

# Practical Guide to the Supreme Court of Texas's 18<sup>th</sup> Emergency Order

The Eighteenth Emergency Order has several different sections that allow Justice Courts to change procedures to help lower the risk of COVID-19 in their communities. Some of its sections are more fully explained below for justice courts.

*Please note any reference to TRCP is a reference to the Texas Rules of Civil Procedure.*

## **Paragraph 3.            AVOID RISK TO COURT STAFF, PARTIES, ATTORNEYS, JURORS, AND THE PUBLIC**

Under the Texas Code of Judicial Conduct, judges generally have a duty to “dispose of all judicial matters promptly, efficiently, and fairly,” which means that cases in justice courts usually move quickly from start to finish.

Paragraph 3 gives judges an additional duty to avoid COVID-19 risks to court staff, parties, attorneys, jurors, and the public.

Any duty for a case to move quickly and efficiently must be balanced with avoiding the threat and spread of COVID-19.

If a judge does not follow the order to avoid risk from COVID-19, it may result in a complaint to the State Commission on Judicial Conduct, cause a loss of the public's trust in the judiciary, and most importantly, put lives in danger.

## **Paragraph 3(a).        MODIFYING OR SUSPENDING DEADLINES AND PROCEDURES**

Paragraph 3(a) gives justice courts broad discretion in their ability to change or suspend any deadlines or procedures that normally apply by any statute, rule, or order (*subject to constitutional limitations like due process*).

This part of the order was designed so that the 800+ justice courts can change or postpone the way their courts operate based on how COVID-19 has impacted their community. For this reason, there may be different procedures in each court, depending on the resources available and how they are impacted by COVID-19. This means it is **VERY IMPORTANT** for each court to be clear about any changes or suspension of rules in their court.

It is important to note that any changes must treat the parties equally to satisfy due process concerns. For example, a court cannot allow discovery from one party but prohibit its use by another or allow remote participation in hearings by plaintiffs

but deny its availability to defendants. Care should be taken to ensure that any changing of rules or procedures does not explicitly or by effect deny due process or access to the court to any party.

*Examples of deadlines or procedures that may be changed or suspended can be found in the FAQ Section below.*

### **Paragraph 3(c). PARTICIPATION BY VIDEOCONFERENCE OR TELEPHONE**

This paragraph gives courts the ability to require or allow parties to participate in court hearings remotely if the parties are able to do so. It is important for the court to give parties a way to contact the court if they are unable to participate remotely, because some parties may not have access to or the ability to use the technology required to join a videoconference (*through a program like Zoom*) or a teleconference. Some parties may also have other needs, such as accessibility accommodations or an interpreter, which are best addressed prior to hearing.

The Texas Access to Justice Commission has developed helpful Best Practices for Courts in Zoom Hearings Involving Self-Represented Litigants, which has an appendix on handling accessibility accommodations, and Tips for Self-Represented Litigants guides that can be found here: <http://txcourts.gov/court-coronavirus-information/electronic-hearings-zoom/>

If a court conducts remote hearings, it must also find a practical and effective way to allow public access to those proceedings. This can be accomplished by relaying the court's hearings on a YouTube channel or other methods of public access. The Office of Court Administration has outlined [legal standards](#) regarding public right to access to remote hearings.

*Question 3 in the FAQ below also provides best practices for ensuring that parties can participate in remote hearings.*

### **Paragraphs 3(f) & 3(g). REASONABLE ACTION TO AVOID COVID-19 EXPOSURE**

All courts must take reasonable action to avoid exposing their court, staff, parties, and the public to COVID-19. The court must alert people who come to their court that they must inform the court if they have symptoms of COVID-19 or have been close to another person who has symptoms of COVID-19 or who has tested positive for COVID-19.

Courts should post this information in **multiple places**, for example:

- on the court's website,
- on the front door of the court,
- in the court lobby, and
- on the court's phone message.

#### **Paragraph 4. PREREQUISITES TO CONDUCTING IN-PERSON COURT**

All courts must follow the Office of Court Administration guidance for any court hearing, trial, or other court business held in-person. The guidance can be found here: <http://txcourts.gov/court-coronavirus-information/court-guidance/>.

Courts should also try to hold court by videoconference or teleconference if the parties and court are able to. The Office of Court Administration provides more information about how to hold hearings remotely on the Texas Courts' website: <http://txcourts.gov/>.

#### **Paragraph 6. JURY TRIALS**

All courts **MUST NOT have ANY jury trials or jury selection before SEPTEMBER 1, 2020**, unless held as one of a few test proceedings where the Office of Court Administration and the court's Regional Presiding Judge must observe and help determine procedures.

