

April 23, 2017

**Texas Supreme Court Advisory Committee  
Subcommittee on Rule 16-166a  
Report on on Suggested Changes  
to TRCP 21a, 21c & 57**

Memo from Subcommittee  
on Rules 16-166a to the Full Texas  
Supreme Court Advisory Committee

Dear SCAC members:

In his letter of September 1, 2016, Chief Justice Hecht asked the subcommittee and the full SCAC to consider the following regarding Tex. R. Civ. P. 21a, 21c and 57:

Texas Rules of Civil Procedure 21a, 21c, 57, and 244. In the attached memoranda, the State Bar Court Rules Committee proposes amendments to Rules of Civil Procedure 21a, 21c, 57, and 244.

The subcommittee followed-up on Chief Justice Hecht's letter. The State Bar of Texas Court Rules Committee proposal is attached. Here are the subcommittee's comments.

1. The State Bar Rule Committee proposed amendments to TRCP 21a would do the following:

- (1) permit unfiled discovery to be served by email;
- (2) permits the parties to agree to some other form of delivery of discovery;
- (3) clarify that email service is complete upon transmission;
- (4) apply the three-day rule to hand deliveries as well as U.S. mail;
- (5) require that the certificate of service be particularized (showing the names of lawyers served, the party they represent, and the manner of service); and
- (6) permit a showing that receipt was delayed.

The Subcommittee had various views on these proposals. Several members voted "yes" on all six proposals. One member said that TRCP 4 would need to be clarified, as to whether Saturday, Sunday or legal holiday would be counted.

(1) As to permitting unfiled discovery to be served by email, one subcommittee member commented "Most attorneys can check their emails anywhere, except for large attachments." It was suggested that we have a rule saying "Discovery can be served in the manner prescribed in Rule 21a." This is because presently there is nothing in the discovery rules that say how you are supposed to serve discovery and Rule 21a only relates to papers that are filed. Some discovery is even being served through the e-file system. Other subcommittee members agreed with the proposal.

(2) Allowing parties to agree to alternate forms of delivery of discovery garnered only "yes" votes. However, parties already have the authority to make agreements, and the agreements will be enforceable under TRCP 11 if signed and filed of record. So a rule saying you can enter into agreements pertaining to the manner of delivery of discovery is not really necessary.

(3) Providing that email service is complete upon transmission stirred up discussion on the subcommittee.

One member expressed concern that the sender's or receiver's email is sometimes not working. Sometimes an attorney is out of the office for an extended time, and no one will see an email addressed to just one person. Unlike a fax machine, which immediately prints out a failure notice when a fax does not go through, notice that an email did not get to the recipient's email server may not be received by the sender for hours if at all. And while a fax machine is normally monitored by multiple persons in a law office, emails to a particular individual's email address may not be monitored by others. Email service by the state's electronic filing system will deliver the email to whomever is registered to receive emails in the particular case, which often includes assisting lawyers and legal assistants. That is not necessarily true when an email is sent to an individual email address. This member also had reservations about a presumption that service is effected by email when the email is sent. However, another member wondered how you would prove "receipt" if email service was not effective upon receipt? If service were to be effective upon receipt, it must be gauged by delivery to the recipient's email provider or email server, or else an attorney could defeat service by not checking emails. Proof of delivery to an email provider or server would be essentially impossible. So making service effective upon transmission seems to be the only practical solution.

(4) The adding of three days to the response period for physical delivery drew opposition from some subcommittee members. Two members opposed adding three days for physical delivery because physical delivery is effective upon actual delivery to the recipient, so no transit time is involved so the additional time to respond is pointless. One member suggested that Rule 21a(c) be amended to add three days for commercial delivery as well, because of the delay inherent in picking up, processing, and delivering the package.

(5) The requirement that the certificate of service show the names of the lawyers served, who they represent, and the manner of service, was well-accepted by subcommittee members. One member did not like the proposal, seeing nothing wrong with the current rule. This change would require a change in what service to specify under TRCP 21a(e).

(6) The suggestion that Rule 21a be amended to show that receipt is delayed was considered by some subcommittee members to go hand-in-hand with a definition of delivery of an email being when the email is sent. If that definition is adopted, then this rule change would be necessary.

2. The State Bar Rule Committee's proposed amendments to TRCP 21c would do the following:

- (1) protect all but the last three digits of a Social Security or other government ID number;
- (2) protect all but the last four digits of a financial account;
- (3) protect the month and day of birth;
- (4) protect the name and address of a child who is a minor when the suit is filed;
- (5) provide for a "reference list" of sensitive data redacted; this list would be filed but considered to be sensitive; this would permit complete identifying information to be available to the court, and anyone with access to sensitive information; and
- (6) refocuses the restricted distribution of information away from "posted on the internet" to "available remotely."

