

Supreme Court Advisory Committee

Date: December 8, 2021

From: Subcommittee on Rules 16-165a

Regarding: Tex. R. Civ. P. 76a

On October 25, 2021, Chief Justice Hecht sent a letter of referral to SCAC Chair Chip Babcock that included the following topic:

Texas Rule of Civil Procedure 76a. Since its adoption in 1990, the Court has received a number of complaints about Texas Rule of Civil Procedure 76a. Courts and practitioners alike complain that the Rule 76a procedures are time consuming and expensive, discourage or prevent compliance, and are significantly different from federal court practice. The Committee should draft any rule amendments that it deems advisable and, in making its recommendations, should take into account the June 2021 report of the Legislative Mandates Subcommittee.

1. Subcommittee Activities. This topic was referred to the Subcommittee on Rules 16-165a on November 2, 2021. Due to the short length of time between the date of assignment and the December 10 committee meeting, the intervening Thanksgiving holiday, and the fact that this is the first assignment received by the subcommittee after being reconstituted at the start of 2021, the full subcommittee has not been able to meet and deliberate over the possible rewriting of Rule 76a. The subcommittee's immediate goal is to bring together persons with ideas about rewriting Rule 76a in order to generate memos and proposed rule changes to serve as points for discussion at the December 10, 2021 full committee meeting. The Agenda attachments contain a proposed rewrite of Rule 76a to discuss on December 10, but the subcommittee as a body is not recommending for or against the proposed changes, and there is opposition on the subcommittee to some of the suggested changes, and some changes that were suggested were not implemented in this discussion draft. The subcommittee needs more time after the December 10 meeting to consider feed-back from the full committee and to vet suggestions from other subcommittee members and take some votes.

2. Judge Yelonosky's Rewrite. Judge Stephen Yelonosky, who is not officially a member of the subcommittee but who volunteered his efforts to the task of revising Rule 76a, submitted to the subcommittee a proposed rewrite of Rule 76a. This draft has been

reviewed and edited and commented on by various members of the subcommittee, but it has not been reviewed or voted on by the subcommittee as a whole due to time limitations. While the proposed draft does not represent the work of the subcommittee as a whole, it is a good foundation to be used by the full committee as a focus for discussion at the December 10, 2021 meeting. Judge Yelonosky has submitted a memorandum to go with his proposed rewrite of Rule 76a, which should be read in conjunction with his rule rewrite. From the subcommittee chair's perspective, this proposed rewrite of Rule 76a addresses some of the mechanical problems of the way TRCP 76a operates, but does not address some fundamental substantive concerns about Rule 76a. Substantive concerns are discussed later in this memo.

3. Past Reviews of Rule 76a. Court Rules Attorney Jaclyn Daumerie researched her list of SCAC meeting topics back to 2001. That list has been combined with a list compiled back in 2006 by Court Rules Attorney Jody Hughes. They show the following agenda items relating to Rule 76a:

- June 14-15, 2002: Rule 76a (Orsinger/Albright)
- September 20-21, 2002: Rule 76a (Orsinger/Albright)
- November 7-8, 2002: Rule 76a (Orsinger/Albright)
- April 11-12, 2003: Rule 76a - Sealing Court Records (Orsinger/ Albright)
- October 24-25, 2003: Sealing Court Records: TRCP 76a (no proposal; no change since 1990)
- January 16-17, 2004: Sealing Court Records: TRCP 76a (Orsinger)
- March 4-5, 2005: Sealing Court Records: TRCP 76a (Orsinger) (no recommendation)
- October 20-21, 2006: Proposed new rule re: sealed records - comparable to TRCP 76a (Dorsaneo)
- December 8, 2006: Proposed new rule re: sealed records - comparable to TRCP 76a (Dorsaneo)
- June 10, 2016: Proposed Appellate Sealing Rule and Rule 76a (Dorsaneo)
- September 16-17, 2016: Proposed Appellate Sealing Rule and Rule 76a (Dorsaneo) (On agenda but not discussed)
- February 3, 2017: Proposed Appellate Sealing Rule and Rule 76a (Dorsaneo)
- April 28-29, 2017: Proposed Appellate Sealing Rule and Rule 76a (Dorsaneo)

A partial investigation into the record of full committee meetings reflects that while Rule 76a has periodically been on this committee's agenda, proposed changes to Rule 76a were usually not discussed in depth and sometimes was not discussed at all. A look into the subcommittee meetings records that are available reflects several proposals for

change discussed at the subcommittee stage, but the historical examination to date has not identified any full committee vote on proposed changes to Rule 76a. Further investigation is needed to be certain of that fact.

4. TRAP 9. A review of full committee and of subcommittee records reflects a consistent effort by Professor William Dorsaneo to develop an appellate rule of procedure to govern sealing documents in Texas' appellate courts. Several proposed rule changes to Tex. R. App. P. 9 were fashioned at the subcommittee level, but investigation has not turned up an instance where a TRAP 9 proposal on sealing records was voted on or even considered by the full committee. In conjunction with a possible rewrite of Rule 76a, it is natural to ask whether a rule governing the sealing of court records in appellate courts should be included in the appellate rules of procedure, spelling out how to pass authority over sealed court records from the trial court to the appellate court, how to file records under seal in appellate courts, whether a motion to seal or unseal records can be filed in the appellate court, and by whom, and what standards the appellate court should consider in resolving such motions.