The postponement of jury trials may be frustrating or hard for both the courts and parties. However, the Supreme Court has ordered this postponement to ensure that they are safe and fair for all involved when jury trials resume.

#### **Paragraph 11. DEADLINE FOR FILING OR SERVICE OF CIVIL CASES**

Paragraph 11 continues the postponement of statutes of limitations that fall between March 13 and August 1 (*from earlier Emergency Orders*) until September 15, 2020.

This paragraph does not affect deadlines related to filing an answer or responding to other motions filed in a case. However, these deadlines could be changed in a particular court under paragraph 3(a) of the 18<sup>th</sup> Order.

## **FAQ**

### **General Court Procedures**

- 1. If a court wants to extend deadlines under the 18<sup>th</sup> Order, should they issue a standing order?**

**Yes, except the deadline cannot be extended beyond September 30, 2020, and the extension should be related to avoiding COVID-19 risk.** Issuing a standing order and giving the public access to that order is a good way to make sure that anyone filing a case or who is already a party knows

how the court will go forward. It is an uncertain time for everyone, and this is one way that the court can let the public know what to expect in justice court.

## **2. Can a court allow filing by email, fax, or some other alternative method?**

**Yes.** The court may accept filings by email or fax under the 18<sup>th</sup> Order, especially if the party is asking to do so because of access to technology (including e-filing), access to safe transportation, or health and safety reasons related to COVID-19. However, this does not waive the obligation of the party to copy the opposing party with its filing. If the Court allows alternative filing methods by a party, it should provide for a method for the opposing party to be notified.

## **3. How can a court make sure that parties have access to technology to participate in a videoconference hearing?**

The court should always make sure that notices, letters, or any other communications to a party include:

- a contact number for the court (*which is answered or messages promptly returned*);
- information about the technology needed (*reliable internet and a laptop, computer, or smartphone.*);
- the court's schedule (*when courts are open and closed*);
- information about access to legal services, including contact information for legal aid, online resources, and any other local resources for low-cost and no-cost legal services; and
- any other information necessary for a party to contact the court about scheduling and technology issues.

Also, the court could provide an area at the courthouse or another location with privacy and that follows safety guidelines for COVID-19 and the Office of Court Administration guidance for court hearings, where a party would have access to the technology to participate in the videoconference. Some courts have put a computer that can connect to a videoconference in a jury room or other room not currently in use, so that at-risk parties who don't have access to technology can use it rather than having to come into a small courtroom with many other people. This type of solution will be dependent on the resources available to the court.

The court must be willing to work with parties on scheduling and balance the safety of the people involved with the due process rights of the parties and the need for courts to continue operating.

## **4. How can the court make sure that their lobby and office setup is safe?**

TJCTC has a webinar called “**Social Distancing in Your Court and Office**” that reviews best practices and includes photos and examples of how some justice courts are putting social distancing procedures in place. You can find the webinar in the Court and Office Management Section here: <https://www.tjctc.org/tjctc-resources/Webinars.html>.

**5. Can the court require all participants to appear in-person or to all appear remotely?**

Courts should try to limit the number of people physically inside a courtroom. Some participants may be at high-risk if they appear in-person or with others in the courtroom. Some areas and some participants may not have the ability to participate remotely. Still other participants may require reasonable accommodations of their disabilities that cannot be provided in-person but can be provided remotely, or vice versa.

For courts to provide access to everyone, a court must develop alternatives for people who cannot join remotely or who cannot come to court in-person.

Such alternatives can be:

- working with your county to create a video conferencing room where participants without access to technology can enter a court proceeding through county provided technology,
- working with your local bar association or local library to create alternative ways for a participant to access technology in a private area, or
- creating a process for someone to participate in person safely if they do not have the technology to participate remotely.

**6. With a lot of hearings set up remotely, how should a court receive evidence for a remote hearing in a civil case?**

**In Civil Cases**

The 18<sup>th</sup> Order allows a court to modify certain civil rules of procedure, including how evidence is presented in court or received by the court. Because remote hearings and in-person hearings during the pandemic may present difficulties in the court reviewing evidence at the time of the hearing, it may be a good idea to require the parties to email or fax (*or mail if email or fax is not possible*) the other party and the court any evidence each side may want to present in a court hearing. If email is used, there must be a process to ensure that the parties have active email accounts that are being used, know that evidence will be shared via email, and also a method to ensure that all parties received the emailed information.

