 1135–36 (10th Cir. 2011).

and substantial interest that justifies depriving the public of access to the records that inform our decision-making process.'"[168]

In the Tenth Circuit, a qualified right of public access applies to judicial documents.[169] Although what constitutes a "judicial document" is not clearly defined, the Tenth Circuit has positively cited the Second Circuit's *Lugosch* decision, which found that merely filing a document with the court is insufficient; rather, "where documents are used to determine litigants' substantive legal rights, a strong presumption of access attaches."[170] It has also cited favorably to the D.C. Circuit's *United States v. El-Sayegh* case[171] that "what makes a document a judicial record . . . is the role it plays in the adjudicatory process."[172] While pretrial documents and discovery materials that the parties intended to keep confidential may be sealed, agreement alone cannot support sealing.[173]

(xi) Eleventh Circuit

The Eleventh Circuit recognizes both a common law right and a limited First Amendment right of access to civil trial proceedings.[174]

Under common law, a trial court concealing the entire record of a case must show that "the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to that interest."[175] When concealing particular documents of a case, the court must balance the competing interests of the parties.[176] Public access to civil documents and proceedings receives less First Amendment protection, and "[m]aterials merely gathered as a result of the civil discovery process . . . do not fall within the scope of the constitutional right of access's compelling interest standard."[177] Rather, in determining whether to unseal the discovery materials, the First Amendment right of access standard is "identical to the Rule 26 good cause standard."[178]

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168 Colony Ins. Co. v. Burke, 698 F.3d 1222, 1242 (10th Cir. 2012) (quoting Helm v. Kansas, 656 F.3d 1277, 1292 (10th Cir. 2011)).

169 *Angilau*, 2017 WL 5905536, at *7; *see also Colony Ins. Co.*, 698 F.3d at 1241 (quoting Soc'y of Prof'l Journalists v. Secretary of Labor, 616 F. Supp. 569, 576 (D. Utah 1985), *appeal dismissed*, 832 F.2d 1180 (10th Cir. 1987)).

170 *Colony Ins. Co.*, 698 F.3d at 1242 (quoting *Lugosch*, 435 F.3d at 121).

171 131 F.3d 158, 163 (D.C.Cir. 1997).

172 *See* United States v. Apperson, 642 F. App'x. 892, 899 n. 6 (10th Cir. 2016) (unpublished).

173 Grundberg v. Upjohn Co., 140 F.R.D. 459, 466 (D. Utah 1991); Sacchi v. IHC Health Servs., Inc., 918 F.3d 1155, 1160 (10th Cir. 2019).

174 Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1311 (11th Cir. 2001) (per curiam).

175 *Id.* at 1311 (quoting Wilson v. Am. Motors Corp., 759 F.2d 1568, 1571 (11th Cir. 1985)).

176 *Chicago Tribune,* 263 F.3d at 1311.

177 *Id.* at 1310.

178 *Id.* (finding error in requiring a party to show a compelling interest to overcome the public's constitutional right of access).

In the Eleventh Circuit, "the mere filing of a document does not transform it into a judicial record."[179] Rather, judicial documents are those that are "integral to the 'judicial resolution of the merits' in any action taken by that court."[180] When a document is filed, the type of filing to which it is attached is a factor for the court to consider in deciding whether the document constitutes a judicial record.[181] For instance, documents filed in connection with discovery motions are not considered judicial documents and are not subject to the common law right of access.[182] However, discovery materials filed in connection with pretrial motions that require judicial resolution of the merits are subject to the common law right.[183] Any "motion that is 'presented to the court to invoke its powers or affect its decisions,' whether or not characterized as dispositive, is subject to the public right of access."[184]

(xii) D.C. Circuit

Relying on the Ninth Circuit's decision in *Foltz v. State Farm Mutual Auto Insurance Co.,*[185] the D.C. Circuit recognizes a common law right of access to judicial records.[186] Further, the First Amendment "guarantees the press and the public access to aspects of court proceedings, including documents, 'if such access has historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct[.]'"[187] The D.C. Circuit applies the *Press-Enterprise II* test to determine if the sealed records have "historically been available, and serves an important function of monitoring prosecutorial or judicial misconduct."[188] However, it is unclear whether the First Amendment right to access applies in civil cases.[189]

In the D.C. Circuit, "not all documents filed with courts are judicial records."[190] What makes a document a "judicial record" is "the role it plays in the adjudicatory process."[191] The reason for

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179 Comm'r., Alabama Dept. of Corrections v. Advance Local Media, LLC, 918 F.3d 1161, 1167 (11th Cir. 2019).

180 *Id.*; F.T.C. v. AbbVie Prod. LLC, 713 F.3d 54, 64 (11th Cir. 2013); *Chicago Tribune*, 263 F.3d at 1312.

181 *Advance Local Media*, 918 F.3d at 1166–68.

182 *Chicago Tribune*, 263 F.3d at 1313; *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987).

183 *Chicago Tribune*, 263 F.3d at 1312 (the court distinguishes between material filed with discovery motions and material filed in connection with more substantive procedures); Romero v. Drummond Co., Inc., 480 F.3d 1234, 1245 (11th Cir. 2007) (presumption applies to "material filed in connection with pretrial motions that require judicial resolution of the merits" but not documents "filed in connection with motions to compel discovery").

184 *Id.* at 1246 (citing United States v. Amodeo (*Amodeo II*), 71 F.3d 1044, 1050 (2d Cir. 1995).

185 331 F.3d 1122 (9th Cir. 2003).

186 Apple Inc. v. Samsung Electronics Co., 727 F.3d 1214 (D.C. Cir. 2013).

187 S.E.C. v. Am. Int'l Grp., 712 F.3d 1, 5 (D.C. Cir. 2013).

188 Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (citing Press-Enterprise. Co. v. Superior Court of Calif. For Riverside Cty. (*Press-Enterprise II*), 478 U.S. 1, 8 (1986); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605–06 (1982); Oregonian Pub. Co. v. Dist. Court, 920 F.2d 1462, 1465 (9th Cir. 1990); United States v. Haller, 837 F.2d 84, 86 (2d Cir. 1988); *In re* Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986)).

189 *Am. Int'l Grp.*, 712 F.3d at 5.

190 *Id.* at 3.

191 *Id.*; United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997).

this rule is intuitive: "the concept of a judicial record assumes a judicial decision, and with no such decision, there is nothing judicial about the record."[192] The common law right of access does not apply to documents "whose contents were not specifically referred to or examined upon during the course of those proceedings and whose only relevance to the proceedings derived from the defendants' contention that many of them were not relevant to the proceedings . . . ."[193]

"A party seeking to seal judicial records can overcome the strong presumption of access by providing 'sufficiently compelling reasons' that override the public policies favoring disclosure."[194] Such compelling reasons must be "supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process."[195] This requires courts in the D.C. Circuit to "conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret."[196]

Under the common law analysis, courts in the D.C. Circuit consider six factors relating to the generalized interests for and against public disclosure, which "can be weighed without examining the contents of the documents at issue[]," but instead looks to the role the document plays in the litigation.[197] Those factors include: (1) the need for public access to the documents at issue; (2) previous public access to the documents; (3) the fact of an objection to public access and the identity of those objecting to public access; (4) the strength of the generalized property and privacy interests asserted; (5) the possibility of prejudice; and (6) the purposes for which the documents were introduced.[198] The proponent of a motion to seal must demonstrate that these six factors, in totality, overcome the "strong presumption in favor of public access to judicial proceedings," which is "the starting point in considering a motion to seal court records."[199]

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192 *Am. Int'l Grp.*, 712 F.3d at 3.

193 United States v. Hubbard, 650 F.2d 293, 316 (D.C. Cir. 1980).

194 Apple Inc. v. Samsung Electronics Co., 727 F.3d 1214, 1221 (D.C. Cir. 2013) (citing *In re* Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig., 686 F.3d 1115, 1119 (9th Cir. 2012) (quoting Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003)).

195 *Apple*, 727 F.3d at 1221 (citing Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1178–79 (9th Cir. 2006) (alterations and internal quotation marks omitted)).

196 *Kamakana*, 447 F.3d at 1179.

197 *Hubbard*, 650 F.2d at 317.

198 *Id.* at 317–22.

199 E.E.O.C. v. Nat'l Children's Ctr., 98 F.3d 1406, 1409 (D.C. Cir. 1996) (quoting Johnson v. Greater Se. Cty. Hosp. Corp., 951 F.2d 1268, 1277 (D.C.Cir. 1991)).

ATTACHMENT A: OVERVIEW OF JUDICIAL RECORD DEFINITION BY CIRCUIT

	Judicial Record Defined?
First Circuit	Yes. "[M]aterials on which a court relies in determining the litigants' substantive rights*" In re Providence Journal*, 293 F.3d 1, 9–10 (1st Cir. 2002), quoting *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).
Second Circuit	Yes. Information that is "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006).
Third Circuit	Yes. A document that "has been filed with the court . . . or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings." *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 672–73 (3d Cir. 2019).
Fourth Circuit	Yes. Documents filed with the court that "play a role in the adjudicative process, or adjudicate substantive rights.*" In re Application of the United States for an Order Pursuant to 18 U.S.C. Section 2703(D),* 707 F.3d 283, 290 (4th Cir. 2013).
Fifth Circuit	Not specifically. *See Bradley on behalf of AJW v. Ackal*, 954 F.3d 216, 227 (5th Cir. 2020) (court has not generally defined "judicial record," but it is common sense that judicially authored or created documents are judicial records).
Sixth Circuit	Not specifically. However, district courts cite favorably to Second Circuit's *Lugosch* decision that a judicial document is one that is "relevant to the performance of the judicial function and useful to in the judicial process." *See, e.g., Snook v. Valley OB-GYN Clinic, P.C.*, 14-CV-12302, 2014 WL 7369904, at *2 (E.D. Mich. Dec. 29, 2014); *Thompson v. Deviney Constr. Co., Inc.*, 216CV03019JPMDKV, 2017 WL 10662030, at *2 (W.D. Tenn. Dec. 15, 2017).
Seventh Circuit	Yes. "[M]aterials submitted to the court that 'affect the disposition' of the case and are not subject to a statute, rule, or privilege that justifies confidentiality." *United States v. Curry*, 641 F. App'x. 607, 609 (7th Cir. 2016) (unpublished), quoting *City of Greenville v. Syngenta Crop Protection*, LLC, 764 F.3d 695, 697 (7th Cir. 2014).
Eighth Circuit	No. However, the District of Minnesota has concurred with the Fourth and D.C. Circuits that judicial records are "documents that are relevant to and integrally involved in the resolution of the merits of a case[.]" *Sorin Grp. USA, Inc. v. St. Jude Med. S.C., Inc.*, 14-CV-04023 (JRT/HB), 2019 WL 2107282, at *3 (D. Minn. May 14, 2019), quoting *Krueger v. Ameriprise Fin., Inc.,* CV 11-2781 (SRN/JSM), 2014 WL 12597948, at *9 (D. Minn. Oct. 14, 2014), aff'd, 11-CV-02781 SRN/JSM, 2015 WL 224705 (D. Minn. Jan. 15, 2015).