5. Is it Time for a Serious Reassessment? Rule 76a is 31 years old. There have been efforts to make changes to the rule, but they have ultimately not come to fruition. It can be argued that enough time has passed for the Supreme Court to engage in not only a procedural but also substantive review of Rule 76a, to see what the Court got right and got wrong back in 1990, and what improvements or changes of direction are suggested by a review of 31 years of experience applying the rule. The original concern of proponents of openness was defective products injuring persons. The IP lawyers and companies inside and outside of Texas were concerned about trade secrets. More recently people have become concerned about private information of their personal lives becoming public knowledge. An emerging issue is the protection of contractual rights and reliance interest of persons who shared non-public information in reliance upon a confidentiality agreement, only to have the opposing party make confidential information public by filing it as a court record. These latter issues were not considered much, if at all, in the creation of Rule 76A in late 1989 and early 1990.

6. Inception of Rule 76a. Rule 76a had its inception with the Legislature's enactment of Section 22.010 of the Texas Government Code, effective September 1, 1989. That law provided:

SEALING OF COURT RECORDS. The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should

be sealed.

In response to the legislative directive, SCAC Chair Luther Soules, III named Charles E. “Lefty” Morris of Austin and Charles Herring of Austin to co-chair an ad hoc Sealing Records Subcommittee. The subcommittee moved with astonishing speed. A memo by Chuck Herring describes the lead up to the adoption of Rule 76a. Chuck wrote:

Accordingly, the Supreme Court Advisory Committee Chairman Luke Soules appointed a subcommittee¹ to propose a draft rule. The subcommittee conducted two public hearings, on November 18, 1989 and December 15, 1989, and also received substantial input at the Texas Supreme Court’s public hearing on November 30, 1989. Twenty-seven participants, including several representatives of public interest and citizen’s groups, as well as several media attorneys and representatives, attended and provided valuable input at the hearings. (A list of participants appears under Tab “Y.”) The subcommittee accumulated several hundred pages of draft proposals, court decisions, law review commentaries and position statements from many sources.

The Co-Chairs presented a draft proposal to the full Advisory Committee for consideration at its February 9, 1990 meeting. In a not-quite ringing endorsement of the Co-Chairs’ work, the Committee almost immediately rejected the Co-Chairs’ draft and adopted as a working draft a proposal from Dallas Morning News counsel, Tom Leatherbury and John McElhaney of Locke Purnell.

After another twelve hours of consideration, amendments, sometimes heated debates, and sharply divided votes extending over three sessions (February 9, 10 and 16), the Advisory Committee produced the draft now before the Court.

The remainder of this memo discusses the general structure of the rule and reviews the arguments against some of the rules’ most controversial provisions.

Chuck Herring’s memo and attachments are available at the following URL:

<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf> [They are also attached at Tab C – p. 005 - p. 536.]

The 42-page memo of Chuck Herring mentioned above is in the record of the meeting, along with 487 more pages of Rule, proposals, a brief, letters, alternatives, edits, a federal

court study, Section 757 of the Restatement of Torts, appellate cases, law review articles, a letter from our current committee chair [Tab C - pp. 156-57], a letter on behalf of the Texas Association of Defense Counsel [Tab C - 159-63], along with a proposed alternative Rule 76a [Tab C – pp. 164-69], a letter from the legal department of Emerson Electric Co. of St. Louis [Tab C – pp. 170-71], a letter from the legal department of American Home Food Products, Inc. of Fort Worth [Tab C – p. 172], a letter from Judge Pat Gregory, Presiding State Statutory Probate Judge [Tab C – pp. 178-79], a letter from the general counsel of General Mills of Minneapolis, Minnesota [Tab C – p. 225], and many more items of interest. A number of letters were concerned with the preservation of trade secrets, others with unfiled discovery, others with confidential settlement agreements. This record of 530 pages sets out the considerations that were voiced when Rule 76a was being contemplated. But it is noteworthy that much of this correspondence was dated after the SCAC had finalized Rule 76a over a seven-day period with many members not in attendance. This suggests that the hurried pace of committee action arrived at a result before the proposed rule was widely disseminated. The predicted advantages or disadvantages of the Rule may or may not have unfolded as projected. After 31 years of use or disuse, these arguments can be tested against the State’s actual experience in dealing with this Rule, in order to make improvements. In the much different world of today, where information can be disseminated widely on the internet, we need to consider the privacy interests of individuals who become involved, sometimes unwillingly, in litigation.

7. The Making of Rule 76a. We have the reporter’s record of two of the three Supreme Court Advisory Committee meetings held in seven days that produced Rule 76a. The transcripts are an eye-opener for anyone interested in Rule 76a or the rule-making process.

The full committee met on Friday, February 9, 1990.² [Tab C – pp. 005-06] The minutes of the meeting indicate that “[a] report was given by Charles (Lefty) Morris, Chuck Herring, and Tom Leatherbury regarding proposed new rule TRCP 76a, regarding Sealing of Court Records. [Tab C – pp. 548-59] Discussion of the committee followed and the matter was reassigned for specific revisions and a new report from the Subcommittee the next day, a Saturday, February 10, 1990 meeting.³

The full committee convened again at 8:00am on Saturday, February 10, 1990. At the end of the meeting it was moved, seconded, and unanimously approved to have a previously-unscheduled meeting the following Friday, February 16, 1990.

