

Senneff, Angie

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Sent: Friday, October 27, 2006 3:07 PM
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Subject: appellate courts' policies regarding sealed records
Attachments: COA policies re sealed records.wpd

Members of the Advisory Committee:

Professor Dorsaneo asked me to circulate the attached document, which reflects responses by the clerks of the 14 courts of appeals to the following 4-question survey I sent them several weeks ago. The four questions I asked were:

- (1) how do you treat records that were sealed in the trial court under 76a and are now part of the appellate record ?
- (2) how do you treat motions to seal records in the appellate court (on appeal or in original proceedings) that were NOT sealed under 76a in the trial court ?
- (3) how you treat records/discovery that was submitted for an in camera inspection on a claim of privilege, where the trial court's denial of that ruling is being appealed ?
- (4) in general, how frequently do issues relating to the above arise in your court?

As the attached survey results indicate, most of the COAs do not have a written policy or internal operating procedures. However, all appear to follow some kind of established practice. The survey responses can be generally summarized as follows:

- (1) most of the COAs keep records that were sealed in the trial court under TRCP 76 sealed on appeal by physically separating them from non-sealed portions of the record and limiting access to only the parties' lawyers;
- (2) some of the COAs apparently handle motions to seal records on appeal on an ad hoc basis, but some remand to the trial court for a hearing under 76a. If sealed pursuant to appellate motion, they are treated like sealed records from the trial court.
- (3) most of the COAs treat records that were viewed in camera as sealed records, unless they became part of the non-sealed record in the trial court; however, at least one court mentioned that if a mandamus is filed to challenge the trial court's ruling against a claim of privilege, then the documents may be treated as sealed pending the appellate court's ruling; and
- (4) most of the COAs say that they confront these issues rarely.

10/27/2006

First Court of Appeals

Karinne McCullough, Clerk of Court

Our chief staff attorney said we are basically in line with the Third Court on the first and third items.

There isn't an equivalent TRAP to 76a so this Court has not sealed records. If a motion to seal appellate records is made, the First Court remands to the trial court for a TRCP 76a hearing.

Second Court of Appeals

Stephanie Lavake, Clerk of Court

1. Records that were sealed in the trial court under Rule 76a usually come to us with the word "SEALED" stamped directly on the outside cover of the records. If the records aren't already stamped "SEALED," we mark on the outside cover of the file jacket that sealed records are contained therein, and we note on case management that the records are sealed. We also place the records in an envelope, tape it shut, mark it "SEALED" and put a copy of the order sealing the record on the outside of the envelope.
2. If the parties are permitted to check out sealed documents that are part of the record, they must sign a confidentiality agreement.
3. If we grant a motion to seal a record, we mark the record sealed and follow the same procedure outlined above.
4. When mandate issues and we return sealed records to the trial court, we give notification in our cover letter that the record is sealed.
5. Whether documents that were submitted to the trial court for an in camera inspection come to us in connection with a mandamus or an appeal, the documents always come to us sealed. The documents remain under seal while in this court's possession.
6. On your frequency question:
 - We rarely get appeals under Rule 76a.
 - Motions to seal are also rare.
 - With regard to records/discovery submitted to the trial court for an in camera inspection: We rarely see this in appeals but we occasionally see it in discovery-related original proceedings.

Third Court of Appeals

Diane O'Neil, Clerk of Court

1. Records sealed under TRCP 76a by the trial court are delivered to us marked and sealed. We place them in a safe in a locked room. When the case is mandated we hand deliver them to

the trial court with a letter to the fact that we are returning sealed exhibits and have them sign for them.

2. If we grant the motion we seal them here and then follow the same steps when the case is mandated as described in number 1.
3. We would keep them in the safe and treat them as sealed until a review is made.

We do not have any written rules; this has been the long time practice of the court.

Fourth Court of Appeals

Keith Hottle, Clerk of Court

As referenced in your correspondence, the Fourth Court briefly addresses TRCP 76a under its Internal Operating Procedures by requiring the Clerk of the Court ensure the record remains sealed to all unauthorized persons; and issue a warning letter to the litigants and their attorneys that the record is sealed in the court. Procedures would dictate that we clearly mark the record (i.e., appellate record, shuck and related files) as sealed pursuant to Rule 76a. The sealed cases relating to minors seeking to circumvent the parental notification provision are maintained in a locked safe.

Motions that are granted to seal records not sealed under 76a in the trial court would be handled in a similar manner. A letter would be issued to the litigants, the trial court and the attorneys that the record has been sealed in the court. We would mark the record as sealed as referenced above and ensure the record remains sealed to all unauthorized persons. An entry would also be made into Case Management that the record is “sealed.”

In response to your question concerning how we would treat records/discovery that was submitted for an in camera inspection on a claim of privilege, where the trial court’s denial of that ruling is being appealed is we would keep the records sealed and only make them available for review upon order of the court.

As to the frequency, these issues rarely come up in our Court.

Fifth Court of Appeals

Lisa Matz, Clerk of Court

We frequently receive records from the trial court that have been sealed. I don’t think our Court has ever ordered anything to be sealed. Like I said, they usually come to us under a sealing order from the trial court. We keep the sealed records out of the jacket that the public can view. We only allow the attorneys on the case to check the records out.