Ninth Circuit	Yes. Any item filed with a court that is "relevant to the judicial function and useful in the judicial process." *Courthouse News Service v. Planet,* 947 F.3d 581 (9th Cir. 2020).
Tenth Circuit	No. But the Tenth Circuit has cited favorably to the Second Circuit's *Lugosch* decision, which found that a judicial document must be "relevant to the performance of the judicial function and useful in the judicial process." *See Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012). It has also cited favorably to the D.C. Circuit's *El-Sayegh* case that "what makes a document a judicial record . . . is the role it plays in the adjudicatory process." *See United States v. Apperson*, 642 F. App'x. 892, 899 n. 6 (10th Cir. 2016) (unpublished).
Eleventh Circuit	Yes. Those that are "integral to the 'judicial resolution of the merits' in any action taken by that court." *Comm'r., Alabama Dept. of Corrections v. Adv. Loc. Media, LLC*, 918 F.3d 1161, 1167 (11th Cir. 2019) (citing *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 64 (11th Cir. 2013) (quoting *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001).
D.C. Circuit	Yes. What makes a document a "judicial record" is the role it plays in the adjudicatory process. *United States v. El–Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). It must be specifically mentioned during the proceedings. *United States v. Hubbard*, 650 F.2d 293, 316 (D.C. Cir. 1980).

ATTACHMENT B: CIRCUIT ANALYSIS OF WHETHER PUBLIC RIGHT OF ACCESS EXISTS FOR NONDISPOSITIVE MOTIONS

	Nondispositive-related Motions and Exhibits Included in Right of Access?
First Circuit	No. *See United States v. Kravetz,* 706 F.3d 47, 54 (1st Cir. 2013) (no public right of access to discovery motions and related materials); *Anderson v. Cryovac, Inc.,* 805 F.2d 1, 13 (1st Cir. 1986) (a request to compel or protect the disclosure of information in the discovery process is not a request for a disposition of substantive rights).
Second Circuit	Unlikely. *Brown v. Maxwell*, 929 F.3d 41, 50 (2d Cir. 2019) ("The presumption of public access in filings submitted in connection with discovery disputes or motions in limine is generally somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment.").
Third Circuit	Yes. *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662, 672–73 (3d Cir. 2019).
Fourth Circuit	Unclear. *In re Application for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 290 (4th Cir. 2013). But some district courts have predicted that the Fourth Circuit will find no public right of access to discovery motions and related exhibits, and that consequently, such documents may be sealed. *See, e.g.*, *Kinetic Concepts, Inc. v. Convatec Inc.,* 1:08tCV00918, 2010 WL 1418312, at *9 (M.D.N.C. Apr. 2, 2010) ("the Fourth Circuit has used language that suggests that no public right of access attaches [to discovery motions]").
Fifth Circuit	Unlikely. *Robroy Indus.-Tex., LLC v. Thomas & Betts Corp.*, No. 2:15-CV-512-WCB, 2016 WL 325174, at *2 (E.D. Tex. Jan. 27, 2016).
Sixth Circuit	Likely. A party seeking to seal records must advance arguments that allow the court to "set forth specific findings and conclusions 'which justify nondisclosure to the public.'" *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594 (6th Cir. 2016).
Seventh Circuit	Depends. Public access depends on whether a document "influenc[ed] or underpin[ned] the judicial decision." *Baxter Int'l, Inc. v. Abbott Labs.,* 297 F.3d 544, 545 (7th Cir. 2002); *Matter of Cont'l Illinois Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir. 1984) (declining to comment as a general matter whether there is a recognized right of public access to pretrial proceedings but finding presumption does apply to a motion to terminate).

Eighth Circuit	No. *IDT Corp. v. eBay,* 709 F.3d 1220, 1223 (8th Cir. 2013) (stating that "other than discovery motions and accompanying exhibits," the modern trend is to treat pleadings as presumptively public).
Ninth Circuit	Possibly. Will turn on whether the motion is "more than tangentially related to the merits of the case[.]" *Ctr. for Auto Safety v. Chrysler Grp., LLC,* 809 F.3d 1092, 1098, 1101 (9th Cir. 2016).
Tenth Circuit	Likely at common law. *Parson v. Farley*, 352 F. Supp. 3d 1141, 1153 (N.D. Okla. 2018), aff'd, 16-CV-423-JED-JFJ, 2018 WL 6333562 (N.D. Okla. Nov. 27, 2018) (finding Motion to Dismiss and exhibit as "judicial documents."). Unlikely under the First Amendment. A "'litigant has no First Amendment right of access to information made available only for purposes of trying his suit' and that 'pretrial depositions and interrogatories are not public components of a civil trial.'" *Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 466 (D. Utah 1991) (quoting *Seattle Times v. Rhinehart*, 467 U.S. 20, 32–33 (1984)).
Eleventh Circuit	Depends. *Romero v. Drummond Co., Inc.,* 480 F.3d 1234, 1245 (11th Cir. 2007) (presumption applies to "material filed in connection with pretrial motions that require judicial resolution of the merits" but not documents "filed in connection with motions to compel discovery").
D.C. Circuit	No. S*.E.C. v. Am. Int'l Grp.*, 712 F.3d 1, 3–4 (D.C. Cir. 2013) (presumption applies only to record that "plays a role in the adjudicatory process," not to documents where the court "ma[kes] no decisions about them or that otherwise relie[s] on them").

Tab J

COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

SEALING FATE: THE PROPOSAL TO RESTRICT JUDICIAL DISCRETION OVER SEALING CONFIDENTIAL INFORMATION WOULD IMPOSE UNWORKABLE STANDARDS ON THE COURTS, CONFLICT WITH STATUTORY PRIVACY RIGHTS, AND STOKE UNPRECEDENTED SATELLITE LITIGATION

March 24, 2021

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") in response to Suggestion 20-CV-T[2], which asks the Committee to adopt a new Federal Rule of Civil Procedure ("FRCP") governing the sealing and unsealing of court records in civil cases.

INTRODUCTION

Data privacy and cybersecurity are the focus of tremendous political and public policy attention today—and for good reason. The "information age" accumulation of proprietary and personal data is raising extremely important questions about the proper collection, storage, and protection of information. As more and more business, personal communications, and healthcare are conducted online,[3] the strong tide of public opinion and policy development favors adding protections for proprietary and personal data, including notable laws in Europe, California, and many other jurisdictions. Meanwhile, federal courts continue to enforce a strong presumption in favor of disclosure, granting sealing orders sparingly. Amidst this debate, Suggestion 20-CV-T urges the Committee to displace established precedent and create a rule governing the sealing of documents in order to establish an even stronger policy preference for forcing litigants (and non-parties) to expose private information to the public—and in doing so, inventing an expansive

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

[3] See https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/cybersecurity-protect-me.html.

new role for federal courts as the general public's clearinghouse for accessing private information.

The complexity of this issue is well known to the Committee and the Standing Committee due to prior work on the topic,[4] and is also evidenced by the legislative history of related proposals[5] and the testimony of federal judges and litigants.[6] Almost without exception, serious efforts to devise a new standard for balancing the competing interests regarding sealing have concluded that the current rules are working. For example, in testimony before the House Judiciary Committee, Judge Richard W. Story of the U.S. District Court for the Northern District of Georgia described the present system for sealing documents as an efficient case management tool.[7] When members of the media advocated for stricter requirements on sealing documents by pointing to a Sixth Circuit decision admonishing a judge for improperly sealing documents,[8] the take-away lesson was that federal appellate courts are easily able to address the matter within the current legal framework.[9]

Suggestion 20-CV-T is not only unneeded, but also unworkable. The proposed rule would: (1) require courts to make "particularized findings" before sealing documents; (2) allow "any member of the public" to contest sealing orders "at any time"; and (3) automatically terminate all sealing orders just 60 days after case disposition. These provisions would inevitably consume significant judicial, private, and public resources by inviting new, time-intensive, and recurring ancillary proceedings. Meanwhile, the proposed rule would require judicial reconciliation of numerous conflicts with well-established sources of law, including federal statutes (such as whistle-blower protection laws), the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, federal rules protecting third parties, federal district court local rules, and Supreme Court precedent. By placing enormous additional burdens on a civil justice system that is already overworked and under-resourced, Suggestion 20-CV-T would create the very "inconsistencies and uncertainties in the justice system"[10] that its supporters claim it would reduce.

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[4] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 49 (Dec. 9, 2020) ("Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all Advisory Committees that responded to concerns then that federal courts had 'sealed dockets' in which all materials filed in court were kept under seal. The FJC did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files . . .").

[5] *See id*. (discussing the failure of Congress to pass a Sunshine in Litigation Act).

[6] *See generally The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 16-18 (2019) (testimony of The Honorable Richard W. Story, Senior Judge, United States District Court for the Northern District of Georgia).

[7] *Id*.

[8] *See generally The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 39-40 (2019) (testimony of Daniel R. Levine, Legal Correspondent, Thomas Reuters Corporation).

