

DRAFT MEMORANDUM

To: Texas Supreme Court Advisory Committee

From: Subcommittee on Legislative Mandates

Date: June 16, 2021

Re: Recommendations on Potential Rulemaking/Response to HB 1540 and HB 2669

The following is a draft memo from the Subcommittee on Legislative Mandates in response to the June 2, 2021 referral from the Supreme Court. This memo is in draft form and has not been fully reviewed by the Subcommittee. The memo is subject to correction and revision. It reflects preliminary evaluation of the issues noted below.

The following is the referral addressed by the Legislative Mandates Subcommittee:

Protection of Sensitive Data. [HB 1540](#) and HB 2669 add several statutes to protect sensitive data. HB 1540, § 4 adds Civil Practice and Remedies Code § 98.007 to permit a claimant in a trafficking suit to use a confidential identity and require a court use a confidential identity and maintain records in a confidential manner. § 98.007 also prohibits the Court from amending or adopting rules in conflict with § 98.007. HB 2669 amends Code of Criminal Procedure Art.

44.2811 and reenacts and amends Art. 45.0217 to make confidential a child's criminal records related to certain misdemeanor offenses. The Committee should consider whether the sensitive data rules should be changed or a comment added to reference or restate the statutes.

I HB 1540

Background: [House Bill 1540](#) by Representative Senfronia Thompson was crafted as an omnibus bill designed to address recommendations from the Texas Human Trafficking Prevention Task Force (See [Texas Human Trafficking Prevention Task Force 2019 Report](#)). Included in the provisions of HB 1540 is language amending Texas Civil Practice and Remedies Code Chapter 98. This Chapter (enacted in 2009, creates a civil remedy for those who are victims of the "trafficking of persons or [those] who intentionally or knowingly benefits from participating in a venture that traffics another person".

Section 4¹ of HB 1540 amends Chapter 98 to permit parties bringing claims under the Chapter to pursue their claims using a confidential identity in the court proceedings. The statute further obligates the

¹ The text of the bill reads as follows:

Sec. 98.007. CONFIDENTIAL IDENTITY IN CERTAIN ACTIONS. (a)

In this section, "confidential identity" means:

(1) the use of a pseudonym; and

(2) the absence of any other identifying information, including address, telephone number, and social security number.

(b) Except as otherwise provided by this section, in an action under this chapter, the court shall:

(1) make it known to the claimant as early as possible

court to advise the claimant of this right 'as early as possible', permitting the use of a pseudonym in the petition and all other filings as well as to avoid any other information that might identify the claimant. The court is required to maintain the records related to the action in a manner that protects the confidentiality of the claimant. Notably the bill prohibits the Texas Supreme Court from adopting any rules that conflict with this section.

Potential Rulemaking to Enable the Provisions of HB 1540

The provisions of HB 1540 impact numerous Texas Rules of Civil Procedure. As noted below, to address each of the impacted rules would be challenging. We recommend adoption of a new rule that incorporates the requirement to enable claimants to bring Chapter 98 actions without disclosure of their identity. The rule would address the myriad of submissions that could result in the disclosure of the claimant's identify in civil actions, including by opposing parties and in discovery. Alternatively, each impacted current rule that potentially involves disclosure could be amended to address this issues.

Proposed new Rule:

Rule _____ . Notwithstanding any rules to the contrary in these rules, in any proceeding brought under Chapter 98 of the Texas Civil Practice and Remedy Code, a claimant may submit his petition using a pseudonym and further is not required to disclose his address or other identifying information in pleadings, motions, discovery responses or other submissions. Any information including identifying information that is included in any pleading or submission to the court must be filed under seal. Affidavits and verifications required under these rules may be submitted using a pseudonym. The Court

in the proceedings of the action that the claimant may use a confidential identity in relation to the action;

(2) allow a claimant to use a confidential identity in all petitions, filings, and other documents presented to the court;

(3) use the confidential identity in all of the court's proceedings and records relating to the action, including any appellate proceedings; and

(4) maintain the records relating to the action in a manner that protects the confidentiality of the claimant.

(c) In an action under this chapter, only the following persons are entitled to know the true identifying information about the claimant:

(1) the judge;

(2) a party to the action;

(3) the attorney representing a party to the action;

and

(4) a person authorized by a written order of a court specific to that person.

(d) The court shall order that a person entitled to know the true identifying information under Subsection (c) may not divulge that information to anyone without a written order of the court. A court shall hold a person who violates the order in contempt.

(e) Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this section.