The committee met again on Friday, February 16, 1990. Twenty members of the

committee were present, 13 were absent, and there were 3 visitors. [Tab C – p. 537] Votes on 117 different rules are recorded in the minutes. The Committee considered the version of Rule 76a that was voted on the previous Friday and Saturday.⁴ [Tab C – p. 556-ff] A large part of the meeting focused on who should be able to seek appellate review, and when and how. The transcript of the meeting shows a vote of 12-to-0 in favor of allowing an appeal from either an order sealing or an order refusing to seal court records. [Tab C – p. 576] Some argued that both parties and intervenors should be able to appeal. The committee then discussed whether to recommend appellate review by interlocutory appeal, severance and appeal from a final judgment, or mandamus. Justice Hecht commented that review by mandamus does not permit the appellate court to correct disputed issues of fact, which he said are likely to exist in this type of case. [Tab C – pp. 582-83]. Justice Hecht also noted that the ability to bring an interlocutory appeal is governed by statute, not by rule. [Tab C – p. 590] The matter was resolved when the committee voted 11-to-4 to allow both parties and intervenors to appeal from a sealing or non-sealing order by appeal from a severed judgment. [Tab C – p. 618] That rendered some language discussed in the previous meetings superfluous and it was deleted by unanimous agreement. [Tab C – p. 622]

A revealing perspective was injected by David Beck, who commented on the speed at which the Rule adoption was proceeding. David said:

I would like to say something for the record, and the first time I saw this proposal is this morning because I could not attend the meeting last week. I am not opposed to what we have done in concept, but I am very troubled about the way we have done it. This represents a very material change in our Rules of Civil Procedure and our general practices.

The bench and the bar have not seen this, to my knowledge. The first time this was ever presented to the general Committee was at the meeting last week with the exception of the subcommittee that was working on this, and I think they have done an excellent job in working on it, but what I am concerned about is the potential problems that we may not even anticipate, like John Collins was saying.

We are trying to write a rule that applies in all cases, and I notice there is some references in the rule to public safety and health, but we use some terminology in that rule that we passed that is very, very broad, and I don't know what some of these provisions mean. And I suspect that some of the members of the bar are going to have some real questions about some of the terms.

* * *

And my concern is that not every case we have got is a personal injury case and not every case we have got is a product liability case. There are patent suits out there, there are domestic relations suits, there are breach of contract suits, that have very critical pieces of information that the parties want to keep private.

[Tab C – pp. 623-24]

* * *

And I am just concerned that we are doing this so quickly, with such limited review opportunities, by such a comparatively few members of even this Committee, that I am concerned we are going to come up with a result that is going to cause us a lot of problems on down the line. I just wanted to say that for the record. [Tab C – p. 625]

Broaddus Spivey responded a few moments later:

I agree with you and I think it is time to move on, except I want the record to reflect a response to Davis Beck’s oratory there. And I can understand his concern, but one of the basic problems is people have elected to take their private disputes into a public forum. And I face that every time a defendant wants my client to produce income tax returns, and that settles cases sometimes. That is one of the hazards of entering into litigation or being drawn into litigation, and that is just something we have to deal with. [Tab C – pp. 626-27]

This exchange reflects the plaintiff-defendant dynamic that existed on the Committee regarding Rule 76a. As Beck later noted, “I want to make sure everybody understands what we are doing here, and I know I am in the minority. There are only two people here that I count that do essentially defense work...” [Tab C – p. 640] However, the compelling need for speed (all committee discussion and voting was compressed into three meetings over seven days), and the reason for the Chairman’s exercise of tight control over discussion in order to reach quick final votes, is not evident from the transcript. Regardless of the reason, the committee’s action was undeniably extraordinarily quick. When David Beck asked “what are our time limits,” Chairman Soules said “this is it... I would like to have a motion that we accept 76(a) as it has been concluded today just by that last vote, in its entirety.” [Tab C – p. 626] Chairman Soules powered through to a vote to adopt Rule 76a as amended that day, and the amended version of Rule 76a was adopted by a vote of 12-to-3. (Less than half of the committee was involved in the vote.) [Tab C – p. 632] Tom Davis asked: “Am I allowed to point out some more things wrong with it before we vote it?” Chairman Soules responded: “We have voted.” Davis continued: “Well, you have got some errors in it and I would like to get the errors out.” Broaddus Spivey said: “That is administrative.” [Tab C – p. 632] And

that was the end of that.

The minutes from the meeting⁵ reflect:

A request for amendment to proposed TRCP 76a was reported on, motion was made, and the committee voted 11 to 4 to recommend that the Supreme Court promulgate the requested amendments to paragraphs C, D, and E and the committee voted 12 to 3 to recommend that the Supreme Court promulgate the requested amendments to TRCP 76a as a whole.

A request for amendment to proposed TRCP 166(b) (5) was reported on, motion was made, and the committee voted 10 to 7 to recommend that the Supreme Court promulgate the requested amendment.

8. Publication and Adoption. Chairman Soules forwarded the final report from the Committee to Justice Hecht on March 1, 1990. Soules made special mention of the proposed amendment to Tex. R. Civ. P. 166b(5), which would prohibit sealing of discovery unless the party seeking protection files the discovery with the clerk of the court and complies with Rule 76a. After saying that this particular provision “needs special mention,” Soules wrote:

The reason that I believe that this recommendation needs special mention is because the process through which it proceeded was not the usual process, and it is an extremely important and far reaching matter.