[9] *See* ROBERT TIMOTHY REGAN, CONFIDENTIAL DISCOVERY: A POCKET GUIDE ON PROTECTIVE ORDERS at 15-16 (Federal Judicial Center) (2012) (discussing the process for appealing protective orders in various circuits); *see also* ROBERT TIMOTHY REGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE at 18 (Federal Judicial Center) (2010) (discussing the same for orders to seal).

[10] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

If the Committee undertakes to draft a new national standard, it should set aside Suggestion 20-CV-T and instead fashion a rule that provides pragmatic guidance for courts and parties balancing the legitimate need for litigants to seal proprietary information with the public interest in oversight of the judicial process. Any new rule should reflect the fact that, in many cases, the information held by companies, governments, hospitals, and non-profits includes customer data, financial histories, patient charts, and employment records is not only proprietary but also pertains to individuals. It also should contemplate that, in today's discovery practices, parties commonly exchange information about their data infrastructure, including the design and operation of their computer systems—information that does not go to the merits of any legal dispute but whose disclosure opens serious risks by providing a roadmap to hackers, competitors, and state sponsors around the world who conduct daily cyber espionage and cyber attacks. Any new rule should: (i) clearly distinguish between discovery and court-filed documents; (ii) allow parties to stipulate to protection of discovery information; (iii) apply the presumption of public disclosure only to documents that are important to the determination of case merits; (iv) provide a mechanism to ensure information exchanged during discovery is appropriately protected from cybersecurity threats; and (v) establish a procedure for parties and courts to minimize the amount of potentially confidential information that gets filed with courts in the first place. Such a rule, unlike Suggestion 20-CV-T, could be "worth the candle" given the many difficulties the Committee will have to tackle when drafting a new rule on this topic.

I. A NEW RULE IS UNNECESSARY BECAUSE THE SEALING OF RECORDS IS RARE AND TYPICALLY GOVERNED BY STATUTE

Presently, litigants must provide a compelling reason for a document to be sealed in the federal courts.[11] The current policy was explained by the then-director of the Administrative Office of the Courts in a recent press release addressing a serious cybersecurity breach in the federal courts:

> "The federal Judiciary has long applied a strong presumption in favor of public access to documents," Duff said. "Court rules and orders should presume that every document filed in or by a court will be in the public domain, unless the court orders it to be sealed, and that documents should be sealed only when necessary," Duff said in his January 6 memo to the courts.[12]

Courts ruling on sealing motions enter findings in accordance with Supreme Court and circuit precedent by balancing the public right of access with the various privacy interests.[13] By most accounts from judges and litigants, this system functions as it is intended to, primarily due to judges' discretion and their proximity to the facts and issues of a specific case.[14]

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[11] *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 4 (2019) (written statement of The Honorable Richard W. Story, Senior Judge, United States District Court for the Northern District of Georgia).

[12] Available at Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records | United States Courts (uscourts.gov).

[13] In re Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981).

[14] *See id*. ("Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court.").

The complete sealing of civil cases is, in fact, extremely rare.[15] The Federal Judicial Center's analysis of sealed cases shows that, in a one-year period, only 576, or 0.2% of the 245,326 civil cases filed were sealed.[16] The majority of sealing orders were entered to protect whistleblowers, government cooperators, and the identity of minors. Specifically, *qui tam* actions accounted for 182 of those cases,[17] 30 cases were *habeas corpus* and prisoner actions that were sealed because the actions involved cooperators or juveniles,[18] and 24 non-habeas cases were sealed to protect the identity of minors.[19] Only 16 cases were found to be sealed in error.[20] The FJC's report also shows that the number of orders protecting or sealing certain documents (rather than the entire case) is also small. According to the FJC, the number of cases involving protective orders never exceeded 10% in the three districts surveyed.[21] Moreover, protective orders were denied 34% of the time,[22] rebutting the narrative that judges are merely rubber stamping motions for protective orders.

Many case sealing orders are required by statute. For example, the False Claims Act states that complaints filed by a private citizen must be filed in camera and remain under seal for at least sixty days.[23] It also provides that any motion to extend that time, together with any supporting evidence, must be filed in camera as well.[24] Similar rules apply for federal funding arising out of State False Claims Act claims.[25] Statutes also require sealing of specific types of documents. The Trademark Act of 1946 requires courts to keep under seal any order to prevent further infringement and all supporting documents, until the person against whom the order would be granted has an opportunity to contest the order.[26] Numerous federal statutes require that information with national security implications remain under seal when submitted to a court, including electronic surveillance authorizations made by the President without a court order, *ex parte* requests by the U.S. government to seal information regarding a party's material support to a foreign terrorist organization, and authorization for the acquisition of foreign intelligence regarding people outside the United States.[27] Arbitration agreements are also required to be sealed when filed with the district court so that a party who wants to request a trial *de novo* can have confidence that the result of the arbitration proceedings "shall not be made known" to the

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[15] *See* GEORGE CORT & TIMOTHY REGAN, SEALED CASES IN FEDERAL COURT 4 (Federal Judicial Center) (2009) (describing the results of an empirical investigation into the sealing of cases in federal courts).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *See* ELIZABETH C. WIGGINS, MELISSA J. PECHERSKI, AND GEORGE W. CORT, PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3 (Federal Judicial Center) (1996) (describing an empirical study conducted to track protective order activity in the District of Columbia, District of Michigan, and the Eastern District of Pennsylvania).
[22] *Id*. at 6.
[23] 31 U.S.C.A. § 3730(b)(2).
[24] 31 U.S.C.A. § 3730(b)(3).
[25] 42 U.S.C.A. § 1396h(b)(3).
[26] 15 U.S.C.A. § 1116(d)(8).
[27] 50 U.S.C.A. § 1805b; 18 U.S.C.A. § 2339B; 50 U.S.C.A. § 1802.

judge assigned to the case until the court has entered final judgment.[28] These examples show that most sealing orders in federal courts are governed by statute rather than procedural rules.

II. THERE IS NO RIGHT TO GREATER DISCLOSURE; IN MANY INSTANCES, PRIVACY INTERESTS OUTWEIGH PUBLIC ACCESS

Although critics may proclaim a desire for increased access to litigants' private information, there is no constitutional or common law right to any greater public access to such information than what is available under current rules. A litigant "does not in fact surrender (or 'forfeit') the confidentiality of its information by seeking judicial review."[29] While courts recognize a presumptive right of access to information that facilitates public oversight of judicial performance and the justice system, "an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power."[30] Many are irrelevant or unreliable, which is why "[t]he universe of documents that can be considered judicial records is not limitless."[31] Federal courts of appeal[32] have found a qualified right to access only as to a subset of judicial records in civil matters.[33] A significant body of caselaw provides a balanced approach[34] that puts the burden on parties seeking protection.[35]

Despite the high bar for confidentiality, there are important areas in which privacy interests clearly outweigh public access, including where judicial records may be used "as sources of business information that might harm a litigant's [or third party's] competitive standing."[36] Courts appropriately use their discretion to deny access to trade secrets and confidential business information in a variety of circumstances[37]—notably including where such information could

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[28] 28 U.S.C.A. § 657(b).
[29] *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 671 (D.C. Cir. 2017).
[30] *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).
[31] *Giuffre v. Maxwell*, No. 15 CIV. 7433 (LAP), 2020 WL 133570, at *4 (S.D.N.Y. Jan. 13, 2020), *reconsideration denied*, No. 15 CIV. 7433 (LAP), 2020 WL 917057 (S.D.N.Y. Feb. 26, 2020). *See also Newsday LLC v. County of Nassau*, 730 F.3d 156, 167 n.15 (2d Cir. 2013) (emphasizing that "the category of 'judicial documents' should not be readily expanded").
[32] The U.S. Supreme Court has not explicitly ruled on whether a First Amendment right of access extends to civil proceedings and records. *Courthouse News Serv. v. Planet,* 947 F.3d 581, 590 (9th Cir. 2020).
[33] *See*, *e.g., id.* (finding qualified First Amendment right of access to newly filed, nonconfidential complaint); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–20 (2d Cir. 2006) (specific documents attached to summary judgment motion in civil RICO action are "judicial documents" subject to qualified First Amendment right of access).
[34] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs*., 800 F.2d 339, 344 (3d Cir. 1986) ("Just as the right of access is firmly entrenched, so also is the correlative principle that the right of access, whether grounded on the common law or the First Amendment, is not absolute.").
[35] *See Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (the common-law presumption of access can be rebutted "if countervailing interests heavily outweigh the public interests in access."). Where there is a qualified First Amendment right of access, "documents may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 119-20. *In re Knoxville News-Sentinel, Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983).
[36] *Nixon*, 435 U.S. at 598.
[37] *See*, *e.g.*, *In re Hewlett-Packard Co. S'holder Derivative Litig.*, 716 F. App'x 603, 609 (9th Cir. 2017) (upholding sealing order where documents at issue included trade secrets, privileged attorney-client communications and work product information, and confidential whistleblower information); *Apple Inc. v. Samsung Elecs. Co*., 727 F.3d 1214,

impede U.S. companies' ability to protect trade secrets from international competitors and might implicate Export Controls restrictions. There is also a rapidly growing array of federal, state, and global privacy laws that require confidentiality concerning specific categories of personal information in order to protect individuals' privacy interests.[38] Because much of the information held by public and private organizations reflects data about individual consumers, patients, and tax payers, many institutions, including companies, governments, hospitals, and non-profits, are investing significantly in appropriate technology, staff, procedures, and training to keep up with evolving legal obligations.[39] Some of those laws are already causing tension with civil discovery obligations, even with the courts' current discretion to resolve motions regarding the sealing and unsealing of documents in a way that best balances the public interest in access with competing privacy interests. The suggestion to develop a new, nationwide rule governing sealing orders that would even more strongly favor public disclosure risks eroding the very flexibility and discretion required for courts to navigate legal requirements, while balancing legitimate privacy interests against the need for public access to information concerning the functioning of the judiciary. This is particularly the case where the rights at issue are held by people who are not parties to any case.