(f) A claimant is not required to use a confidential identity as provided by this section.

and clerk shall not submit any information that discloses the name of the claimant, including bills of costs. All parties to such a suit must not disclose identifying information of a Chapter 98 claimant, including in party listings, disclosures, pretrial reports, discovery or other proceedings. Experts and other witnesses may not be informed of the identity of a Chapter 98 claimant absent the express written approval of the court which approval must also include an admonishment that disclosure of the identity of the claimant is punishable by contempt.

The Following are specific Rules of Civil Procedure that are potentially impacted by the provisions of HB 1540.

Tex. R. Civ. P. 14 permits a party that is required to make an affidavit to have an agent make the affidavit. Absent a general rule, the Court should consider a rule permitting claimants in Chapter 98 cases to submit affidavits using their pseudonym as well as permitting them to avoid disclosure of facts that would include identifying information. Alternatively, the Rule can permit the submission of affidavits and other pleadings under seal. This would also apply to pleadings required to be verified. This should also apply to interrogatory responses.

Rule 18c permits trial courts to permit broadcasting of proceedings. The public broadcasting of proceedings involving claims under Chapter 98 would undermine the confidentiality of claimants and the Subcommittee recommends that the Supreme Court include in its Rules for Recording Broadcasting and Photographing Court Proceedings (for example: [Rules for Recording Broadcasting and Photographing Court Proceedings in the Supreme Court of Texas](#)) should including a provision that requires the protection of the identify of claimants in Chapter 98 cases. Note that this step should be considered notwithstanding the adoption of a general rule.

Tex. R. Civ. P. 21(f)(2) requires unrepresented parties to include their email address when electronic filing is mandated. For claimants filing under a pseudonym, a similar anonymous email address should be considered.

Tex. R. Civ. P. 21(f)(4) lists the types of filings excepted from the requirement to file electronically. The exceptions include materials to be filed under seal. The Court should consider adding to this exception pleadings filing in proceedings brought under Chapter 98.

Electronic filing services should be asked to include reference to the confidentiality rights of claimants in Chapter 98 actions and prompt claimants that they may use a pseudonym and limit disclosure of other identifying information. This should include completing the electronic filing information when submitting their petition.

Rule 21c provides privacy protection related to the filing of court records that include sensitive data. The Subcommittee recommends amending this rule to include reference to proceedings filed under Chapter 98.

The following is a proposed amendment to Rule 21c:

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; andPage 20

(3) a birth date, a home address, and the name of any person who was a minor when the underlying suit was filed.

(4) the identity of a claimant in a suit brought under Chapter 98 of the Texas Civil Practice and Remedies Code if the claimant requests confidentiality, including the name, address, telephone number and social security number of the claimant.

(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 or a pseudonym is used in the case of a proceeding under Chapter 98 of the Texas Civil Practices and Remedies Code.

(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

Rules 38 and 39 provide for third party practice and joinder. A question is triggered whether the rules should include language that prohibits a party from naming as a third party to a suit an individual who is a claimant under Chapter 98 without the use of a pseudonym or other method to protect the identity of the individual. Additionally the Court should consider whether to amend Rule 43 on Interpleader to include language requiring that interpleader petitions in Chapter 98 cases be pleaded to avoid naming potential claimants.

Rule 42 on Class Actions includes a provision that permits a court to permit plaintiffs to opt out of the claim (Rule 42(c)(2)(A)). The Court should consider whether to include language in this Rule that ensures that a requirement for parties to opt of a class include language permitting a claimant under Chapter 98 to submit an opt-out notice using a pseudonym. Similar consideration should be given for notice requirements for class members.

Rule 57 (Signing of Pleadings) should be amended to permit *pro se* claimants in Chapter 98 actions to sign pleadings using a pseudonym and are not required to list an address other than a non-identifying email address.

Rule 63 on Amendments and Responsive Pleadings. Consideration should be given to adding language in Rule 63 that parties submitting responsive pleadings or other submissions in Chapter 98 actions should not submit any pleading that names or otherwise identifies a claimant if the claimant has elected confidentiality unless such pleadings are filed under seal. For example, Motions to Transfer Venue under Rule 86 could include allegations and fact pleadings that could identify the claimant. Similarly, Counterclaims under Rule 97 should be governed by the same provision.

Rule 75a – Filing Exhibits: Court Reporter to File With Clerk. This rule should be amended to include a provision that any exhibits in a Chapter 98 proceeding that identify a claimant who seeks confidentiality shall be filed under seal.

Rule 76a. Sealing Court Records. Rule 76a(2)(a)(2) exempts from the definition of a court record “documents in court files to which access is otherwise restricted by law.” Tex. Civ. Practice and Remedies Code Section 98.007 will restrict access to documents that identify claimants in Chapter 98 actions if they elect confidentiality. Note however, that Rule 76a(1) states that “No court order or opinion issued in the adjudication of a case may be sealed.” Therefore, any court orders disposing of issues in the case should omit the name or identifying information of the claimant.