1. That provision was never submitted to the discovery subcommittee for study or recommendation.

2. That concept was considered before the Special Subcommittee on Sealing of Court Records and was, by that subcommittee, not recommended. Neither the Subcommittee’s reported rule nor the “Locke-Purnell” proposal for Rule 76a encompassed discovery not filed with a court.

3. That concept was never a subject of any advance written proposal in any agenda prepared for any Committee meeting.

4. The inclusion of discovery in the rule on sealing court records was expressly tabled by a majority of all members present at the meeting on Friday 9, 1990, on motion of Justice Peeples. That meeting was attended by 25 of 36 members of

the Supreme Court Advisory Committee.

5. Notwithstanding the February 9 vote to table, a majority of the 20 members who attended the smaller meeting on Friday, February 16 voted to reopen the question. The matter then passed by narrow majority vote of 10 to 7 with less than half the full membership attending and voting. None of the four member judges of the committee was able to attend the February 16 meeting.

6. The proposal was not published for comment from the bench and bar.

In conclusion, Chairman Soules said: “I believe this to be the only occurrence in the history of the Committee where such a broad sweeping and burdensome change has been recommended by the Committee with so little study and consideration.”⁶

On March 5, 1990, Chuck Herring authored a memo to the Supreme Court. [Tab C-pp. 007-48] Herring explained various parts of proposed Rule 76a, and mentioned arguments for and against parts of the proposed rule. Herring concluded:

The issues of whether and how to seal court records are complex and evoke strong and varied opinions from many different perspectives. Proposed rule 76a, together with the companion amendments to Rule 166b(5), creates a veritable thicket of constitutional, statutory, common law and procedural issues. The many public and private interests affected by the rule are exceedingly difficult to reconcile, and that difficulty is compounded by the diverse contexts in which sealing orders arise, including family law, trade secrets, products liability, commercial litigation.

My advice to the Court -- after distilling all of the knowledge and wisdom I have acquired during many, many hours of listening and reading and studying about these issues - is simple: good luck. Good luck, and may you have the patience and insight to develop a reasonable, workable rule.

Proposed Rule 76a was published in the April 1990 Texas Bar Journal,⁷ [Tab C – pp. 488-89] followed by a supporting article written by John H. McElhaney and Thomas S. Leatherbury, [Tab C – pp. 490-92] and then an opposing article written by Gale R. Peterson [Tab C – pp. 493-96] and an opposing article written by David E. Chamberlain. [Tab C – pp. 497-98]

The Texas Supreme Court adopted a number of rule changes on April 24, 1990, including

the adoption of Rule 76a. However, Justices Gonzalez and Hecht dissented from the adoption of Rule 76a and the concomitant amendment to Rule 165(5)(c). They wrote:

We concur in the changes to the Texas Rules of Civil Procedure adopted by this Order except the addition of Rule 76a and the concomitant amendment to Rule 166b.5.c. We agree that that it is appropriate to articulate standards for sealing court records which recognize and protect the public's legitimate interest in open court proceedings. Our concern is that the adopted rules are excessive.

Strong arguments have been made that pleadings, motions and other papers voluntarily filed by a party to avail itself of the judicial process should not be sealed absent specific, compelling reasons. The arguments are much weaker for denying protection from public disclosure of information which a person is ordinarily entitled to hold private and would not divulge except for the requirements of the discovery process. It is one thing to require that pleas to a court ordinarily be public; it is quite another to force a person to give an opponent in a lawsuit private information and then require disclosure to the world. On balance, we believe that the adopted rules do not afford litigants adequate protection of their legitimate right to privacy.

The procedural burdens created by the adopted rules are thrust principally upon already overburdened trial courts and courts of appeals. The trial courts must now conduct full, evidentiary hearings before ordering court records sealed. After records are ordered sealed, any party who did not have actual notice of earlier proceedings may request reconsideration of the order. Because it is impossible to give actual notice to the world, an order sealing records can never be effectively final. Trial courts must either hold as many hearings as there are requests by people without actual notice of prior hearings, or surrender and unseal the records. All parties, for and against sealing, are entitled to appeal. The demand of the adopted rules on the judiciary's limited resources is impossible to assess.

Finally, Rule 76a and the change in Rule 166b.5.c are probably more controversial than any rules ever adopted by this Court. Although issues relating to sealing court records have been addressed across the country, adoption of rules like these two is unprecedented. Despite strongly conflicting views of the members of our Rules Advisory Committee, the Court has not invited the same public comment on these two rules as it has on the others. People outside the rules drafting process, lawyers and non-lawyers alike, have only recently become

aware that these two rules were being considered. Even without inviting comment, the Court has received a relatively large number of sharply divergent views of these rules. The stridency of the controversy, the dearth of precedent, and lack of opportunity for full public comment all counsel a more measured response by the Court than the rules it adopts. We have refused this year to change the rules pertaining to the preparation of jury charges because of conflicting comments on the proposed amendments. The reasons for deferring sweeping changes in the charge rules for further debate apply equally to Rule 76a and Rule 166b.5.c.