Due process requires that both sides have an opportunity to see the evidence that the court is considering. Usually this happens in-person, in the court room. However, if your court requires evidence be sent in before a court proceeding, it is important that that the other side gets a chance to see it, so that they are able to respond during the remote hearing. This might have to be done ahead of time, if the evidence cannot be properly examined by all parties during the hearing.

The amount of time given for the parties to file the evidence with the court and send a copy to the other party may be different depending on how it is delivered to the court (*email or fax may be a shorter time than mail*) or the court's estimation of the ability of each party to properly prepare after receiving the evidence.

As an example, some courts have put in their notices of hearing that evidence must be sent to the court and the other party on a set date prior to a hearing. Courts have chosen different amounts of time, but many have a different date for information mailed rather than e-mailed or faxed (*it takes longer to receive mail than email or fax*).

If a court wants to set a deadline for when evidence should be sent to the court or other party, the main thing a court should think about is how much time is needed for the evidence to arrive (*mail vs email or fax*) and be reviewed by the other party so that the hearing or trial is not a trial by surprise or ambush.

Courts should not be afraid to postpone a case if evidence comes up at a hearing or trial that was not sent to the other party and not able to be shared during the remote hearing, so that party was unable to respond.

### **In Criminal Cases**

There is no burden or obligation for a criminal defendant to produce evidence, share any evidence or discovery, or present any evidence in a criminal case, and the 18th Order does not modify that. However, in a criminal trial, there should be a process in place by the court for either party to review a piece of evidence before the offering party moves to admit the evidence.

The 18th Order does not modify the State's obligation to provide any and all discovery that is contemplated under Tex. Code Crim. Proc Art. 39.14 ("The Michael Morton Act") or other laws. Accordingly, every prosecuting office should already have procedures in place for providing discovery on cases in County and District Courts, and these policies may be easily adapted to cases in Justice Court.

However, Courts should review their current practices for making discovery available to the defense. Any court requiring a defendant or defense counsel to appear in-person at a pretrial hearing or otherwise may be increasing the risk of COVID-19 in violation of the 18<sup>th</sup> Order paragraph 3c.

Some suggested ways of maintaining constitutional protections while following the safety guidelines of the 18<sup>th</sup> Order are:

- Require prosecuting offices to send discovery via e-mail to the defendant or defense counsel.
- Require prosecuting offices to send discovery via USPS to an address on file for either the defendant or defense counsel.
- Establish some online portal for defendants to view discovery.
- In the case of a pro se defendant where the State is not allowing electronic duplication of evidence (as provided for in 39.14(e)), the Court may wish to consider alternatives such as:
  - providing an area at the courthouse or another location with privacy where the defendant would have access to review the discovery safely while maintaining social distancing. Courts may consider using the room they've set up for videoconferencing or a jury room or other room not currently in use.
  - working with your local bar association or local library to create alternative ways for a participant to access technology in a private area, or
  - creating a process for someone to participate in person safely if they do not have the technology to participate remotely.

There is no deadline in the law for when the State must provide all discovery to the defendant. The Michael Morton Act requires discovery to be provided "as soon as practicable after receiving a timely request from the defendant." However, courts should be aware that late produced evidence could be grounds for continuances on trials.

## **Eviction Cases**

### **7. Can a court schedule an eviction trial more than 21 days from filing?**

**Yes.** The court could extend the timelines in TRCP 510.4(a)(10) under paragraph 3(a) of the 18<sup>th</sup> Order, especially if there are issues with the parties having access to technology, transportation, or other health and safety reasons related to COVID-19.

**Some factors to consider if your court can hear eviction cases practically are:**

- The ability for the parties to participate by videoconference or by phone,
- The ability of the parties to have safe transportation to court or a place to use technology to appear;
- The ability for parties who are at high-risk for COVID-19 complications to participate in court;
- The court's ability and resources to safely hold in-person court if a party cannot participate remotely;
- The effect on any local orders on the justice courts; and
- Whether or not the local operating plan has been approved.

**8. Can a court postpone or continue an eviction case longer than the normal 7 days without agreement by the parties under TRCP 510.7(c)?**

**Yes.** The court could postpone the case for longer than 7 days under paragraph 3(a) of the 18<sup>th</sup> Order, especially if there are issues with the parties having access to technology, transportation, or other health and safety reasons related to COVID-19.

**9. How does the CARES Act affect cases in justice court?**

The 15<sup>th</sup> Emergency Order of the Supreme Court of Texas requires plaintiffs to include in their petition (*they may amend the petition after filing*), a sworn statement that the CARES Act doesn't apply to the case.

This is required, because Section 4024 of the CARES Act applies a Temporary Eviction Moratorium on evictions cases **for nonpayment of rent or other fees or charges** filed in justice court for properties covered under the CARES Act.