Rule 79. The Petition. The rule currently requires the plaintiff to state the names of the parties and their residences. This rule should be amended to permit a plaintiff filing Chapter 98 actions to use a pseudonym and are not required to include their address information.

Rule 99. Issuance and Form of Citation. Rule 99(b) states that the citation shall include the names of the parties. Citations in Chapter 98 cases should permit pseudonyms and also note that the address of the claimant should not be listed if the case is filed *pro se*.

Rule 129. How Costs Collected. The provisions of HB1540 arguably prohibit the clerk to submit a bill of costs to the Sheriff or constable for collection (as permitted under Rule 129) absent an explicit order from the Court.

Rule 145 – Payment of Costs Not Required. The submission of a statement of an inability to afford costs should include a provision that permits a Chapter 98 claimant to submit a statement without requiring the disclosure of information that would identify the claimant.

Rule 149. Execution for Costs. Similar to Rule 129, an itemized bill of costs adjudicating costs to the claimant should not disclose the name of the claimant.

Rule 167.2 – Settlement Offers. Rule 167.2(b)(3) requires the disclosure of the parties making the offer and the parties to whom the offer is made.

Rule 173 Guardian Ad Litem. Orders appointing a Guardian Ad Litem should not list the identity of the claimant in a Chapter 98 action.

Rule 181. Party as Witness. A defendant has the right under this rule to compel the claimant to appear. Either this rule or Rule 176 (Subpoenas) should be amended to clarify that a subpoena to a Claimant under a Chapter 98 case should not disclose the true name and address of the claimant.

Rule 191. Discovery. Rule 191.3 requires the signing of disclosures and responses. This rule requires a *pro se* party to sign disclosures and discovery requests, notices, responses and objections, including addresses. Similar to comments above, any such submissions should exempt the listing of identifying information for claimants or a process permitting for the use of pseudonyms. Similarly, parties responding to discovery requests should be advised not to include information that would identify the claimant.

Rule 192 Discovery. The rules related to discovery generally and specific discovery tools should reflect the importance of not requiring the disclosure of identifying information absent appropriate protections to ensure that the provisions of HB1540 are observed (i.e. limiting access to the information identifying the claimant). For example, the disclosure of statements of persons with knowledge of facts under 192.3(h) should ensure that identifying information regarding claimant(s) are protected from disclosure to other witnesses or to non-parties.

Rule 193.3 Asserting a Privilege. A party should not be required to list or disclose identifying information regarding the claimant in supporting its withholding of privileged material or information.

Rule 194. Initial Disclosures. This rule requires parties to disclose the correct names of the parties to the lawsuit and any potential parties. The rule (or a general rule) should reflect that these disclosures should not include information protected by Chapter 98.

Rule 194.2(d) includes proceedings exempt from initial disclosure. Potentially a Chapter 98 action could be included in this list but that might impact the adjudication of the claims in those proceedings. Alternatively, courts could be directed to manage discovery in those proceedings through specially crafted discovery plans that are designed to ensure that the identity protections in HB1540 are addressed.

Rule 194.4 Pretrial Disclosures. This rule requires parties to disclose information regarding witnesses who will testify at trial (including their address and telephone number). Similar to other rules noted above, this rule should include an exception to the listing of witnesses protected by Chapter 98 unless otherwise covered by a broad rule.

Rule 195. Discovery Regarding Experts. Under the provisions of HB1540, experts are not permitted to become aware of the identity of a claimant in a Chapter 98 proceeding absent written approval by the court with an admonishment provided to the expert (or other witness) that disclosure of the identity is punishable by contempt.

Rule 197. Interrogatories. As noted above, the process of responding to interrogatories could result in the disclosure of identifying information. Verifications to interrogatories under Rule 197.2(d) should specifically permit the use of a pseudonym.

Rule 199. Depositions. Due to the involvement of individuals not permitted to be aware of the identity of a Chapter 198 claimant, depositions involving claimants should be approved by the Court in writing and participants in the deposition (court reporters, videographers, etc.) should receive explicit notification that they may not disclose the claimant's identity under risk of contempt. Notices of depositions should not include the name of a Chapter 198 claimant. Transcripts should be maintained under seal unless the pseudonym is used throughout the deposition and no other identifying information is included in the transcript or exhibits.