Sixth Court of Appeals

Debbie Autrey, Clerk of Court

(Response by chief staff attorney, Stacy Stanley:)

In connection with your email on dealing with sealed records in the possession of our court:

1. We do not have a written policy.
2. Our general practice is this: Documents sealed by trial court under TRCP 76a are kept physically sealed on appeal. If we need to look at them, the writing attorney/justice does. They are not circulated further unless another justice asks to separately review them. Internally, we have no further security measures. We then reseal them. If a request by some outside party (or even the other side who did not get to see those sealed records) is made to review, the clerk's office refers the matter to the court. Very seldom happens. When it does, we have denied the request [although we have noted that it does make it pretty difficult for the other side to intelligently argue that it should get documents when it hasn't ever had a chance to see them ... or even have any clear idea of what they contain.].
3. We have never had a motion asking to seal any type of record up here that was not first addressed to trial court.
4. See 2 – we treat discovery/in camera review sealed docs the same way.

Seventh Court of Appeals

Peggy Culp, Clerk of Court

The Seventh Court will file a sealed record and it will remain sealed and placed with the file. We do not lock them up. It is not opened by anyone but the Judge or attorney working on the case.

If we receive a motion requesting that the record be sealed, the court will consider the motion. If the motion is granted, the court will instruct the clerk's office to seal the record and it is then placed back in the file.

Appeals regarding an in camera inspection are treated like any other sealed record. We very rarely have sealed records filed.

Eighth Court of Appeals

Denise Pacheco, Clerk of Court

In response to your question we do not have formal written procedures but our informal procedures are as follows:

1. Documents delivered to us marked and sealed are placed with the case file and a note is made in case management and on the shuck stating that sealed documents have been filed. This alerts us so that we don't release these to anybody coming by to view the file. If the trial court's order sealing the records requires us to return the records at the conclusion of the appeal or if a motion to return the records is filed and granted, we will do so. Otherwise, we generally do not return them to the trial court once the mandate is issued unless such instructions were brought to our attention.
2. Case by case. It's our recollection that we've had one such motion filed with this court. The Court granted the motion and the documents were marked as sealed.
3. If not sealed, will only seal if motion filed.
4. Seldom.

Ninth Court of Appeals

Carol Anne Flores, Clerk of Court

1. We keep sealed court records (TRCP 76a) separated from the rest of the record. It is not viewable by the public. Only our staff is allowed to review sealed records if the judges deem necessary to the case.
2. We have only sealed one motion with attachment which was filed directly with our court.
3. In camera documents are also kept separate from the remainder of the record. And are only reviewed by our staff if the judges deem necessary to the case.

Both original sealed records and original in camera records are resealed by our court prior to returning them to the trial court. If they are copies they are destroyed by shredding or incineration.

These situations are arising more frequently since more documents are being sealed by the trial courts. In camera documents are also arising more frequently than in past years.

Tenth Court of Appeals

Sharri Roessler, Clerk of Court

1. They are delivered to us marked and sealed. We note in case management that a portion of the record is sealed. They are placed in the shuck with the remainder of the record. We do not allow the sealed portion to be checked out.
2. If the motion is granted, we follow the same steps as described in #1.
3. We would treat them as sealed until further review by the court.
4. It is rare that we receive records with sealed documents.

The court does not have a written policy.

Eleventh Court of Appeals

Sherry Williamson, Clerk of Court

The 11th Court's procedures are the same as the Third Court's.

It is very rare that we receive cases with sealed documents, however.

Twelfth Court of Appeals

Cathy Lusk, Clerk of Court

In response to your questions:

1. Sealed records or documents are immediately, clearly marked as "sealed" on the case file jacket. We note in case management that the record/document is sealed. Sealed documents or records are not allowed to be checked out or to be viewed by anyone other than this court's judges. The only court members allowed to "break" the seal on sealed documents are Judges. The Judge personally writes his initials and the date on the envelope/container of the sealed document/record at the time he opens it.
2. Such motions in our court are very rare but are handled the same as all motions -- on a case-by-case basis.
3. Essentially, we treat such records as "sealed" until the court makes a final determination in the issue.
4. Sealed Records are a rare occurrence in our court.

We do not have written policies regarding "sealed" records.

Thirteenth Court of Appeals

Cathy Wilborn, Clerk of Court

The 13th COA's procedures for sealed documents are the same as the 3rd COA.

Fourteenth Court of Appeals

Ed Wells, Clerk of Court

1. Records sealed under TRCP 76a are forwarded to us from the trial court under seal. We docket them in case management, place the case information into a spreadsheet that lists all exhibits contained in our safe and then lock the exhibit in a safe which is contained in a room which is locked outside of our normal hours of

operation. When we finally dispose of the case by issuing our mandate, we then prepare an exhibit return form that outlines exactly what the court will be returning to the trial court. The sealed record along with this form are then either mailed via certified mail return receipt requested to the county or district court of origin or in the case of Harris County, released to the county courier following him/her signing this exhibit return form. All signed exhibit return forms are then maintained by the Court in a folder for safekeeping.

2. This Court does not issue orders or rulings sealing appellate records. Instead we refer the matter to the trial court for a hearing and order under rule 76a. If a sealed record is then forwarded to us following this hearing, the same procedures outlined in the first question would be followed.
3. We would treat them as sealed and follow the same procedures outlined previously.

This Court historically has had very few issues resulting from the filing of sealed records. We receive only a small number of cases each year that contain documents sealed by the trial court under TRCP 76a.

This Court currently does not have any written IOP's regarding this issue. The procedures that are currently being followed are a result of the long term practices of the Court.