III. SUGGESTION 20-CV-T IS UNWORKABLE

A. Requiring Courts to Make "Particularized Findings" Would Burden Courts with A Novel Standard That Is Inconsistent with Supreme Court Precedent

Suggestion 20-CV-T would require courts to detail the basis of all orders to seal with "particularized findings."[40] To comply with that mandate, courts would be forced to make fact-intensive inquiries and complicated determinations about potentially thousands of documents

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1221 (Fed. Cir. 2013) (district court in patent infringement case abused its discretion in refusing to seal confidential business information); *In re Elec. Arts, Inc.,* 298 F. App'x 568, 570 (9th Cir. 2008) (trial court committed clear error in refusing to issue a sealing order protecting a litigant's confidential and commercially sensitive information used as trial exhibit in licensing dispute); *Crane Helicopter Servs., Inc. v. United States*, 56 Fed. Cl. 313, 327 (2003) (trade secrets of nonparty helicopter manufacturer would remain sealed after trial where release of the information might significantly damage manufacturers' competitive advantage).

[38] The United States has not adopted a comprehensive federal approach to data protection, instead taking a sector-specific approach in areas such as securities, health, consumer lending, and children's online privacy. *See* Michael L. Rustad & Thomas H. Koenig, Towards A Global Data Privacy Standard, 71 Fla. L. Rev. 365, 381 (2019) (summarizing U.S. federal legal regime governing data privacy). States are enacting their own laws governing privacy obligations, such as the California Consumer Privacy Protection Act. Cal. Civ. Code §§ 1798.100-.199 (effective Jan. 1, 2020) (creating new privacy rights to give consumers control over their personal information). Multinational companies are subject to individual countries' privacy laws and are likely to be subject to European Union law barring the "processing" or public disclosure of personal information, including names and contact information, without the individual's consent. *See*, *e.g.*, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

[39] *See* Corporate Data Privacy Today: A Look at the Current Readiness, Perception, and Compliance (FTI Consulting, May 2020) (report of survey of over 500 large U.S.-based companies' data privacy activities; 75 percent of respondents changed their data privacy efforts in the preceding 12 months and 97 percent plan to increase their data privacy spending in the next year, most by 50 percent), *available at* https://static2.ftitechnology.com/docs/white-papers/FTI%20Consulting%20White%20Paper%20-%20Corporate%20Data%20Privacy%20Today.pdf (reg. required).

[40] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

that implicate parties' trade secrets, confidential business information, and other sensitive data. This would require judges to review pre-trial discovery documents, read extensive briefing and affidavits, hold hearings, and write detailed opinions—all of which would divert judicial resources,[41] cost parties considerable expense, and prolong law suits.

The term "particularized findings" would be a brand new standard for the FRCP.[42] No current rule imposes on courts a burden to make specific or particularized findings.[43] Indeed, there are few places in the FRCP that even require courts to make "findings." Rule 52(a)(1) requires a court to enter findings of fact and conclusions of law after a bench trial,[44] and Rule 23(b)(3) states that class certification should occur only if a court finds the standard for class verification is met.[45] These provisions cannot be analogized to orders to seal and protective orders, which are widely understood to be litigation management tools.[46] The term "particularized findings" also does not appear in any of the 94 local rules governing orders to seal.[47] Even the local rule for the Western District of North Carolina cited in support of Suggestion 20-CV-T merely requires the court to "state its reasons with findings supporting its decision."[48]

Moreover, the "particularized findings" standard begs the question: particularized findings of *what*? Suggestion 20-CV-T would establish a four-part test, including whether the rationale for sealing "overcome[s] the common law and First Amendment right of access."[49] This means that, for every sealing order, judges must explicitly elaborate the reasons why the order does not violate an entire body of caselaw and First Amendment jurisprudence. Such a rule would starkly contrast with the Supreme Court's *Nixon v. Warner Communications*[50] holding that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[51] The high burden and

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[41] The Committee regularly weighs the burdens of a proposed rule against its utility. *See* Advisory Cmty. On Civil Rules, April 2020 Minutes 32 (Apr. 1, 2020) (discussing pragmatic considerations, including the burdens imposed by Rule 17(d)); Advisory Cmty. On Civil Rules, Report to the Standing Cmty. 50 (Dec. 9, 2020) (questioning the burden that the proposed rule for sealing documents would impose on courts). The federal judiciary is presently rife with overburdened courts, overloaded dockets, and overworked judges and court staff. *See generally* Peter S. Menell & Ryan Vacca, Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform, 108 CALIF. L. REV. 789 (2020). An empirical study tracking federal caseloads since 1970 found a 145% increase in the number of actions filed, with the majority of the increase attributable to increased civil litigation. *Id*. at 844. During the same period, caseloads per judge increased by 90%, and the average time from the filing of a case to disposition rose from 152 to 272 days. *Id.* at 848, 851.

[42] *See generally* Fed. R. Civ. P.

[43] *See, e.g.,* Fed. R. Civ. P. 9(b) (requiring that "fraud or mistake" be plead with "particularity"); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[44] Fed. R. Civ. P. 52(a)(1); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[45] Fed. R. Civ. P. 23(3)(b); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[46] *See* Statement of the Honorable Judge Richard W. Story, *supra* notes 6-7 (discussing the utility of orders to seal and protective orders as a case management tool).

[47] *See generally* Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH at 2 (Aug. 7, 2020) (quoting numerous local rules with no instances of the term "particularized findings").

[48] W.D.N.C. L. Civ. R. 6.1 (f).

[49] *See* Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH at 2 (Aug. 7, 2020) (outlining the proposed rule).

[50] 435 U.S. 589 (1978).

[51] Warner Communications, 435 U.S. at 599.

attendant uncertainties of such a rule overwhelm any possible benefit, especially given that the current standard has a proven record of helping judges balance litigants' privacy rights with the public's right to access information related to the functioning of our courts.[52]

B. Allowing "Any Member of The Public" To Challenge Sealing Orders "At Any Time" Would Vastly Expand the Judiciary's Role and Workload

The proposal to allow "any member of the public" to challenge sealing orders and motions to seal "at any time" would invent a bold, new role for the federal judiciary as the "information clearinghouse"[53] for access to confidential information. Suggestion 20-CV-T would effectively nullify Rule 24(b) and corresponding caselaw by doing away with intervention standards for non-parties who wish to challenge court orders on sealing.[54] Instead, any "member of the public"[55] would be allowed into court without any showing of interest in the case or even the contents of the sealed filing. When handling a member of the public's challenge to a sealing motion or its own sealing order, the court's role would change from that of adjudicator and manager of the case to that of referee and reconciler of differing public policy viewpoints. And the proposal would allow such challenges "at any time" without regard to the procedural posture of the case (even during trial or after the case is closed), including unlimited re-litigation of sealing orders that have already been entered with particularized findings under the new four-part test. This would be the first FRCP provision with a time period of "forever,"[56] opening up novel jurisdiction issues and a strong likelihood that the unsealing of records will occur without notice to former litigants and non-parties.

Inevitably, Suggestion 20-CV-T would flood the federal civil docket with a new workload of motions that rarely, if ever, relate to the merits of cases. Each motion would lead to lengthy delays as documents are reviewed, briefs are written and read (with supporting affidavits and other evidence), a hearing is held, and a written opinion with "particularized findings" is drafted and issued from the court. This burden would be particularly heavy in complex civil cases, where confidential documents frequently number in the thousands or even millions.[57] The costs

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[52] *Id*. *See also* Siedle v. Putnam Invs., Inc., 147 F.3d 7, 10 (1st Cir. 1998) ("The trial court enjoys considerable leeway in making decisions of this sort."); San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999); United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997).

[53] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427, 487 (1991); *cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (rejecting the use of an executive agency as an information clearinghouse).

[54] *See* 8A Fed. Prac. & Pro. § 2044.1.

[55] This term is ambiguous and would need definition if incorporated into the FRCP. For example, would it be limited to U.S. citizens or permanent residents? Would government, corporate, and non-profit entities qualify, and if so, how about foreign-owned or foreign-registered entities and international non-governmental organizations?

[56] *Cf.* Fed. R. Civ. P. 60(c)(1) (limiting time for relief from judgment to "a reasonable time" and for relief due to mistake, newly discovered evidence, or fraud to one year).

[57] *See* Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999) ("We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge."); *see also* Am. Nat'l Bank Trust Co. of Chicago v. AXA Client Solutions, LLC, No. 00 C 6786, 2002 WL 1067696, at *6 (N.D. Ill. May 28, 2002) ("In a case involving thousands of documents, such as this one, the court need not make a finding of good cause on a document-by-document basis.").

and delays inherent in such a process (including interruptions during trial) would trammel any hope of securing the "just, speedy, and inexpensive determination" of affected cases.[58]

Evaluating these burdens puts a fine point on how strongly Suggestion 20-CV-T favors one public policy outcome over another. While the proposal would sacrifice much in order to give any member of the public the right to *oppose* a motion or order to seal, it does not permit the public or an individual who would be harmed by disclosure to *move for* or *support* a sealing order. This gaping omission belies the presumption that Suggestion 20-CV-T would always serve the public interest; it would do so only when public disclosure is good, not when it's harmful. If the burdens contemplated by the proposal would be justified when members of the public advocate on *one side* of sealing questions, wouldn't it also be worthwhile to allow the public to advocate on the *other side* as well?

C. The Automatic Unsealing of Protected Documents Would Cause Pointless Re-Litigation

Despite establishing the very high bar of "particularized findings" under its four-part test, Suggestion 20-CV-T nevertheless would automatically terminate all court sealing orders, without judicial review, 60 days after the final disposition of the case.[59] There is no rationale provided as to why this is appropriate—especially for court orders required by statute—or why judges should be denied the discretion to set a different duration to fit the needs of a particular case.[60] No doubt, motions to renew sealing orders would be filed in almost every case because the need for confidentiality is unlikely to change within such a short time[61]—especially because Suggestion 20-CV-T would require such motions to be filed 30 days after final disposition (within 30 days of the expected unsealing date). Not only would the automatic unsealing provision cause a significant increase in post-resolution litigation, with its attendant burdens on judicial time, but it would also create a substantial risk of unlimited public access to documents that have been adjudicated private, sensitive, and confidential. As written, the proposed rule suggests that if a motion to renew sealing is not filed within 30 days of the final disposition, not even the court would have the power to keep the documents under seal.