Rules 200, 201 and 202. Depositions on written questions, depositions in foreign jurisdictions and depositions before suit. The same strictures regarding oral depositions in Rule 199 should apply to depositions on written questions and depositions in foreign jurisdictions and depositions before suit. In the case of a deposition before suit, if a potential defendant to a Chapter 98 action seeks pre suit discovery, consideration should be given by the court to ensure that the identity of a potential claimant is protected.

Rule 203. Signing and Certification of Depositions. This rule similarly should permit a claimant to sign the deposition transcript using a pseudonym. The court reporter should be explicitly permitted to certify the deposition transcript accuracy even though a pseudonym was used.

Rule 204. Physical and Mental Examination. Similarly to the other discovery rules, a motion and order for a physical or mental examination of a claimant should ensure that the identity of the claimant is protected. Motions and orders should either be filed under seal or a pseudonym should be used. The order should also authorize disclosure to a physician or psychologist with the required admonishment to the medical professional regarding protection of the claimant's identity. The Rule 204.2 Report should be prepared to avoid disclosure or sealed.

Rules – Section 10 – the Jury In Court. The trial court should ensure that steps are taken to enable the claimant to use the pseudonym in all proceedings, including before the jury. This might require procedures / screens to limit visual access to the claimant. It will also impact numerous proceedings, including Voir Dire (ie. Potential jurors will not be informed of the name of the claimant in determining potential grounds for disqualification). Rule 226a (approved venire instructions) potentially should be modified to include instructions for claims under Chapter 98 that advise the jury of the use of the pseudonym and special procedures in place (such as screens blocking the claimant from view). Rule 230

(certain questions not to be asked) should potentially be amended to include questions regarding the claimant's identify in a Chapter 98 proceeding.

Hearings and Trial Proceedings

Consideration should be given as to how a trial and appellate court can protect the identity of the claimant in a court proceeding, including whether the proceedings are held *in camera* or subject to rules restricting the disclosure of identifying information. This will apply to hearings on evidentiary issues, summary judgment motions and trial proceedings. It also will apply to motion practice where exhibits are included in the submissions.

How to Ensure that Courts Notify Claimants of the Right to File Under a Pseudonym

It is unclear how a court can enable notification to a claimant regarding the right to file the petition using a pseudonym. Options could include adding language to this effect on electronic filing forms and through outreach measures. Clerks should also be instructed to alert plaintiffs in Chapter 98 cases of their right to proceed anonymously and provision should be made for the substitution of pleadings (and changes to electronic records that list the name and address of plaintiffs if they later elect to proceed under a pseudonym).

Rules of Appellate Procedure

A similar approach is necessary in the Rules of Appellate procedure, including provision to enable a Claimant to proceed under a pseudonym as an appellate or appellee. This would need to include provision for *pro se* parties. Impacted rules would include Rule 6 and Rule 9.

TRAP Rule 9.2(c)(3) addresses documents filed under seal which are not electronically filed. This rule should apply to Chapter 98 proceedings. Rule 9.9 that provides for Privacy Protection for Documents Filed in Civil Cases. TRAP Rule 9.9(a) defines sensitive data (driver's license number, social security number, etc). The Court should consider whether to add to the list of sensitive data the identity of a claimant in a Chapter 98 proceeding. TRAP Rule 9.10 (Privacy Protection for Documents Filed in Criminal Cases) includes a provision on sealed materials that would be appropriate to be included in Rule 9.9:

(g)Sealed materials. Materials that are required by statute to be sealed, redacted, or kept confidential, such as the identity of claimants who seek confidentiality in Texas Civil Practice and Remedies Code Chapter 98 proceedings,[] must be treated in accordance with the pertinent statutes and shall not be publicly available on the internet. A court may also order that a document be filed under seal in paper form or electronic form, without redaction. The court may later unseal the document or order the filer to provide a redacted version of the document for the public record. If a court orders material sealed, whether it be sensitive data or other materials, the court's sealing order must be affixed to the outside of the sealed container if the sealed material is filed in paper form, or be the first document that appears if filed in electronic form. Sealed portions of the clerk's and reporter's records should be clearly marked and separated from unsealed portions and tendered as separate records, whether in paper form or electronic form. Sealed material shall not be available either on the internet or in other form without court order.

II. HB 2669

[HB 2669](#) by Red. Ryan Guillen requires that records from fine-only misdemeanors (other than traffic offenses) committed by children may not be disclosed to the public. According to the [Bill Analysis](#), the purpose of this bill is to avoid confusion with duplicative language in the Code of Criminal Procedure on the subject set out in Code of Criminal Procedure Article 44.2811 and Article 45.0217. This legislation does not appear to make a significant change in the protection of these records and only clarifies the circumstances when the confidentiality principles apply. Therefore we do not anticipate new rulemaking is required to implement this legislation.