The subcommittee generally supported these Rule 21c suggestions. However, one member expressed concern about having an order or decree where the child's name is nowhere specified. How would third parties know that an order pertained to a particular child if the name is not specified in the order? Another member of the subcommittee wanted to know more about the "reference list" and "identifying information." One member noted that TRCP 30.014 already requires that the last three digits of the party's TDL and SSN be disclosed in pleadings.

3. The next State Bar Rules Committee proposal would amend TRCP 57. As the rule is now written, the email address of a self-represented litigant is required, whereas a fax number is required only "if available." This change would extend "if available" to service by email as well as service by fax. Stated differently: do we want to require pro se's to have email addresses or not?

The proposal garnered support on the subcommittee. One committee member thought that, even though the current rule requires a pro se party to supply an email address, he was not sure that rule can be enforced. He currently has a suit involving about 60 pro se defendants and about 25 or 30 of them do not have an email address or a fax number. He has to send everything to them by mail. It would be convenient to be able to serve pro se litigants by email or through the efilng system, but difficult or impossible to force the pro se litigants to get an email address if they don't already have one. Another member felt that the problem would be a challenge for indigent litigants who cannot afford to own a computer, smart phone, etc. Another subcommittee member suggested that Rule 57 read "and if available, fax number and email address."

Richard R. Orsinger  
Subcommittee Chair

**STATE BAR OF TEXAS COMMITTEE ON COURT RULES**  
**PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 21a**

**I. Exact language of existing Rule: TRCP 21a (Methods of Service)**

(a) **Methods of Service.** Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

(1) **Documents Filed Electronically.** A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) **Documents Not Filed Electronically.** A document not filed electronically may be served in person, by mail, by commercial delivery service, by fax, by email, or by such other manner as the court in its discretion may direct.

**(b) When Complete.**

(1) Service by mail or commercial delivery service shall be complete upon deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service.

(2) Service by fax is complete on receipt. Service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day.

(3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(c) **Time for Action After Service.** Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(d) **Who May Serve.** Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(e) **Proof of Service.** The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing

service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received, or, if service was by mail, that the document was not received within three days from the date that it was deposited in the mail, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(f) Procedures Cumulative. These provisions are cumulative of all other methods of service prescribed by these rules.

Amended by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21a is revised to incorporate rules for electronic service in accordance with the Supreme Court's order - Misc. Docket No. 12-9206, amended by Misc. Docket Nos. 13-9092 and 13-9164 - mandating electronic filing in civil cases beginning on January 1, 2014.

## II. Proposed changes to existing rule:

(a) Methods of Service. Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record in the manner specified below:

(1) Documents Filed Electronically. A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager. If the email address of the party or attorney to be served is not on file with the electronic filing manager, the document may be served on that party or attorney under subparagraph (2).

(2) Documents Not Filed Electronically. Any document not filed electronically, including discovery materials not to be filed, may be served:

A) in person;

B) to an attorney by mail, by commercial delivery service, by fax, or by email using the attorney's email address provided [pursuant to Section 2A of Article III of the State Bar Rules]<sup>1</sup>;

C) to a party not represented by an attorney by mail, by commercial delivery service, by fax, or by email if the party has consented to email service under Rule 21;

<sup>1</sup> The Court Rules Committee understands that the State Bar of Texas and the Judicial Committee on Information Technology ("JCIT") are considering revisions to the State Bar Rules which may require an attorney to designate an official email address for service in the near future. The Court Rules Committee intends for this rule proposal to be considered in conjunction with, and harmonized with, any proposed changes to the State Bar Rules. Thus, this bracketed language is a placeholder that should be revised as appropriate, to be consistent with the amended State Bar Rules.

D) by any other method to which the parties agree in writing; or  
E) by such other manner as the court in its discretion may direct.

(b) When Complete.

(1) Service by mail or commercial delivery service shall be complete upon deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service.

(2) Service by fax is complete on receipt. Service completed after 5:00 p.m. local time of the recipient shall be deemed served on the following day.<sup>2</sup>

(3) Electronic service is complete on transmission of the document to the serving party's electronic filing service provider. The electronic filing manager will send confirmation of service to the serving party.

(4) Service by email is complete upon transmission.

