



June 15, 2020

Via electronic mail to [rules@gasupreme.us](mailto:rules@gasupreme.us)

Hon. Harold D. Melton  
Chief Justice, Supreme Court of Georgia  
330 Capitol Avenue, S.E.  
Atlanta, Georgia 30334

Re: *Comments Regarding Proposed Statewide Business Court Rules*

Dear Chief Justice Melton:

Thank you for providing the Georgia First Amendment Foundation and others the opportunity to comment on the proposed Statewide Business Court Rules.

As you know, the Foundation is a non-profit that advocates for greater government transparency and free speech, and that, for more than 25 years, has been providing educational services, to citizens, journalists and public officials about Georgia's laws regarding access to government records and proceedings.

Like this Court, the Foundation believes that open courtrooms and court records are indispensable elements of an effective and respected judicial system. For this reason, the Foundation has always been a strong proponent of this Court's longstanding policy of promoting access to and understanding of court records and proceedings not only by the participants in them but also by the general public and by news media who will report on the records and proceedings to the public.

Engendering respect for its decisions and processes by facilitating public access is particularly important for a new court such as the Statewide Business Court. Unfortunately, the proposed rules fail to do so in some important respects.

Proposed Rule 15, governing access to the court's records, would radically depart from well-established law and create an unprecedented opportunity for court secrecy.

Proposed Rule 16, governing electronic devices and recording, while consistent with the rules for such devices and recording recently adopted for

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*"Because public men and women are amenable  
'at all times' to the people, they must conduct  
the public's business out in the open."  
— The late Charles L. Weltner Sr., Chief Justice,  
Georgia Supreme Court*

the rough-and-tumble of the state's criminal and civil trial courts, misses a tailor-made opportunity to adopt the more public and media friendly rules and practices of the courts with which the new Statewide Business Court shares facilities, this Court and the Court of Appeals.

*Proposed Rule 15.* For decades, pursuant to Uniform Superior Court Rule 21, this Court has made repeatedly clear that, with scant exceptions and only under “compelling circumstances,” see U.S.C.R. 21.3, civil court records may be filed under seal only after a hearing and judicial determination that sealing “clearly outweighs the public interest.” *Id.* 21.1-21.2.<sup>1</sup> Proposed Rule 15 is not true to this requirement. Although proposed Rule 15 incorporates much of Rule 21 in its provisions, it appends to those requirements a contradictory North Carolina business court provision that both permits and facilitates “provisional” under-seal filing as a matter of course. As observers of the judicial system know, the practical effect of this Court’s approval of this provision would be to effectively shift the presumption of public access to Statewide Business Court records to one of closure.<sup>2</sup> Following the court’s cases and understanding its decisions would become much harder for the public, journalists, and even lawyers. Proposed Rule 15—specifically, its deviation from U.S.C.R. 21 at sections 15-7(b)-(e)—should be rejected by the Court for this reason.

*Proposed Rule 16.* By adopting (albeit with a spate of stylistic revisions) Uniform Superior Court Rule 22, the Statewide Business Court’s proposed rule on electronic devices and recording reflects a missed opportunity. Two years ago, after a lengthy and contentious process, this Court approved U.S.C.R. 22, including many of its presumptive restrictions on the courtroom use of electronic devices by the public, based on frequently articulated concerns about the danger and difficulty of detection of the misuse of such devices in criminal cases, particularly by members of gangs. Those concerns will not be an issue in the Statewide Business Court. Given their absence, the Statewide Business Court could and should significantly improve proposed Rule 16 and eliminate unnecessary complexity and prolixity by (1) creating two rules -- one to govern recording of Statewide Business Court proceedings (an amended Rule 22) and another to govern use of electronic devices in the Statewide Business Court; and (2) beginning and imbuing each rule with the presumption that recording and use is permitted, albeit subject to pooling and other decorum regulations of the sort imposed by the rules and practices of this Court and the Court of Appeals, with which the Statewide Business Court shares facilities.

Especially for a new court—one that must earn acceptance as well as legitimacy—operating in a

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<sup>1</sup> See, e.g., *Atlanta Journal v. Long*, 258 Ga. 410 (1988); *In re Atlanta Journal-Constitution*, 271 Ga. 436 (1999); *Wall v. Thurman*, 283 Ga. 533 (2008); *Altman v. Altman*, 310 Ga. 211 (2017).

<sup>2</sup> This is so because businesses and other parties in litigation—particularly when they can do so in you-scratch-my-back-I’ll-scratch-yours agreement with their adversaries—have no meaningful incentive to protect the public interest in access to court records relevant to their dispute that they consider negative. As a result, they and their lawyers have a tendency to err—and quite widely so—on the side of provisionally filing under seal. For courts, even those conscientious about protecting public access, effectively policing these provisional filings is practically impossible. Judges lack the time, resources and tools to effectively evaluate after the fact, when public interest is likely to be substantially diminished, the parties’ typically conclusory secrecy claims and to meaningfully sort through their sealed filings. There are courts, including the Northern District of Georgia, that have reluctantly adopted provisional sealing procedures but these procedures have substantial safeguards against abuse not present in the North Carolina rule incorporated in proposed Statewide Business Court Rule 15. See [Local Rules, N.D. Ga., Appendix H](#) (revised electronic case filing standing order and administrative procedures) at ¶ J (filing documents under seal in civil cases); see, e.g., *id.* at 2.c (“[a] provisionally sealed electronic filing that complies with these procedures ... will not be considered by the Court for any substantive purpose unless and until the Court gives it permanently sealed status”).

manner that is transparent to the state's lawyers, media and public is indispensable to earning the trust and respect critical for the Statewide Business Court to survive and prosper in the manner its proponents intend. The Foundation respectfully submits that the changes it recommends here are necessary to that end. With these changes, the Statewide Business Court's rules respecting public access will serve, rather than conflict with, the State's strong public policy in favor of open government and its oft-stated corollary that the State's courts must always strive to be more accessible to the public. *See, e.g., R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 576 n.1 (1982) ("This court has sought to open the doors of Georgia's courtrooms to the public and to attract public interest in all courtroom proceedings because it is believed that open courtrooms are a *sine qua non* of an effective and respected judicial system which, in turn, is one of the principal cornerstones of a free society.") *See generally* [Embracing the Courts of the Future: Final Report of the Next Generation Courts Commission](#) (March 2014) at 19-23 (recommending that courts "practice and promote transparency"; "As a result of security concerns and budget cuts, the news services and citizens that do make the trip to the courthouse often find not a welcoming place that reflects the courts' fundamentally public nature but a cold and inhospitable fortress").

The Foundation is pleased to have been given the chance to be involved in this process and would welcome further discussion.

Thank you very much for your consideration.

On behalf of the Georgia First Amendment Foundation,

Sincerely,

A handwritten signature in black ink, appearing to read "Richard T. Griffiths", with a large, sweeping flourish at the end.

Richard T. Griffiths  
President Emeritus

cc: Therese S. Barnes, Clerk (via [barnest@gasupreme.us](mailto:barnest@gasupreme.us))