D. The Proposed Rule Would Overwhelm Court Clerks Offices

Implementing the requirements of Suggestion 20-CV-T, including the sealing and unsealing of pleadings, evidence, and orders and abiding by the various timelines for each, would likely

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[58] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020) (questioning the burden that the proposed rule for sealing documents would impose on courts).

[59] *Cf.* N.D. Tex. L.R. 79.4 (district court local rule cited by Professor Volokh to support this proposed provision, which states that "all sealed documents *maintained on paper* will be deemed unsealed 60 days after the final disposition of a case") (emphasis added).

[60] *Cf.* W.D.N.C. L. Civ. R. 6.1 (district court local rule cited by Professor Volokh, which provides that sealed documents "may be subject to unsealing *by the Court* upon the close of the case") (emphasis added).

[61] *Cf.* district court local rules cited by Professor Volokh, including D. Kan. R. 79.4 (automatic unsealing after 10 years); N.D. Ca. R. 79-5 (automatic unsealing after 10 years); 3d Cir. R. 106.0(c)(2) (automatic unsealing after 5 years); E.D. Pa. R. 51.5 (automatic unsealing after 2 years); S.D. Flor. R. 5.4 (automatic unsealing after 1 year).

overload court clerks offices.[62] It could require changes to document management systems and practices, as well as the creation and management of a centralized website.[63] Of course, the main source of new burdens would be complex civil cases[64] because the proposed rule would bar the use of stipulated protective orders where parties agree to file agreed-upon categories of records under seal, which today are widely employed in large disputes, including multi-district litigation, to "expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication."[65] The document-by-document adjudication the proposed rule will require in such cases is highly likely to overwhelm the current capabilities of clerks offices, even in the largest and busiest districts.

E. The Proposed Rule Would Disrupt Rule 45's Well-Balanced Protections That Enable Discovery from Non-Parties

Rule 45 protects non-parties from undue burdens, including subpoenas that might require disclosure of confidential information, in order to enable discovery from people and entities who have no stake in the litigation.[66] It does so by giving parties an affirmative duty to avoid imposing "undue burden or expense" on non-parties and mandating that courts "must" enforce that duty by imposing sanctions for failure to meet it.[67] Rule 45 requires courts to modify or quash subpoenas when compliance would subject non-parties to undue burdens,[68] and specifically allows courts to quash or modify subpoenas that would result in "disclosing a trade secret or other confidential research, development, or commercial information."[69] Finally, Rule 45 obligates courts to impose cost-shifting (when certain requirements are met) to protect non-parties from "significant expense resulting from compliance" with subpoenas.[70] These provisions are designed to streamline the process to allow parties to obtain third-party discovery while simultaneously protecting third parties from the burdens of being involuntarily brought into litigation.

Unfortunately, Suggestion 20-CV-T would fatally disrupt Rule 45's careful balance. By banning stipulated sealing and protective orders, Suggestion 20-CV-T would preclude parties from obtaining confidential documents from non-parties without imposing the significant burden and

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[62] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020) (highlighting the possible burdens associated with requiring particularized findings).
[63] *Id*.
[64] *See* MANUAL FOR COMPLEX LITIGATION 4th § 11.432, at 64 (Federal Judicial Center) (2004) ("[c]omplex litigation will frequently involve information or documents that a party considers sensitive").
[65] *Id*.
[66] *See generally* The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, 22 SEDONA CONF. J. 1, 42-77 (forthcoming 2021); *See also* In re Northshore Univ. Health Sys., 254 F.R.D. 338, 343-44 (N.D. Ill. 2008) ("Thus, as this case demonstrates, if a non-party is not fearful of public disclosure of their proprietary documents due to the protection gained from a protective order, they will likely be more forthcoming. As a result, cases will be able to proceed more efficiently through the discovery phase.").
[67] Fed. R. Civ. P. 45(d)(1); Voice v. Stormans Inc., 738 F.3d 1178, 1184 (9th Cir. 2013) (finding that Rule 45 requires courts to enforce cost shifting when an undue burden would be placed on a third party receiving a subpoena). *See also* Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001); Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 17-6221, 2019 WL 7283254 (S.D.N.Y. Dec. 26, 2019).
[68] Fed. R. Civ. P. 45(d)(3).
[69] *Id.*
[70] Fed. R. Civ. P. 45(d)(2)(B)(ii)

expense on those non-parties of demonstrating the need for sealing by satisfying the rule's four-part test with "particularized findings," and then defending against any number of challenges and motions to unseal brought by any member of the public at any time in the proceedings. Perhaps even worse, the automatic termination of sealing orders 60 days after final case disposition would impose additional, ongoing burdens and expenses on non-parties who likely have had no involvement in the litigation and might have no knowledge about the resolution of the case. Does a party's Rule 45 duty to avoid imposing undue costs and burdens apply to the increased motion costs that will result from Suggestion 20-CV-T, and does that duty continue after resolution of the case, including non-party eligibility for cost-shifting? Will the court be required to notify non-parties regarding the pending expiration of the sealing at case conclusion? Because non-parties do not affirmatively place their confidential information into the public record,[71] but instead are obligated to comply with subpoena requests, the proposed rule does not sufficiently address the implications to Rule 45 and the protections it affords.[72]

F. The Proposed Rule's Implementation Would Be Confused by Its Inconsistency with Numerous Federal Statutes

Suggestion 20-CV-T is inconsistent with numerous federal statutes that specifically require or permit the sealing of documents in certain situations.[73] Although it purports to exclude situations governed by such statutes from its presumption that all filed documents "shall be open to the public," the proposed rule does not allow such exceptions from its other terms. For example, the proposed rule would permit "any member of the public" to file a motion to unseal documents "at any time," even when the sealing of those documents is required by statute. Similarly, the proposed rule would automatically terminate all sealing orders 60 days after final disposition of a case, making no exception for orders entered pursuant to statutes barring disclosure of information that endangers specific individuals or national security. By running directly counter to laws requiring confidentiality, the proposed rule creates confusion and, at the very least, unnecessary and inappropriate litigation. This is a profound flaw, and the solution should not be to assume that courts will simply ignore the rule when needed.

G. The Proposed Rule Would Affect the Scope of Discovery by Complicating Rule 26's Proportionality Requirement

Suggestion 20-CV-T would have unintended consequences on the scope of parties' discovery obligations because it would cause new and recurring motion practice that would impose significant burdens and expense. Achieving proportionality under Rule 26(b)(1) is "critically

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[71] *See* U.S. v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 11297188, at *1 (N.D. Cal. Jan. 21, 2014) (granting third parties' motions to seal and stating, with respect to the protected confidential information, "the third parties did not voluntarily put it at issue in this litigation").

[72] *See, e.g., id.* at *1 (in case where thousands of documents were subpoenaed from third parties, granting third parties' motions to seal because the "information contains pricing and competitive information that could cause damage to the third parties if made public"); In re Northshore Univ. Health Sys., 254 F.R.D. at 342-44 (in ruling on protective order, stating that "[d]eference should be should be paid to the interests of non-parties who are requested to produce documents or other materials that contain confidential commercial information or trade secrets").

[73] *See* Part I, *supra*.

important" to ensuring the "just speedy and inexpensive resolution" of civil disputes.[74] The key to proportionality is "whether the burden or expense of the proposed discovery outweighs its likely benefit."[75] By disallowing stipulated protective orders, allowing "any member of the public" to litigate sealing orders "at any time," and automatically terminating all sealing orders after 60 days following resolution, Suggestion 20-CV-T would materially change this calculus, particularly in complex litigation where the confidentiality of thousands of documents could be continually in dispute. Even after the court finds a compelling basis for sealing under the proposed rule's four-part test, and articulates "particularized findings" supporting its decision, the proposed rule still provides an open door to unlimited motions challenging the court's order, which the producing party would need to defend. The burden for proportionality purposes would not only include the expense of motions practice, but also the risks of public disclosure of the party's sensitive and proprietary information. Inevitably, these burdens will alter the outcome of proportionality analysis, leading to the conclusion that any discovery benefit of certain documents is outweighed by the additional burden and expense of litigating and re-litigating their confidentiality under the proposed rule's standards.

H. The Proposed Rule Would Chill Meritorious Litigation

The Supreme Court recognizes that requiring parties to produce sensitive information can have a chilling effect on meritorious litigation, noting that "rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims."[76] *A fortiori*, the regime that Suggestion 20-CV-T would impose—striping courts of their discretion to make sealing determinations, allowing "any member of the public" to challenge sealing orders "at any time," and automatically terminating all sealing orders 60 days following case disposition—would no doubt cause companies, governments, hospitals, individuals, and non-profits to forego litigating their just claims and defenses in federal courts. The rule would also discourage parties from appealing arbitration awards under the Federal Arbitration Act because of the consequence that otherwise confidential and non-discoverable records in the arbitration will be subject to public disclosure in the federal court action under this rule.

I. The Proposed Rule Would Conflict with the Federal Rules of Appellate Procedure while Burdening Circuit Courts with New Sealing Motions

Adopting Suggestion 20-CV-T would result in conflict with the approaches taken by federal appellate courts and require changes to the Federal Rules of Appellate Procedure ("Appellate Rules"). Currently, the Appellate Rules do not govern sealing of the appellate record, leaving that determination to each circuit. By establishing a new four-part test for district courts, imposing the requirement of "particularized findings," and automatically terminating all sealing orders 60 days after case disposition, Suggestion 20-CV-T would change the standards for the district courts in all circuits while also forcing appellate courts to consider many more motions to seal pending appeal. The resulting inconsistency and confusion amid a higher volume of

[74] *See generally* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 147 (2017).
[75] Fed. R. Civ. P. 26(b)(1).
[76] Seattle Times Co. v. Rhinehart, 467 U.S. 20, n.22 (1984).

motions would almost certainly require the Advisory Committee on Appellate Rules to consider rule amendments.