(c) Time for Action After Service. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or commercial delivery service, three days shall must be added to the prescribed period.

(d) Who May Serve. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify.

(e) Proof of Service.

(1) Certificate of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate of service must be signed by the person who made the service and must state:

(A) the date and manner of service;

(B) the name and address of each person served; and

(C) if the person served is a party's attorney, the name of the party represented by that attorney.

~~(2) Evidence of Service. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. —A~~

<sup>2</sup> The subcommittee considered removing this sentence requiring service by 5 pm if by fax as antiquated or unnecessary in light of the seldom use of fax service and the fact that many attorneys now receive fax as an email. Ultimately, because of considerations unique to fax (e.g., that it is a paper which may sit on a fax machine, received but not actually seen over a weekend as an email would be), to leave this special provision for fax service in the rule.

certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service. Nothing herein shall preclude any party from offering proof that the document was not received, or receipt was delayed, ~~if service was by mail, that the document was not received within three days from the date that it was deposited in the mail~~, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just.

(f) Procedures Cumulative. These provisions are cumulative of all other methods of service prescribed by these rules.

Proposed Comment: Rule 21a provides that certain service is complete upon "transmission." Transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

**III. Brief statement of reasons for requested changes and advantages to be served by the proposed new rule:**

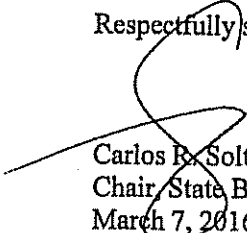
There has been a great deal of comment from the Bar regarding confusion and loopholes in the new electronic service rules, and in particular the appropriate e-mail address for service. These revisions are meant to close some gaps and clarify expectations for attorneys.

For revision to 21a(a)(2), the term "Discovery Materials Not to Be Filed," is used and is a reference to TRCP 191.4.

The change to 21a(b)(4) "upon transmission" is taken from Fed. R. Civ. P. 5(b)(2)(E). The proposed comment is also borrowed from the Fed. R. Civ. P. 5.

The change to 21a(a)(2) is to accommodate users (pro se users) without email addresses. The proposed change would only permit a party to serve a pro se party over email only after the pro se party has consented in writing to electronic service (evidencing the ability to correspond electronically).

Respectfully submitted,

  
Carlos B. Soltero  
Chair, State Bar Court Rules Committee  
March 7, 2016

**STATE BAR OF TEXAS COMMITTEE ON COURT RULES**  
**PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 21c**

**I. Exact language of existing Rule:**

**Rule 21c. Privacy Protection for Filed Documents**

- (a) Sensitive Data Defined. Sensitive data consists of:
  - (1) a driver's license number, passport number, social security number, tax identification number, or similar government-issued personal identification number;
  - (2) a bank account number, credit card number, or other financial account number; and
  - (3) a birth date, home address, and the name of any person who was a minor when the underlying suit was filed.
- (b) Filing of Documents Containing Sensitive Data Prohibited. Unless the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation, an electronic or paper document, except for wills and documents filed under seal, containing sensitive data may not be filed with a court unless the sensitive data is redacted.
- (c) Redaction of Sensitive Data; Retention Requirement. Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain an unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.
- (d) Notice to Clerk. If a document must contain sensitive data, the filing party must notify the clerk by:
  - (1) designating the document as containing sensitive data when the document is electronically filed; or
  - (2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."
- (e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.
- (f) Restriction on Remote Access. Documents that contain sensitive data in violation of this rule must not be posted on the Internet.

Added by order of Dec. 13, 2013, eff. Jan. 1, 2014.



Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

## II. Proposed changes to existing rule:

### Rule 21c. Privacy Protection for Filed Documents

- (a) Sensitive Data Defined. Sensitive data consists of:
- (1) all but the last three digits of a government-issued personal identification number, such as a driver's license number, passport number, social security number, personal tax identification number, or similar government-issued personal identification number;
  - (2) for an open bank account, an open credit card account, or any other open financial account, all but the last four digits of the a bank account number, credit card number, or other financial-account number; and
  - (3) a birth date, a person's month and day of birth; and
  - (4) the name and home address, and the name of any person who was a minor when the underlying suit was filed.
- (b) Filing of Documents Containing Sensitive Data Prohibited. Sensitive data must be included in filed documents if the inclusion of sensitive data is specifically required by a statute, court rule, or administrative regulation. For other documents, sensitive data must be redacted.
- (c) Redaction of Sensitive Data; Retention Requirement-Option for Filing a Reference List.
- (1) Sensitive data must be redacted by using the letter "X" in place of each omitted digit or character or by removing the sensitive data in a manner indicating that the data has been redacted. The filing party must retain any unredacted version of the filed document during the pendency of the case and any related appellate proceedings filed within six months of the date the judgment is signed.
  - (2) A document that contains redacted sensitive data may be filed with a reference list, accompanied by the notice required under (d), that lists each item of redacted sensitive data and specifies an appropriate identifier that uniquely corresponds to each item listed. Any reference in the case to a specified identifier will be construed to refer to the corresponding item of sensitive data.
- (d) Notice to Clerk. If a filed document must contain sensitive data under (b) or is a reference list permitted under (c), the filing party must notify the clerk by:
- (1) designating the document as containing sensitive data when the document is electronically filed; or
  - (2) if the document is not electronically filed, by including, on the upper left-hand side of the first page, the phrase: "NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA."