We agree with the Court generally that court records should be open to the public. We do not agree with the manner in which the Court has chosen to effectuate this policy.⁸ [Tab C – pp. 589-90 & 646]

9. Selling Depositions. On September 28, 1993, the Court Reporters Certification Board issued Letter Opinion No. 93-87, asking whether a court reporting firm could enter into a contract to sell all of its depositions to a business in exchange for a percentage of the proceeds from selling the depositions. The Board made the following comment about Rule 76a:

Rule 76a of the Texas Rules of Civil Procedure, which sets forth the standard for sealing court records, is also relevant to your inquiry. That rule presumes that “court records” are open to the general public and may be sealed only upon a heightened showing. [footnote 5] Rule 76a defines “court records” for purposes of the rule as “documents of any nature filed in connection with any matter before any civil court” with certain exceptions. Tex. R. Civ. P. 76a(2)(a). It also defines court records for purposes of the rule as discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights. Tex. R. Civ. P. 76a(2)(c). In providing that discovery that has been filed with a court as well as discovery concerning certain matters which has not been filed with the court constitutes “court records” presumed open to the general public, rule 76a suggests that discovery that has not been filed with a court and does not concern such matters, is not open to the general public. As noted above, however, rule 206 requires the shorthand reporter who has taken a deposition to file a copy of a certificate with the court. We do not consider whether, given this filing, deposition transcripts are “court records” under rule 76a(2)(a) in every case, or whether they are

subject to the special provision under rule 76a(2)(c) for “discovery, not filed of record.”

Clearly, a company which operates a computerized database may obtain a deposition transcript which has been filed with a court and is available to the public from the court. We are not aware of any statutory authority or rule, however, which would prohibit or authorize a shorthand reporter to sell a copy of a deposition transcript to a company which operates a computerized database.

10. Public Access to Judicial Records. In September of 1998, the Texas Judicial Council issued a writing on Public Access to Judicial Records.⁹ [Tab C – pp. 657-71] It talked at a general level about access to judicial records by virtue of statute, judicial decision, executive agency opinion, and court rule or policy. The writing says “There are six policy issues to consider when determining which judicial records should be made public and the procedures that should govern their release.” [Tab C – p. 659] They are: judicial accountability, availability of judicial resources, costs, privacy, open courts, and security of information and individuals, each of which is described. [Tab C – p. 659-60] The article relates to a rule proposed by the Judicial Council, that does not apply to court records.¹⁰ However, the principles discussed are germane to “court records.”

11. April 11, 2003. The Agenda for the April 11, 2003 SCAC meeting [Tab C – p. 672-73] included this item:

4.5 Sealing Court Records: TRCP 76A

The SCAC has been asked to review the effectiveness and operation of Texas Rule of Civil Procedure Rule 76a addressing the appropriateness of and method for sealing court records. A copy of the most recent information on this issue is below:

<http://www.supreme.courts.state.tx.us/rules/Committee/Sep-2002/2.11%20background.pdf> [Tab 10]

The Agenda attachments include a memo on *Rule 76a Background Information*. This memo discusses legislative activity from 2001 through 2002 related to defective products. The memo said:

During the 12 years since the passage of Rule 76a, the Supreme Court has accumulated 17 three ring binders of Rule 76a filings. Since January 1, 2002, there have been 31 filings. Facial examination of the pleading does not often

disclose the reason for the court sealings. Among the types of cases in which sealing orders have been requested in the last six months are: suits relating to adoption issues and suits seeking the sealing of documents filed by an opponent following the inadvertent production of the document. One attorney routinely files motions in probate cases stating that the disclosure of the amounts paid to beneficiary's would be improper. The Court does not receive notification if a motion under Rule 76a is granted or denied.

12. October 20, 2006. The Agenda for the meeting on October 20, 2006 [Tab C – p. 688] contained an item under Professor Dorsaneo's subcommittee: "Proposed new rule re: sealed records -- comparable to TRCP 76a." [Tab C- p. 688] Supporting documents include a survey conducted by Supreme Court Rules Attorney Jody Hughes of the varied practices in the fourteen courts of appeals dealing with the sealing of court records.

13. August 16, 2013. The Supreme Court adopted an amendment adding TRAP 9.8, "Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases," requiring that all papers in an appeal from a parental-termination case must identify a minor by an alias, and that a court may order other family members to be identified by an alias if necessary to protect a minor's identity, and the court must use an alias in court opinions. The same rules were adopted for juvenile appeals. The Supreme Court also adopted TRAP 9.9, Privacy Protection for Documents Filed in Civil Cases, defining "sensitive data" as all but the last three digits of social security or other taxpayer-identification numbers, bank or financial accounts, and driver's licenses, passports, etc. Sensitive Data must be redacted from documents filed with courts. The redaction must be using the letter "X" for each redacted digit. A document containing unredacted sensitive data must notify the clerk in the upper left-hand corner that the document contains sensitive data. The court "may" strike documents containing sensitive data. Remote access to documents with sensitive data cannot be made available to internet access. [Tab C- p. 776]

14. September 27, 2013. In the SCAC meeting on September 27, 2013, Judge Yelenosky shared his opinions on certain practices surrounding Rule 76a. He said that attorneys cannot enter into Rule 11 agreements that seal files without complying with Rule 76a. He also said that parties cannot show an unredacted document to the court while delivering a redacted copy to the court reporter. He also said that exhibits marked in a hearing or trial are court records under Rule 76a. Committee member (and former Rules Attorney) Lisa Hobbs disagreed about redacting, saying that courts are required by law to redact certain things. After some discussion, they still disagreed. [Tab C - pp. 709-11]

15. December 14, 2015. A group of appellate lawyers and judges exchanged emails regarding a proposed revision to TRAP 9.2(a)(3) to deal with sealing records on appeal. [Tab C - pp. 712-13]

16. June 10, 2016. The Agenda for the meeting on June 10, 2016, [Tab C – pp. 714-16] included this item: “Proposed Rule on Sealing Documents and Appellate Proposed Revs. To Rule 76a- June 8, 2016 w/76a documents/Rule 9 (Alternative Draft) (6/9/2016) Rule 76a (2).”