IV. IF A NEW FEDERAL RULE IS CONSIDERED, IT SHOULD DISTINGUISH BETWEEN DOCUMENTS THAT ARE NECESSARY TO DISPOSITIVE MOTIONS AND DOCUMENTS THAT DO NOT NEED TO BE FILED WITH THE COURT

A. Any New Sealing Rule Should Apply Only to Documents Filed with The Court, Not Discovery Materials

If, despite the shortcomings of Suggestion 20-CV-T described above, the Committee proceeds to consider a new federal rule governing sealing, it should limit any new provision only to documents filed with the court, and not interfere with confidentiality agreements relating to discovery. Information exchanged during discovery is not subject to a First Amendment or common-law public right of access.[77] Litigants often enter into protective agreements and proposed protective orders to guide the access to and use of confidential, proprietary, or trade secret information that is exchanged during discovery. Many federal courts provide useful tools and resources, such as model or standard protective orders, to help parties agree on efficient and effective procedures.[78] New restrictions on such protective orders are not warranted and would impair parties' ability to obtain and protect sensitive information. While the distinction between protecting discovery documents and sealing documents filed with the court may be obvious to the Committee, not all practitioners and stakeholders understand the important difference. Any rule draft should explicitly separate these two very different concepts to ensure that courts, counsel, and parties do not wrongfully assume that documents exchanged in discovery should be subject to the same presumptions and procedures as court filings.[79]

B. Any New Rule Should Distinguish Between Documents That Are Necessary for Dispositive Motions and Less Important Documents

While federal courts generally recognize a presumption of public accessibility to "judicial documents,"[80] a lower presumption applies to documents related to non-dispositive proceedings,

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[77] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial"); *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1118–20 (3d Cir. 1986) (the standard for issuing a discovery protective order is good cause; First Amendment concerns are not a factor); *In re Gannett News Serv., Inc.*, 772 F.2d 113, 116 (5th Cir. 1985) ("The results of pretrial discovery may be restricted from the public."); *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir. 2009) ("[T]here is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court. Unfiled discovery is private, not public."); *Pintos v. Pacific Creditors Assoc*., 565 F.3d 1106, 1115 (9th Cir. 2009) ("[discovery] documents are not part of the judicial record"); *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.").

[78] *See*, *e.g.,* https://www.cand.uscourts.gov/forms/model-protective-orders/, https://nysd.uscourts.gov/model-protective-order-0, https://www.insd.uscourts.gov/forms/uniform-protective-order.

[79] https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/a-protective-order-doesnt-guarantee-sealing/.

[80] Most, if not all, circuits apply a higher standard to overcome the presumption of public accessibility to "judicial documents." *See*, *e.g.*, *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016);

such as discovery motions.[81] This two-tiered approach is appropriate to balance the public's interest in court records against the parties' right to confidentiality.[82] Although courts differ as to what constitutes a "judicial document" subject to the public access presumption,[83] drawing a line is important because parties often include confidential documents as exhibits merely as background information, for provocative effect, or to illustrate an ancillary point that has no ultimate bearing on the court's decision. If a party's confidential documents are not important to the court's determination of a dispositive motion or are otherwise unrelated to the merits of the case, they should not be treated as "judicial documents" whose public disclosure is presumed.

It would make sense for a sealing rule to define first-tier documents to include dispositive motions and judicial documents relied upon or directly relevant to the court's merit-based decision; these would be subject to the presumption of access. Second-tier documents—those filed with non-substantive motions, or documents that are not relevant to the court's decision[84] or the case merits—should be subject to a more lenient standard for sealing (such as a certification by counsel as addressed below). Such a framework would free judicial resources that would otherwise be spent on document-by-document sealing determinations regardless of the records' importance. Similarly, it would allow courts to dispose of requests to seal second-tier documents filed in relation to non-substantive motions efficiently without extensive evaluation of the various interests in public access to the documents. Of course, this approach also saves parties from spending significant time and resources preparing motions and gathering supporting evidence to seal confidential documents that have little or nothing to do with the merits of the case.

Bernstein v. Bernstein Litowitz Berger & Grossmann LLP, 814 F.3d 132, 139-40 (2d Cir. 2016); *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013); *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007); *Leucadia v. Applied Extrusion Technologies*, 998 F.2d 157, 164 (3d Cir. 1993).

[81] *See Brown v. Maxwell*, 929 F.3d 41, 50 (2d Cir. 2019) ("Although a court's authority to oversee discovery…surely constitutes an exercise of judicial power, we note that this authority is ancillary to the court's core role in adjudicating a case. Accordingly, the presumption of public access in filings submitted in connection with discovery disputes or motions in limine is generally somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment."); *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312-13 (11th Cir. 2001) ("The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold."); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) ("there is no presumptive first amendment public right of access to documents submitted to a court in connection with discovery motions").

[82] *Newsday LLC v. County of Nassau*, 730 F.3d 156, 166-67 (2d Cir. 2013).

[83] *Compare Newsday LLC v. County of Nassau*, 730 F.3d 156 (2d Cir. 2013) (whether public access presumption applies depends on the "degree of judicial reliance on the document in question and the relevance of the document's specific contents to the nature of the proceeding") *with United States v. Kravetz*, 706 F.3d 47, 58-59 (1st Cir. 2013) (public access presumption not dependent on whether the documents actually played a role in the court's deliberations; rather presumption applies to "relevant documents which are submitted to, and accepted by, a court"); *see also Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1099 (9th Cir. 2016) (holding a party must satisfy the higher, "compelling reasons" standard when the motion to which the documents are attached is more than tangentially related to the underlying cause of action).

[84] Second-tier documents would also include materials that are not relied upon by the court or relevant to the determination of the proceeding, as such documents are not considered "judicial documents."

C. For Second-Tier Documents, A Certification by Counsel That Documents Are Confidential Should Suffice for A Sealing Order

Because the sealing standards for "judicial documents" differ from those for less-important documents, any new rule should differentiate between the procedures for each category. A party seeking to seal records related to a discovery motion in which the public has no heightened interest should not have to file a fulsome declaration substantiating on a document-by-document basis why the documents should be sealed. For such motions, a certification of counsel affirming that the records are confidential should suffice. Such a certification procedure would save judicial resources while also minimizing the parties' costs and burdens of litigating sealing motions for documents that have no bearing on a dispositive issue.

D. Any New Rule Should Require Certification that Documents Filed with The Court Are Necessary

One of the best ways to reduce litigation over sealing would be to reduce the number of confidential documents that are filed unnecessarily. Unfortunately, private information is sometimes filed to give tangential background color or just for "the sake of filing." Even worse, confidential documents are sometimes filed out of gamesmanship or improper motive (perhaps even for the purpose of inviting press attention). Any new rule for the efficient handling of sealing motions should not presume that all filed documents are necessary to the proper determination of the motion or issue at hand. It should do so by requiring the party seeking to file documents to certify they are necessary.[85] Such a certification would relieve the court from having to make decisions on sealing documents that are not pertinent to the filing, reduce the number of documents a party would need to prove up for sealing, and allow everyone to focus attention on the merits and substantive issues in the case.

E. Any New Rule Should Require Notice of Intent to File Documents

To avoid unnecessary judicial attention to, and litigation over, sealing disputes, any new rule should require parties to provide notice before filing documents that could be subject to a sealing order. Unfortunately, parties (and non-parties) are often caught by surprise when documents they consider confidential or proprietary are filed with the court, usually in conjunction with a motion. Advanced notice of such filings would allow parties to avoid disputes by conferring about documents that are subject to sealing and important to any motion. It would also provide

[85] According to the Fourth Circuit, the right of public access to judicial documents "derives from two independent sources: the First Amendment and the common law," and accordingly, the Fourth Circuit applies two tests when considering whether any specific document may be filed under seal (or unsealed). *United States v. Appelbaum*, 707 F.3d 283. The threshold inquiry under the common law test is whether the document at issue qualifies as a "judicial record." The Fourth Circuit has explained that it is "commonsensical that judicially authored or created documents are judicial records," including court orders. *Id* at 290. Documents filed with the court, including motions and exhibits, qualify as judicial records "if they play a role in the adjudicative process, or adjudicate substantive rights." *Id.*; *see also In re: Policy Mgmt. Sys. Corp*., 1995 U.S. App. LEXIS 25900, at *13 ("we conclude that a document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach"). In *In re: Policy Mgmt. Sys. Corp*., the Fourth Circuit found that documents attached to a motion to dismiss "played no role in the court's adjudication of" the motion, and therefore, "did not achieve the status of judicial documents to which the common law presumption of public access attaches." *Id*.

the party seeking to seal such documents adequate time to file the necessary motion papers—and this is especially important when a party is filing confidential documents produced in discovery by someone else. In such situations, the filing party often does not know the facts that support sealing, merely stating that the producer designated the documents as confidential. The surprised producing party is frequently forced to scramble on short notice to put together a detailed pleading supported by evidence satisfying the applicable sealing requirements—or face denial of the filing party's motion for failure to meet the applicable standards. A rule providing notice of the intent to file[86] would allow the producing party to file the motion to seal, along with supporting documentation, at the same time as the underlying motion.

CONCLUSION

The Supreme Court has concluded that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[87] There is a comprehensive and effective legal framework already in place to govern the sealing of documents, including Rule 5.2, district court local rules, and an extensive body of caselaw. There is no reason for the Committee to re-visit this complicated issue, which it has examined repeatedly, concluding each time that no action is needed.

Suggestion 20-CV-T reflects a strongly one-sided perspective of an important public policy debate and asks that the FRCP be tilted sharply to its side. Its means of producing that outcome are unworkable. By stripping court discretion and imposing a duty to make "particularized findings" under a new four-part test, allowing "any member of the public" to litigate sealing orders "at any time," and automatically terminating all sealing orders, the proposed rule would inevitably consume significant judicial, private, and public resources by inviting new, time-intensive, and recurring litigation. It would also require judicial resolution of numerous conflicts with federal statutes, the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, local district court rules, and an entire body of caselaw. The proposal would invent a bold, new role for the federal judiciary as the information clearinghouse for access to private information, and would become the first FRCP provision with a time period of "forever." The proposal should be rejected.