- (e) Non-Conforming Documents. The clerk may not refuse to file a document that contains sensitive data in violation of this Rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit a redacted, substitute document.
- (f) Restriction on Remote Access. Documents that contain sensitive data ~~in violation of this rule~~ must not be made available remotely to any person other than the court, the parties, or the parties' counsel ~~posted on the Internet~~.

Added by order of Dec. 13, 2013, eff. Jan. 1, 2014.

Comment to 2013 Change: Rule 21c is added to provide privacy protection for documents filed in civil cases.

Proposed additional comment: Rule 21c is amended to modify the definition of "sensitive data," incorporate a procedure for filing a reference list that identifies sensitive data that has been redacted from filed documents that can be accessed remotely, and clarify the scope of permissible remote access to documents that contain sensitive data and have been filed in compliance with Rule 21c. Documents that contain sensitive data in violation of Rule 21c should not be made available remotely to any person other than the court. Remote access means any access other than in-person, physical access at a courthouse.

III. Brief statement of reasons for requested changes and advantages to be served by the proposed revisions:

The Texas Supreme Court and the Court Rules Committee have received feedback regarding the effects of existing Rule 21c. Based on that feedback, it appears there are perceived inconsistencies between existing Rule 21c and other laws (e.g., Section 30.014 of the Texas Civil Practice and Remedies Code), difficulties in implementing aspects of existing Rule 21c, and unintentional consequences of the extent of redaction required under existing Rule 21c. These proposed revisions are intended to address those inconsistencies, facilitate compliance with sensitive-data requirements, and strike the appropriate balance between protecting sensitive data and generating a court record that is sufficiently detailed to facilitate the proper processing and disposition of cases.

The provision for a "reference list" in part (c) is borrowed from the Federal Rule of Civil Procedure 5.2(g). This option is an attempt to facilitate disposition in matters where redaction is necessary but where an exact identity of the person/account number/etc. is required for disposition. The Committee is concerned, however, that even though these reference lists are marked as containing sensitive data, the public can still access them at the courthouse. The Committee thus asks the Court to consider an automatic sealing of reference lists, which would require an accompanying amendment to Texas Rule of Civil Procedure 76a. The right to file reference lists under seal, without going through the typical Rule 76a sealing procedures, would be consistent with Federal Rule of Civil Procedure 5.2(g). In case the Court does not want to allow the automatic sealing of reference lists,

**STATE BAR OF TEXAS COMMITTEE ON COURT RULES**  
**PROPOSED AMENDMENT TO RULE OF CIVIL PROCEDURE 57**

**I. Exact language of existing Rule: TRCP 57**

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address, and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, email address, and, if available, fax number.

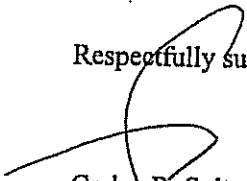
**II. Proposed changes to existing rule:**

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, with his State Bar of Texas identification number, address, telephone number, email address, and if available, fax number. A party not represented by an attorney shall sign his pleadings, state his address, telephone number, and, if available, email address and fax number. Information provided under this Rule may be used for service under Rules 21 and 21a.

**III. Brief statement of reasons for requested changes and advantages to be served by proposed new rule:**

Elsewhere in the Rules, e-filing is permissive for parties not represented by an attorney. E.g., Tex. R. Civ. P. 21(f)(1). The email address of a party not represented by an attorney who does not file electronically is not required to be included on a document. Tex. R. Civ. P. 21(f)(2). This proposed change makes Rule 57 consistent with other Rules.

Respectfully submitted,

  
Carlos R. Soltero  
Chair, State Bar Court Rules Committee  
March 7, 2016