In short, the CARES Act applies to federally subsidized housing programs including public housing, project-based section 8, Section 8 Housing Choice Vouchers, Low-Income Housing Tax Credit (LIHTC) properties, etc., as well as the rural voucher program.

The CARES Act also applies to properties with federally-backed mortgages (*Fannie Mae, Freddie Mac, HUD, FHA, USDA*), including properties with loans that were made in whole or in part, insured, guaranteed, supplemented, or assisted in any way by the federal government, and those that were purchased or securitized by Fannie Mae or Freddie Mac.

The effects of the Act include:

- No **nonpayment** (*of rent or other amounts due*) evictions can be filed on any of these covered properties from March 27 through July 24.



- No notices to vacate for nonpayment may be issued in any of these properties until after the 120-day period expires on July 24, AND such notice to vacate must be for at least 30 days (*so it couldn't expire sooner than Aug. 24*).
- These covered properties may not charge late fees/other penalties for late payment during the 120-day period.
- Under Section 4023(d) of the CARES Act, these same protections (eviction moratorium, no late fees, 30 day notice to vacate) also applies to multi-family properties with federally-backed mortgages **in forbearance**, so if the forbearance period extends beyond July 24, so would these protections.

The federal eviction moratorium **does not** affect the following:

- Eviction cases that were filed before March 27, 2020;
- Notices to vacate issued prior to March 27, 2020;
- Eviction cases with purely private landlords with none of the funding or mortgage backing described above; or
- The CARES Act does not prohibit the filing of eviction cases involving breaches not related to nonpayment, but it does prohibit the issuance of notices to vacate until after July 24. The CARES Act does not specify whether this restriction on notices to vacate applies only to nonpayment notices to vacate or to all notices to vacate.)

Full text of the CARES Act is available here (applicable Sections are 4024 and 4023): <https://www.congress.gov/bill/116th-congress/house-bill/748>; see *Helpful Links* at the end of this Practical Guide for databases of properties covered by the CARES Act.

There are many properties in Texas that are covered by the CARES Act, underlying the importance of the 15<sup>th</sup> Order's sworn statement requirement regarding the CARES Act's applicability to a property. Best practices would include providing a plaintiff with an affidavit to submit to the court regarding coverage of the CARES Act. For example, courts are accepting a CARES Act affidavit that is available on the Justice Court Training Center website available here: <https://www.tjctc.org/coronavirus.html>.

## 10. What if someone requests a jury trial for an eviction case?

Under the 18<sup>th</sup> Order a jury trial cannot occur until September 1, 2020, including eviction jury trials.

There is a provision in the order to allow a limited number of jury trials before September 1, 2020, with the help of OCA and the Regional Presiding Judge. However, those cases should be **rare and only for extraordinary**

**circumstances** due to the intense resources and procedural requirements to safely conduct a jury trial during the pandemic.

## **Debt Claim Cases/Other Civil Cases**

### **11. Can a court sign default judgments?**

The court may sign default judgments if they are proper in a case. Note that in some cases, there is no requirement for a default hearing prior to the judge issuing a default judgment.

However, it is very important that the court review the file to ensure that the **defendant received proper service of citation** and had notice that failure to appear in the case (*by filing an answer or coming to a hearing if one was necessary*) could result in a judgment being issued against them.

If a hearing is required or if the court in its discretion believes setting a hearing for default judgment is in the interest of justice, and that hearing is scheduled to be held remotely, it is a best practice for the court to send out additional notices about videoconference and teleconference hearings and how they could affect the parties' rights, for example, if a default judgment may be entered against them. That notice should also explain that if a party can't appear remotely or on the designated date, they should contact the court for other options. Parties may not realize that a judgment could be entered against them if they don't participate as required by the court.

### **12. If my court is open shorter hours or must close before 5:00 pm, will the appeal deadlines change?**

**Yes.** Don't forget about TRCP 500.5(a)(3)(B). If a court closes before 5:00 pm, any deadline for a party to file something, such as an answer or appeal, with the court that falls on that day is extended to the next business day.

### **13. Can the judge send parties to mediation in a civil case?**

**Yes.** The State of Texas's policy is to encourage the peaceable resolution of disputes through alternative dispute resolution, including mediation. TRCP 503.5. However, the court should keep in mind that the costs of mediation (*including the travel costs of the parties or the time required to take off of work*) may not be reasonable if the amount in dispute is small or the parties are remote.

More information about alternative dispute resolution, including mediation, can be found at the State Bar of Texas Alternative Dispute Resolution Section's website: <https://texasadr.org/>.