If, however, the proposal convinces the Committee to undertake creation of a new national standard for sealing orders, that effort should be premised on the understanding that companies, hospitals, schools, governments, employers, and other entities hold proprietary information that should be protected from public disclosure—particularly when it relates to individual customers, patients, students, taxpayers, and employees. Any new rule should reflect that today's discovery exchanges commonly include information about data infrastructure that is irrelevant to any legal dispute but whose disclosure risks providing a roadmap to nefarious actors who commit cyber

[86] A party should serve a "Notice of Intent to File" 21 days prior to filing documents that may be subject to sealing, which would be consistent with other FRCP rules that provide similar time frames for notice, responses, objections, and deadlines. *See, e.g.*, Fed. R. Civ. P. 33, 34, and 36 (providing for a 30-day response period for Interrogatories, Requests for Production and Requests for Admission); *see also* Fed. R. Civ. P. 12 (in general, "unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows….").
[87] Warner Communications, 435 U.S. at 599.

espionage and cyber attacks. Finally, any new rule should distinguish between documents that are important to the determination of merits issues and those that are not, and provide a fair mechanism for minimizing the number of potentially confidential documents filed with the courts in the first place.

Tab K

Supreme Court Advisory Committee

Date: December 7, 2021

Report of Subcommittee on Rules 15-165a.

Subject: Possible amendments to TRCP 162

1. On October 25, 2021, Chief Justice Hecht sent a letter to SCAC Chair Chip Babcock referring a suggestion from Judge Robert Schaffer to amend Tex. R. Civ. P. 162. Judge Schaffer, of the 152nd District Court in Harris County, wrote in his September 20, 2021 email:

> There is a conflict in the rules as it relates to non-suits of claims in which minors are parties.
>
> Rule 162 says, "at any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." Caselaw says that "granting a non-suit is a ministerial act, and a plaintiff's right to a non-suit exists from the moment a written motion is filed or an oral motion is made in open court, unless the defendant has, prior to that time, sought affirmative relief."
>
> Rule 44 states that when a next of friend files a lawsuit, "Such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit."
>
> The conflict is occurs when we get a motion for a non-suit of a lawsuit in which minors are making claims. When this happens I have set a status conference to determine whether a settlement is being made for a minor in which the minor is getting money that is being paid directly to the minor's parent. One of my colleagues has this situation in which the case settled and 3 minors received around $10,000 each and that money was paid directly to the parent of the minors. After the settlement was concluded, the parties filed a motion for non-suit. There was no minor settlement hearing and the court did not have an opportunity to hear the evidence to determine whether

the settlement was in the minor's best interest. If Rule 162 applied, we would have dismiss the case without any determination as to whether the settlement was in the minor's best interest or whether the minor or next friend on behalf of the minor received any money.

It feels like Rule 162 needs to be amended to allow a trial court to approve or reject a minor settlement before a non-suit is granted. We would suggest the following change to the second paragraph of Rule 162:

> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court**. Any dismissal pursuant to this rule involving a next of friend shall not be effective unless approved by the Court pursuant to Rule 44.** Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

This suggestion is made to ensure that the court's ability to oversee claims involving minors is not impaired and the minor's interest is protected.

Robert K. Schaffer
Judge, 152nd District Court

A portion of the Subcommittee likes Judge Shaffer's suggestion, and would adopt it. One subcommittee members suggested that a rule change is not necessary because Rule 44, being more specific than Rule 162, is controlling because the specific prevails over the general. This member of the subcommittee suggests that the full committee consider three alternatives: (1) is it better to let the case law develop and, eventually, have the Court weigh in about this potential conflict in the two rules; or (2) is it better to add a comment after Rule 162 (e.g., something along the lines suggested by Judge Shaffer (i.e.,"Any dismissal pursuant to this rule involving a next of friend shall not be effective unless approved by the Court pursuant to Rule 44"); (3) why would amending the rule be better than either of these other options?

Rule 162 has several other problems that would not be resolved by this change. Here is TRCP 162 as presently written:

> RULE 162. DISMISSAL OR NON-SUIT
>
> At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order.
>
> Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. Any dismissal pursuant to this rule which terminates the case shall authorize the clerk to tax court costs against dismissing party unless otherwise ordered by the court.

The Committee has not settled on recommendations for the following questions, so they are presented for consideration by the full Supreme Court Advisory Committee:

1. Is a non-suit exclusively the action of a party while dismissal is exclusively the action of a court? Rule 162 says "the plaintiff may dismiss a case." But case law says the termination of plenary power runs from the court signing an order of dismissal. Should we make it clear that non-suit is a two-step process: first a non-suit by a party and then a dismissal by the court? Or should we merge the two concepts into one, and call it either non-suit or dismissal? Or is the plaintiff free to either non-suit or dismiss, if they are different things?

2. What is the effect of a non-suit where the court never signs a written order dismissing the plaintiff's claims? Does plenary power go on forever?

3. How is an oral dismissal "entered in the minutes"? How is an oral non-suit "entered in the minutes"? Does the clerk hand-write the oral dismissal or non-suit on paper minutes or type them into electronic minutes?

4. What does "without necessity of court order" mean in the second sentence of the

rule, which says: "Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order"? Does that mean "even in the absence of an order of dismissal"? Can we delete that clause without changing the meaning of the Rule? If not, can we rewrite the sentence so that its meaning is clearer?

5. The entire second paragraph of Rule 162 says that dismissal is subject to counterclaims, but does not say the same thing for non-suit. Do the rules of the second paragraph apply to a non-suit? If so, why don't we say so? If not, then what is the effect of a non-suit (without dismissal) on pending counterclaims?

6. The Supreme Court in *University of Texas v. Estate of Blackmon* said that a court can defer signing an order of dismissal to allow a reasonable amount of time to hear costs, attorneys fees, sanctions, etc. and other matters collateral to the merits. Should the rule say that: "A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, ~~as~~ to be determined by the court within a reasonable time."

7. Do we need to add a Comment to Rule 162 to help clarify any of this?

McDonald & Carlson, TEXAS CIVIL PRACTICE 2d § 27:48 (1999) says: "A plaintiff dismisses a case by filing a motion for nonsuit with the clerk of the court. If the motion is timely, as discussed below, nothing else is required; the nonsuit is effective the moment it is filed and it must be entered in the minutes. ... No order ever needs to be entered." [citing to *Strawder v. Thomas*, 846 S.W.2d 51, 58-59 (Tex. App.–Corpus Christi 1992, no writ).]

In *Epps v. Fowler*, 351 S.W.3d 862, 868-70 (Tex. 2011), the Court wrote:

> In Texas, plaintiffs may nonsuit at any time before introducing all of their evidence other than rebuttal evidence. TEX.R. CIV. P. 162. No court order is required. *Id.*; *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex.2010). A nonsuit terminates a case "from `the moment the motion is filed.'" *Joachim*, 315 S.W.3d at 862 (quoting *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex.2006) (per curiam)). At the same time, a nonsuit does not affect any pending claim for affirmative relief or motion for attorney's fees or sanctions. *Id.* at 863; TEX.R. CIV. P. 162. When a case is nonsuited without prejudice, res judicata does not bar relitigation of the same claims. *Klein v.*

Dooley, 949 S.W.2d 307, 307 (Tex. 1997).
* * *
[W]e have no doubt that a defendant who is the beneficiary of a nonsuit with prejudice would be a prevailing party. ... In contrast, a nonsuit without prejudice works no such change in the parties' legal relationship; typically, the plaintiff remains free to re-file the same claims seeking the same relief.
* * *
[W]e hold that a defendant may be a prevailing party when a plaintiff nonsuits without prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits.

In *University of Texas v. Estate of Blackmon*, 195 S.W.3d 98, 100-01 (Tex. 2006) (per curiam), the Court wrote:

Under the Texas Rules of Civil Procedure, "[a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." TEX. R. CIV. P. 162. Rule 162 applies in this case because Shultz filed the nonsuit while this matter was pending on interlocutory appeal from UTMB's pretrial plea to the jurisdiction. Under these circumstances, the nonsuit extinguishes a case or controversy from "the moment the motion is filed" or an oral motion is made in open court; the only requirement is "the mere filing of the motion with the clerk of the court." *Shadowbrook Apts. v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990); *see also Greenberg v. Brookshire*, 640 S.W.2d 870, 872 (Tex. 1982). While the date on which the trial court signs an order dismissing the suit is the "starting point for determining when a trial court's plenary power expires," a nonsuit is effective when it is filed. *In re Bennett*, 960 S.W.2d 35, 38 (Tex.1997); TEX. R. CIV. P. 329b. The trial court generally has no discretion to refuse to dismiss the suit, and its order doing so is ministerial. *In re Bennett*, 960 S.W.2d at 38; *Shadowbrook*, 783 S.W.2d at 211.

Of course, the trial court need not immediately dismiss the suit when notice of nonsuit is filed. Rule 162 states that the plaintiff's right to nonsuit "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk," and a dismissal "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal." TEX. R. CIV. P. 162.

> A claim for affirmative relief must allege a cause of action, independent of the plaintiff's claim, on which the claimant could recover compensation or relief, even if the plaintiff abandons or is unable to establish his cause of action. *BHP Petroleum Co., Inc. v. Millard*, 800 S.W.2d 838, 841 (Tex.1990). UTMB has not raised a claim for affirmative relief, but it did request costs in its plea to the jurisdiction. Rule 162 permits the trial court to hold hearings and enter orders affecting costs, attorney's fees, and sanctions, even after notice of nonsuit is filed, while the court retains plenary power. *In re Bennett*, 960 S.W.2d at 38. Thus, the trial court has discretion to defer signing an order of dismissal so that it can "allow a reasonable amount of time" for holding hearings on these matters which are "collateral to the merits of the underlying case." *Id.* at 38-39. Although the Rule permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot.