Attached is a Memo from Professor Dorsaneo dated May 27, 2016 setting out a proposed appellate sealing rule and proposed companion amendments to Rule 76a. [Tab C - p. 716] He suggested revisions (in italics) to Rule 76a.8 relating to appeals:

8. Appeal [Procedures]

(a) Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order.

(b) Documents that have been sealed by an order of the trial court or are subject to a motion to seal filed in the trial court may be filed in a sealed envelope as part of the appellate record in an appeal or an original proceeding pending in the appellate court.

(c) The appellate court may [abate an appeal and] order the trial court to determine whether documents not filed in the trial court or that were not filed under seal in the trial court are court records that may be sealed in the proceeding in accordance with the standard and the procedures for sealing court records contained in this rule. The appellate court may abate the appeal and order the trial court to direct that further notice be given, or to hold further hearings, or to make additional findings.

Professor Dorsaneo also attached his memo of June 8, 2016, proposing a Rule 9 that set out instructions for moving in the appellate court to seal documents, submitting documents in a sealed envelope, the appellate court identifying what record is sealed, temporary sealing orders, and a requirement that the appellate court state specific facts supported by affidavit showing why records should be sealed, etc. The standard proposed by Professor Dorsaneo is enclosed in brackets, and comes verbatim from Rule 76a, “to

protect a specific, serious and substantial interest of the movant which clearly outweighs the presumption of openness that applies to court records, any probable adverse public health and safety; and that no less restrictive means than adequately and effectively protect the specific interests asserted.” [Tab C - pp. 722-26]

17. September 16, 2016. The Agenda for the meeting on September 16-17, 2021 [Tab C – pp. 731-32] contained this Agenda item: “Tex. R. Civ. P. 76a (Suggested Revisions-September 7, 2016),” under Professor Dorsaneo’s appellate subcommittee. Attached is an 8-31-2016 “conference call redraft” of TRAP 9 laying out rules for sealing documents in appellate courts. [Tab C - pp. 733-37] The proposed Rule is comprehensive, with definitions, the transition of sealed document from trial to appellate court, motions to seal in the appellate court, the requirement of specific facts supported by affidavits or other evidence, provisional sealing until the motion is ruled upon, filing a response, abatement pending ruling on sealing, temporary orders, motions to unseal documents, referral to the trial court for further hearings, contents of the sealing order, hearing, in camera review, a public order ruling on sealing request, appeal from trial court sealing orders as a severed final judgment, and the power to abate an appeal pending further action in the trial court. [Tab C - p. 733]

18. December 20, 2016. December 20, 2016 is the last day of a series of emails in which Professor Dorsaneo put forth his proposed revisions to TRAP 9.2(d), Rule 193.4 and Rule 76a. [Tab C - p. 740] Professor Dorsaneo summarized:

I plan to present each of the proposed rule amendments to the Advisory Committee in January 2017, if possible. The main objectives that have been dealt with in the proposed amendments are:

1. Sequencing and coordination of procedures for handling documents by Civil Procedure Rule 193.4 (b) - (d) and proposed Appellate Rule 9.2(d)(1)(c), (2), (6) to facilitate confidentiality and avoid inadvertent disclosure.
2. Specification of the form of documents filed under seal in appellate courts in both paper and electronic form in Proposed Appellate rule 9.2(d)(6) based on definitions contained in other current rules; and
3. Miscellaneous proposed amendments to Civil Procedure Rule 76a and proposed Appellate Rule 9.2(d) designed to coordinate the procedures for handling documents produced for in camera review under Rule 76a.

Professor Dorsaneo's final proposed amendments to Rule 76a [Tab C – p. 741] were:

Tex. R. Civ. P. 76a (Suggested Revisions) (December 20, 2016)

4. *Hearing; In Camera Review.* A hearing open to the public on a hearing to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. . . The court may inspect records in camera when necessary. If the court determines that an in camera review is necessary, that material or information must be segregated and produced to the court in a sealed envelope [at least seven days before the hearing.] [within a reasonable time before the hearing]. The material or information produced to the trial court for in camera review must be placed in the custody of the official court reporter or filed with the clerk of the trial court before the hearing. The reporter or clerk must retain custody of the material or information reviewed in camera until the trial court or an appellate court having jurisdiction of the appeal [or original proceeding] orders the reporter or court clerk to transmit the material or information under seal to the appellate court, and the material or information is filed under seal in the appellate court. [Tab C - p. 741]

6. *Order on Motion to Seal Court Records.* A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; specify who may be given access to the records; the terms and conditions of access to the records; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability. [Tab C - p. 741]

8. *Appeal [Procedures].*

(a) Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. [Tab C - p. 741]

Professor also suggested changes to TRCP 193.4 [Tab C - p. 742] and TRAP 9.2 [Tab C - pp. 743-49].