It is also possible for mediation to be held online, so this might also be a good solution for parties who want to resolve their case during the pandemic. For example, a court can set a videoconference or teleconference mediation so both parties have an opportunity to participate and settle their case. Judges should be mindful of the limitations set out in the Code of Judicial Conduct regarding a judge encouraging mediation/settlement.

## **Criminal Cases**

### **14. Should justice courts issue warrants on Class C criminal cases right now?**

It is likely that issuing warrants on Class C criminal cases and affecting arrests on those warrants creates an unnecessary risk of COVID-19 for defendants, law enforcement officers, and court personnel.

This is ultimately up to the judge, but the judge should consult with other county officials and keep in mind that the 18<sup>th</sup> Order gives courts broad discretion to modify court procedures in order to lower the risk of COVID-19.

In some areas of Texas, jails have had a high rate of COVID-19 infection. Because the court has other options for enforcing judgments and getting a defendant who failed to appear to court on these mostly non-violent offenses, the court may want to wait to issue warrants in their cases until the risk of COVID-19 is lower.

Often, a notice to the defendant that there are other options besides arrest in resolving a Class C criminal case will provide for swifter, safer, and more just resolutions.

Courts should consider sending a letter informing defendants of certain alternatives any time a warrant letter or notice of hearing is sent out. Things that defendants should be made aware of include:

- 1) Entering an appearance via mail instead of waiting to be apprehended on a warrant.
- 2) Systems for negotiating with the prosecution outside of in-person hearings
- 3) Notice that paying a fine means the defendant is pleading guilty, will be convicted, and will have the charge placed on their record.

## **Alternative Ways to Satisfy Criminal Judgments**

It is also a best practice to have information about alternative means of satisfaction of judgments in several places. For example, the court may post this information on the court website, in the court lobby, and mail the information out to defendants with pending cases.

These alternative means for satisfying judgements are a great resource in normal times but are especially helpful during the COVID-19 pandemic. They can help the courts avoid the need to issue warrants, be a tool for disposing cases, and can help manage dockets.

A form listing the various methods of satisfying a criminal judgment can be found on TJCTC's website under the Criminal Procedure section here: <http://www.tjctc.org/tjctc-resources/forms.html>.

## HELPFUL LINKS

The Texas Judicial Branch Website - <http://txcourts.gov/>

The Texas Justice Court Training Center Coronavirus Resources - <https://www.tjctc.org/coronavirus.html>

Texas RioGrande Legal Aid COVID-19 - <https://www.trla.org/covid19-main>

Texas Law Help Coronavirus Resources - <https://texaslawhelp.org/article/coronavirus-covid-19>

Office of Court Administration Coronavirus Resources - <https://www.txcourts.gov/court-coronavirus-information/>

Texas Access to Justice Best Practices for Zoom Hearings (*it can be found under the "Getting Started" heading*) -

<https://www.txcourts.gov/court-coronavirus-information/electronic-hearings-oom/>

State Bar of Texas Alternative Dispute Resolution Section's website: <https://texasadr.org/>.

Lone Star Legal Aid - <https://lonestarlegal.blog/covid-19-eviction-resources/> (COVID-19 Eviction and Other Resources)

Texas Apartment Association - <https://www.taa.org/resources/useful-resources-for-responding-to-covid-19-novel-coronavirus/>

Resources for CARES Act coverage of properties:

Anyone can access these online databases for CARES Act covered properties:

- The National Low Income Housing Coalition's database of covered multifamily properties: <https://www.nlihc.org/federal-moratoriums>
- The National Housing Preservation Database of multifamily properties with certain federal subsidies: <https://preservationdatabase.org>
- Fannie Mae: <https://www.knowyouroptions.com/rentersresourcefinder>
- Freddie Mac: <https://myhome.freddiemac.com/renting/lookup.html>
- Texas RioGrande Legal Aid/Texas Housers/BASTA Austin map: <https://TXCARESact.org>

Landlords/homeowners can also access the following:

- Call the FHA, VA, USDA, Fannie Mae, or Freddie Mac escalation number to inquire as to the status of their mortgage: <https://www.hmpadmin.com/portal/resources/advisors/escalation.jsp>.
- Look up if Fannie Mae or Freddie Mac own their mortgage at:
  - <https://www.consumerfinance.gov/ask-cfpb/how-can-i-tell-who-owns-my-mortgage-en-214/>

- Fannie Mae: <https://www.knowyouroptions.com/loanlookup>
- Freddie Mac: <https://ww3.freddie.mac.com/loanlookup/>