In *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862-63 (Tex. 2010), the Court wrote:

> A party has an absolute right to file a nonsuit, and a trial court is without discretion to refuse an order dismissing a case because of a nonsuit unless collateral matters remain. *See Villafani v. Trejo*, 251 S.W.3d 466, 468-69 (Tex. 2008); *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (per curiam); *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 59 (Tex. 1991). A nonsuit "extinguishes a case or controversy from 'the moment the motion is filed' or an oral motion is made in open court; the only requirement is 'the mere filing of the motion with the clerk of the court.'" *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex.2006) (per curiam) (quoting *Shadowbrook Apts. v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990) (per curiam)). It renders the merits of the nonsuited case moot. *See Villafani*, 251 S.W.3d at 469 ("One unique effect of a nonsuit is that it can vitiate certain interlocutory orders, rendering them moot and unappealable."); *Shultz*, 195 S.W.3d at 101 ("Although [Rule 162] permits motions for costs, attorney's fees, and sanctions to remain viable in the trial court, it does not forestall the nonsuit's effect of rendering the merits of the case moot."); *Gen. Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990) ("As a consequence of the trial court's granting the nonsuit, the temporary injunction ceased to exist and the appeal became moot.... It was not necessary for the trial court to enter such a separate order because when the underlying action was dismissed, the

> temporary injunction dissolved automatically.") (citation omitted).
> * * *
> After a nonsuit, a trial court retains jurisdiction to address collateral matters, such as motions for sanctions, even when such motions are filed after the nonsuit, as well as jurisdiction over any remaining counter-claims. *See Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (per curiam) (holding that a trial court has authority to decide a motion for sanctions while it retains plenary power, even after a nonsuit is taken); TEX.R. CIV. P. 162 ("Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk.").
> * * *
> Many litigants use a nonsuit as a procedural device to effectuate a settlement agreement, intentionally dismissing claims with prejudice. Indeed, in this case Joachim had taken a nonsuit with the first trial court "dismissing with prejudice all of Plaintiff's claims" against another defendant with whom Joachim had settled, before he filed the nonsuit as to Travelers. Just as the trial court has jurisdiction to enter a dismissal with prejudice upon the filing of a nonsuit to effectuate a settlement agreement, it must also have jurisdiction to enter a dismissal with prejudice in other nonsuit situations.

In *Valencia v. McLendon*, No. 14-18-00122-CV (Tex. App.–Houston [14th Dist.] Dec. 19, 2019, no pet.) (mem. op.), the Court wrote:

> A nonsuit of the plaintiff's cause of action," therefore, "is not an adjudication of the rights of the parties and does not extend to the merits of the action; it merely puts them back in the position they were in before the lawsuit was brought." *Waterman v. Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 398 (Tex. App.-Houston [1st Dist.] 2011, pet. denied)....

In *Salinas v. Aguilar*, No. 04-11-00260-CV (Tex.. App.–San Antonio, no pet.) (mem. op.), the Court said:

> Because the trial court retained jurisdiction to rule on the motions for sanctions for 105 days from the date the nonsuit was signed, the trial court did not err in setting the motions for hearing on March 29, 2011. However, appellants agreed to reset the hearing on the pending motions to May 31, 2011, which was past the date on which the trial court's plenary power

> expired. The record contains no other efforts by appellants to have the motions heard within the trial court's plenary power. Because the motions for sanctions were never heard or expressly ruled upon, there is nothing before us to review.

In *McDougal v. McDougal*, No. 07-16-00422-CV (Tex. App.–Amarillo 2018, pet. denied) (mem. op.), the Court wrote:

> It is settled, however, that the signing by the trial court of an order dismissing a case, not the filing of a notice of nonsuit, is the starting point to determine when the trial court's plenary power expires. *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (orig. proceeding) (per curiam).

In *Strawder v. Thomas*, 846 S.W.2d 51, 50 (Tex. App.--Corpus Christi 1992, no writ), the Court wrote:

> The case law surrounding Rule 162 clearly reflects that taking of a nonsuit does not necessitate the filing of any other pleadings or observing other technical rules, but merely requires the appearance before the court or clerk by a plaintiff, or intervenor, through its representative or attorney, and the transmittal to the clerk of the party's abandoning its claims. No particular procedure is required to take a nonsuit. *Greenberg*, 640 S.W.2d at 872; *Orion Investments, Inc. v. Dunaway & Associates, Inc.*, 760 S.W.2d 371, 373 (Tex. App.--Fort Worth 1988, writ denied). The Supreme Court has held that the rule is to be liberally construed in favor of the right to nonsuit, *Greenberg*, 640 S.W.2d at 872, and that it should not be given strict or technical construction. *Smith v. Columbian Carbon Co.*, 145 Tex. 478, 198 S.W.2d 727, 728 (1947). The rule is equally applicable to intervenors claiming affirmative relief. *Boswell, O'Toole, Davis & Pickering v. Townsend*, 546 S.W.2d 380, 381 (Tex.Civ. App.—Beaumont 1977, no writ). The Texas courts have uniformly held that presentation to the court of a nonsuit in some fashion and entry of that presentation upon the court's calendar ends the case with regard to any claims involving that party, except for claims for affirmative relief then pending against the nonsuiting party; no order ever need be entered.

Respectfully submitted,
Richard R. Orsinger
Subcommittee Chair

Tab L

Memorandum

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: March 24, 2022

Re: February 17, 2022 Referral relating to TRAP disclosures for disqualification and recusal

I. Matter referred to subcommittee

Rules for Identifying Potential Disqualification and Recusal Issues. Texas Rules of Appellate Procedure 38, 52, 53, and 55 are designed to capture the information needed for disqualification and recusal purposes by requiring that petitions and briefs contain the basic information about a case, including the identity of "all" counsel. The Committee should study and make recommendations on how to strengthen the requirement of disclosure on parties and counsel at the outset so courts will have better information to make informed, reasoned decisions on disqualification and recusal. The Committee should consider whether the Court should:

- amend Rules 38, 52, 53, and 55 to clarify that "all" counsel means both current and former counsel at all levels of a proceeding;
- amend Rules 38, 52, 53, and 55 to clarify that the requirement to list the "names" of all counsel includes all firm names at which they practiced during their representation;
- amend other rules, like those governing the notice of appeal and the docketing statement in the courts of appeals, to require disclosure earlier and more often; and
- impose a duty to amend and supplement.

No materials were provided with the referral.

Jaclyn Daumier provided addition background regarding the Court's thinking on this issue.

We think the issue is really a small tweak to TRAP 38.1(a), 52.3(a), 53.2(a), and 55.2(a) to make sure that all counsel and firms that have appeared at any stage of the proceedings are identified as counsel. This is necessary to properly evaluate potential disqualification or recusal issues.

Under the current rules for identifying parties, "all trial and appellate counsel" can be read to refer only to counsel who represented the parties at the time of the final judgment, rather than *all* counsel who have appeared at *any* stage of the proceedings.

The rules also may not be clear that the requirement to list the "names" of all counsel includes all firm names at which they practiced *during their representation*. This issue could become more problematic as attorneys move firms more often.

Finally, we might differentiate what information we need for former counsel no longer on the case from what information we need for counsel appearing in the CA/SCOTX. I don't think courts send former counsel anything—so, we may not need their addresses. If we require information we don't really need, it could result in briefs getting struck for no good reason or cause counsel to spend time tracking down the current whereabouts of former counsel (and billing the client for that time). For current counsel, email addresses and phone numbers are probably more important than mailing addresses.

II. Current Rules

TRAPs 38, 52, 53, and 55 are all briefing rules in the courts of appeals and the Texas Supreme Court. They require the following disclosures so that the justices hearing the case can determine whether disqualification or recusal is required:

- TRAP 38.1(a). Identity of Parties and Counsel. The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

- TRAP 52.3(a). Identity of Parties and Counsel. The petition [for writ of mandamus] must give a complete list of all parties, and the names, and addresses of all counsel.

- TRAP 53.2(a). Identity of Parties and Counsel. The petition [for review] 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.

- TRAP 55.2(a). Identity of Parties and Counsel. The brief 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.

- TRAP 25 governing the notice of appeal does not require the listing of trial and appellate counsel.

- TRAP 32 governs the contents of the docketing statement on appeal and requires the listing of information about lead counsel on appeal and in the trial court.

III. Subcommittee Discussion and Recommendation

No materials were provided with the referral letter. It is unclear whether the referral was made to address specific problems that have come up with failures to fully disclose counsel for a party or any resulting problems with failures of justices to timely recuse or disqualify. But the questions asked appear to reflect two concerns:

- Incomplete disclosure of all trial and appellate counsel by (a) failing to list former counsel no longer involved in the case and (b) failing to list all current and former law firms of the counsel during representation.

- Timing issues relating to the disclosure: (a) a full list of counsel is not required before a brief is filed; and (b) after a brief is filed, there is no requirement that the list of counsel be updated if a lawyer changes firms.

The subcommittee discussed these four concerns and agreed that the rules should be clarified to require the listing of all counsel, past and present, and all law firms, past and present, that have appeared in the trial court or on appeal. The subcommittee also agreed that the disclosure should not be required to be included in the docketing statement or the notice of appeal to avoid making those documents longer and unduly cumbersome. The subcommittee also agreed that there should be a duty to supplement when a listed counsel has changed law firms.

An open question for discussion by the full SCAC is whether the listing of counsel and firms requirement also should be required for motions as part of TRAP 10.

IV. Proposed rule change

Proposed amendment to TRAP 38.1(a):

Identity of Parties and Counsel. The brief must give a complete list of all parties to the trial court's judgment or order appealed from, ~~and~~except as otherwise provided in Rule 9.8. The brief must also give a complete list of the names ~~and addresses~~ of all ~~trial and appellate~~ counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses~~, except as otherwise provided in Rule 9.8~~. If new counsel makes an appearance or if any listed counsel changes firm affiliation during

the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.

Proposed amendment to TRAP 52.3(a):

Identity of Parties and Counsel. The petition must give a complete list of all parties, and the names~~, and addresses~~ of all counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses. If new counsel makes an appearance or if any listed counsel changes firm affiliation during the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.

Proposed amendment to TRAP 53.2(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.~~ The petition must also give a complete list of the names of all counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses. If new counsel makes an appearance or if any listed counsel changes firm affiliation during the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.

Proposed amendment to TRAP 55.2(a):

Identity of Parties and Counsel. The brief 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.~~ The brief must also give a complete list of the names of all counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses~~, except as otherwise provided in Rule 9.8~~. If new counsel makes an appearance or if any listed counsel changes firm affiliation during the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.