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## PROTECTING THE RECORD FOR REMOTE COURT PROCEEDINGS CONDUCTED ON VIDEO

A number of existing rules already touch on procedures involving recorded hearings. These rules provide a starting place when looking for answers about adapting procedures for a remote hearing via Zoom or other platforms — along with the Texas Supreme Court’s series of COVID 19 emergency orders, Office of Court Administration guidance, and local emergency orders adopted by individual courts. Don’t forget about underlying constitutional standards for open courts under the 6th Amendment to the United States Constitution and Article I, sections 10 and 13 of the Texas Constitution.

Making a record for a remote court proceeding presents a similar challenge to making one for an in-person proceeding. Your task is to help an appellate court understand what was happening in the trial court when the appellate judges were not present in the trial court. You can enhance preservation in a novel and potentially fluid environment by focusing on these strategies.

- **Plan ahead.** Communicate with court staff and opposing counsel so that you have an idea about what to expect; how the court is going to proceed; and how you may need to adapt.
- **Create a written backup.** Efiling hasn’t changed. Use it. In the run-up to your court proceeding, consider assembling and submitting a “Pre-Hearing Filing” document containing your requested relief and arguments; exhibits that you anticipate tendering for the hearing; and any other written material that may help to put what happens on video in context. You also may want to submit a “Post-Hearing Filing” that recaps what happened and contains relevant documents discussed during the proceeding.
- **Do the play-by-play.** During the remotely conducted proceeding, recite your understanding on the record of what’s happening, what you’re doing and why, and the procedures being used. Recite your understanding of rulings, perhaps



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with a global wrap-up of key rulings if you're not sure the record clearly reflects them. Explain what happened off camera, and discussions among the parties and court staff, if doing so will make on camera events more understandable. If technical glitches impede your ability to object contemporaneously or make a point, recite what happened and why you are making your statement as soon as practicable. If you are concerned that some aspect of the proceeding is impeding your ability to participate and present your position, explain what's happening and the basis for your concern.

### Rules Relating to Electronic Hearings

- TRCP 18c **“Recording and Broadcasting of Court Proceedings”**: This is really an open courts and First Amendment-focused rule addressing circumstances under which a “trial court may permit broadcasting, televising, recording, or photographing proceedings in the courtroom . . . .” But it’s written broadly enough to have potential application in these circumstances. Subsection (a) directs parties to “guidelines promulgated by the Supreme Court for civil cases.” And subsection (b) deals with consent to be photographed/videoed. The combination of Supreme Court emergency orders and Office of Court Administration guidance probably brings this situation under subsection (a).
- TRAP 14 **“Recording and Broadcasting Court Proceedings”**: This is the analog to TRCP18c for appellate oral arguments. Most of this rule is geared to press coverage of oral argument.
- TRAP 13.1 **“Duties of Court Reporters and Recorders”**: This is the catch-all rule that can be cited to ask for a court reporter to be present for the Zoom hearing to create a written transcript. The court reporter’s obligation is NOT limited to in-person court proceedings or evidentiary proceedings; that obligation covers ALL proceedings in any format. This rule covers “reporters” and “recorders.” Note that the terms “reporter” or “court reporter” are defined to encompass a “court recorder” under TRAP 3.1. See also the duty to create a detailed log under TRAP 13.2. As a litigant, you are entitled to a record of your remotely conducted proceeding if you want one although it may be “recorded” instead of “reported.” If you can get it reported stenographically to create a written transcript, briefing may be easier.



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- TRAP 34.6(a)(2) expressly authorizes a reporter's record to be made by *electronic recording*. This originally contemplated procedures followed by some judges who had audio recording equipment and a "court recorder" in their courtrooms instead of a court reporter making a stenographic record. But on its face, this rule isn't limited only to audio recordings. This rule also requires a certified log of an electronically recorded proceeding as per TRAP 13.2.
- TRAP 38.5 "**Appendix for Cases Recorded Electronically**": This rule ties into TRAP 34.6(a)(2) and sets out procedures for appendices to briefs in cases that were recorded using audio equipment instead of being recorded stenographically. This rule might come into play if a Zoom hearing was recorded but a stenographic record wasn't made simultaneously. Otherwise, if a court reporter takes down the whole proceeding stenographically, then the ordinary appendix procedures for a written transcript probably would apply.

### **Fixing Omissions and Inaccuracies in the Record**

If you're involved in an appellate proceeding and have concerns about whether the record from the trial court is accurate or understandable, or that the appellate record omits portions that were "on the record" in the trial court, then look to existing rule mechanisms to address the problem. In general: (1) identify the omission or inaccuracy; (2) confer with opposing counsel to see if agreement can be reached on supplementing the record to address the problem; and (3) if there's no agreement, file a motion and set a hearing in the trial court so that the trial judge can sign an order addressing the problem. Rules to consult:

- TRAP 34.5(d), (e) addressing discrepancies or omissions from the clerk's record;
- TRAP 34.6(e) addressing discrepancies or omissions from the reporter's record; and
- TRAP 38.5(e) addressing discrepancies in the appendix for a case recorded electronically.



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Note that this process differs from the **Formal Bills of Exception** procedure under TRAP 33.2, which is used to create a record of evidence or proceedings that a trial court orders NOT to be part of the record, e.g., purposeful exclusion of witness testimony.