19. February 3, 2017. The Agenda for the meeting on February 3, 2017, [Tab C – pp. 752-54] contained “Proposed Appellate Sealing Rule and Rule 76a,” with subparts--

- (e) Rule 9 Redraft, December 20, 2016
- (f) Rule 193.4(a) and (b) December 19, 2016
- (g) Tex. R. Civ. P. 76a December 20, 2016
- (h) Hon. Brett Busby email
- (i) Filing Documents Under Seal October 24, 2016 B. Dorsaneo Memo.

Attached to the Agenda was Professor Dorsaneo’s December 20, 2016 draft of TRAP 9.2, his draft of amended TRCP 193.4, his December 20, 2016 proposed amendment to Rule 76a, a January 16, 2017 email from Justice Brett Busby on the amendments to TRAP 9.2, and a Memorandum from Bill Dorsaneo dated October 24, 2016 [Tab C - pp. 768-69], which starts:

While reviewing the draft of proposed Rule 9.2(d), it has become increasingly clear to me that the procedures followed in the trial courts probably should be sequenced and coordinated with the procedures following in the appellate courts. As a result, I have revised the draft of proposed Civil Procedure Rule 193.4. Subdivisions (b) and (c) of the draft are designed to provide more detailed guidance to counsel and to trial judges about how documents filed “under seal” or “presented to the court in camera” are presented or produced to the court and how the court should handle them thereafter in anticipation of an appeal or mandamus review of the trial court’s order concerning disclosure of the documents.

The revised draft of proposed Rule 9.2(d) also contains paragraphs concerning the procedures for transmission of documents that were filed under seal or presented for in-camera inspection in the trial court under Rule 193.4 (see proposed Appellate Rule 9.2(d)(3) and 9.2(d)(6). I have also prepared a draft revision of those portions of Civil Procedure Rule 76a to match the current draft of proposed Appellate Rule 9.2(d).

The Agenda attachments include a proposed amendment to TRCP 21c relating to Sensitive Data. [Tab C - pp. 776-79]

20. OCA Article on Public Access to Remote Hearing During COVID. In 2020, the Office of Court Administration published an article about public access to Zoom and other remote court proceedings. [Tab C - p. 782-84] The article says:

The Supreme Court has also held that the press and public have a similar, independent right under the 1st Amendment to attend all criminal proceedings in both federal and state courts.³ Although the Supreme Court has never specifically held that the public has a First Amendment right of access to civil proceedings,⁴ federal and state courts that have considered the issue have overwhelmingly held that there is a public right to access in civil cases under the 1st Amendment.⁵

Courts must ensure and accommodate public attendance at court hearings. However, although constitutional in nature and origin, the right to public and open hearings is not absolute, and may be outweighed by other competing rights or interests, such as interests in security, preventing disclosure of non-public information, ensuring a fair trial, or protecting a child from emotional harm.⁶ Such cases are rare, however, as the presumption of openness adopted by the Supreme Court must be overcome in order to close hearings to the public.⁷ When a violation occurs, the Supreme Court held that a person whose rights to a public trial are violated do not have to “prove specific prejudice in order to obtain relief” and that the “remedy should be appropriate to the violation.”⁸

As recognized by *Waller* court, there may be times when a court finds that the rights or interest of privacy of the proceedings outweighs the rights or interests of a public trial. But because the constitutional right at issue belongs to the public rather than the parties, all closures or restrictions of public access to such hearings must satisfy the same heightened standards handed down by the Supreme Court in *Waller* regarding criminal cases – even when agreed to by the parties. Thus, while the court may consider the parties’ agreement while evaluating a request for closure, that agreement alone is not sufficient to warrant closure. The 1st Amendment right belongs to the public – not to the parties; the parties cannot waive it by agreement.

21. The Current Referral. Chief Justice Hecht’s October 25, 2021, letter recites complaints that the Rule 76a procedures are time consuming and expensive, discourage or prevent compliance, and are significantly different from federal court practice. These are procedural issues, some of which are addressed in Judge Yelenosky’s proposed amendment to Rule 76a attached to the Agenda for this meeting. But the issues with Rule 76a are not just procedural. The right to privacy was mentioned in the correspondence leading up to the adoption of Rule 76a and in later discussions about the rule. The right to privacy is a countervailing right to the right of the public to see court filings, exhibits, and unfiled discovery. The proposals now being considered to improve the efficiency of

the Rule 76a procedures, if they increase the public's involvement in sealing, will make greater inroads on the right of litigants to privacy. This can be seen in the business community's desire for different procedures and different standards for trade secrets. But there are privacy rights of individuals that are as or more important to them than trade secrets are to companies. The standards and perhaps even the procedures that apply when a person who is a litigant wishes to seal private information contained in court records requires a balancing that is not achieved by the rigid presumption and standard of proof in present Rule 76a.

22. Trade Secrets. Under Tex. R. Evid. 507, “[a] person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice.” The Rule goes on to say: “If a court orders a person to disclose a trade secret, it must take any protective measure required by the interests of the privilege holder and the parties and to further justice.” Tex. Civ. Prac. & Rem. Code § 134A.006 provides:

§ 134A.006. PRESERVATION OF SECRECY.

