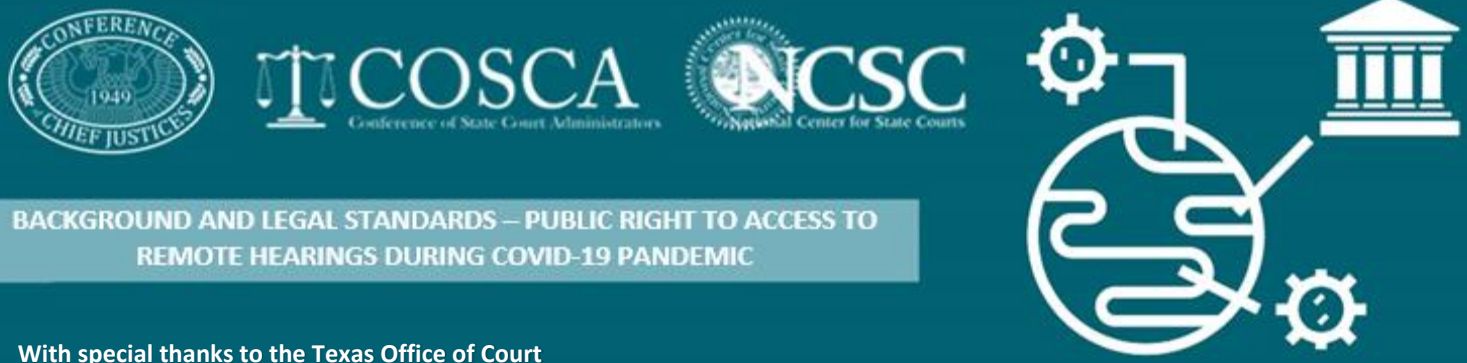

BACKGROUND AND LEGAL STANDARDS – PUBLIC RIGHT TO ACCESS TO REMOTE HEARINGS DURING COVID-19 PANDEMIC[1]

Many courts across the country have transitioned to conducting remote proceedings during the pandemic or restricting public access to courtrooms. As courts make this transition, many have considered the public's right to reasonable notice and access to court proceedings, both civil and criminal, is consistent with traditional practice in state courts and with federal and state[2] 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.

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.[3] Although the Supreme Court has never specifically held that the public has a First Amendment right of access to *civil* proceedings,[4] federal and state courts that have considered the issue have overwhelmingly held that there is a public right to access in civil cases under the 1st Amendment.[5]

Courts must ensure and accommodate public attendance at court hearings. However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other

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

[2] State courts should review state precedent which may interpret state law or federal precedent as applicable to specific state court proceedings.

[3] *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).

[4] 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.

[5] *See Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984, cert. denied), *Publicker Indus., Inc. v. Cohen*, 733 F. 2d 1059 (3d Cir. 1984), *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983, cert. denied), *In re Continental Ill. Secs. Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984), *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).

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.[6] 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.[7] When a violation occurs, the Supreme Court held that a person whose rights to a public trial are violated do not have to "prove specific prejudice in order to obtain relief" and that the "remedy should be appropriate to the violation."[8]

As recognized by *Waller* court, there may be times when a court finds that the rights or interest of privacy of the proceedings outweighs the rights or interests of a public trial. 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 should take all reasonable measures necessary to ensure public access. Lack of access to a single hearing (suppression), or even a portion of a single hearing (voir dire), may be enough to mandate reversal and a new trial. When the movement of the general public is limited by the executive branch through the governor and various county judges or the access to the courtroom is limited by judicial orders, the public's right of access may be violated. Shelter-in-place orders and prohibitions on non-essential travel prevent members of the general public from viewing hearings in the courthouse. Even if a judge is physically in a courtroom for a 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 limit the public's access to the courtroom. For the duration of this crisis and while emergency orders are in effect, courts must find a practical and effective way to enable public access to virtual or in-person 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.

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.[9] 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

[6] *See Waller v. Georgia*, 467 U.S. 39 (1984).
[7] Id.
[8] Id.
[9] *Waller v. Georgia*, 467 U.S. 39, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

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.[10]

Courts should strongly consider employing protective measures short of interrupting or terminating a live stream to a virtual hearing. 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.[11] To employ a less-restrictive measure (for example, temporarily obscuring video but not audio, or not displaying exhibits through screen share,[12] 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 YouTube private link or link to the videoconferencing platform meeting), the court need only find a "substantial reason" for the limitation and employ a restriction that does not exceed justifiable limits.[13] Terminating or interrupting the livestream – even temporarily – would likely 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 neglect 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.

[10] *See Cameron v. State*, 535 S.W.3d 574, 578 (Tex.App.—San Antonio 2017, no pet.)

[11] *United States v. Osborne*, 68 F.3d 94, 98-99 (5th Circ. 1995).

[12] 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).

[13] *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).