(a) In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means. There is a presumption in favor of granting protective orders to preserve the secrecy of trade secrets. Protective orders may include provisions limiting access to confidential information to only the attorneys and their experts, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

Tex. Civ. Prac. & Rem. Code § 134A.002(6) defines “trade secret” in the following terms:

“Trade secret” means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or suppliers, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

In *Computer Assocs. Intern v Altai*, 918 S.W.2d 453, 455 (Tex. 1994), the Supreme Court defined a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know or use it.” In *In re Cont’l Gen. Tire*, 979

S.W.2d 609 (Tex. 1998), the Supreme Court held that “when a party resisting discovery establishes that the requested information is a trade secret under Rule 507, the burden shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claim or defense.” While *Continental Tire* was a discovery case where one party to a lawsuit was seeking the trade secrets of the opposing party, its principles apply equally to a situation where the opposing party who is attempting to force public disclosure of the trade secret in litigation already has the trade secrets and the issue is how to protect those trade secrets from becoming public knowledge in the conduct of the law suit.

23. Human Trafficking. Texas Civil Practice and Remedies Code § 98.007 permits a claimant in a trafficking suit to use a confidential identity and requires a court use a confidential identity and maintain records in a confidential manner. Section 98.007 also prohibits the Court from amending or adopting rules in conflict with that section. What happens if an attorney or pro se litigant files a pleading in violation of Section 98.007? Can it be sealed without complying with Rule 76a? HB 2669 from the recent legislative session amended Code of Criminal Procedure Art. 44.2811 and reenacted and amended Art. 45.0217 to make confidential a child’s criminal records related to certain misdemeanor offenses. The Subcommittee on Legislative Mandates draft memo of June 16, 2021, discusses the mandates in detail. [Tab C–p. 785] The interface between these statutory privacy rights and Rule 76a need to be explored.

24. Procedure Versus Standards For Sealing. One of the most powerful and in certain circumstances the most potentially harmful aspect of Rule 76a is the promulgation of a uniform standard for sealing court records that applies to all types of information regardless of the subject matter or context. The distinction between procedure and standards was addressed by Austin attorney Jett Hanna in his letter of November 30, 1989 to Ad Hoc Committee Co-Chair Chuck Herring. [Tab C-- pp. 180-83] Hanna argued that setting standards for sealing in a way that impaired the substantive rights of parties took the Supreme Court into an area reserved to the Legislature. Hanna suggested

that a Rule 76a order sealing records require findings of fact “demonstrating that sealing is permitted under applicable constitutional, statutory, and common law, that sealing the court record will adequately protect any interest served by sealing, and that no less restrictive alternative can adequately protect the interest served by sealing.” Hanna concluded: “If the Supreme Court decides once and for all the standard right now without having hard cases in front of it, it may be locking into a system which would trample on the substantive rights of parties.” There is a strong argument that the uniform standard for sealing court records established by Rule 76a is not appropriate for private information of individuals who willingly or unwillingly end up in litigation.

25. Constitutional Right to Privacy. There is the issue of a party using filings in a pending lawsuit to bring about public disclosure of information that falls within the constitutionally-recognized zone of privacy. Every individual has a privacy interest in avoiding the disclosure of certain personal matters under both the United States and Texas Constitutions. See *Nguyen v. Dallas Morning News, L.P.*, No. 02-06-00298-CV, 2008 WL 2511183, at *14 (Tex. App.--Fort Worth June 19, 2008, no pet.) (mem. op). While the Texas Constitution, which was adopted in 1876, does not separately enumerate a right to privacy, the Supreme Court of Texas has ruled that the Texas Constitution protects personal privacy from unreasonable intrusion. See *Tex. State Emps. Union v. Tex. Dep’t of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987). Thus courts have ruled that certain personal matters fall within a constitutionally protected zone of privacy, including matters related to marital relationships, procreation, contraception, family relationships, child rearing and education, and medical records. *In Re Srivastava*, No. 05-17-00998-CV, 2018 WL 833376, at *4 (Tex. App.--Dallas February 12, 2018, orig. proceeding) (mem. op.); *Nguyen v. Dallas Morning News, L.P.*, No. 02-06-00298-CV, 2008 WL 2511183, at *4 (Tex. App.--Fort Worth June 19, 2008, no pet.) (mem. op). “Information contained in employment records may, under some circumstances, be included within this protected zone.” *Nguyen v. Dallas Morning News, L.P.*, at *4. There is a strong argument that where information in a court record falls within the Constitutional zone of privacy, the presumption of openness in Rule 76a should be reversed.

26. Tortious Public Disclosure of Embarrassing Private Facts. There is also the issue of one party using filings in a pending lawsuit to bring about public disclosure of embarrassing private facts of the adverse party, private facts that if made public outside of documents filed in a law suit could give rise to liability for invasion or privacy and subject the party making the information public to liability for actual damages and exemplary damages. The Texas Supreme Court said in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 684 (Tex. 1976): “Once

information is made a matter of public record, the protection accorded freedom of speech and press by the First Amendment may prohibit recovery for injuries caused by any further disclosure of and publicity given to such information, at least if the information is at all newsworthy.” There is a strong argument that where information in a court record is embarrassing private information protected by tort law, that the presumption of openness in Rule 76a should be reversed.

27. Protection of Contractual Right to Confidentiality. It is argued that confidentiality agreements under Rule 11 are subject to the requirements of Rule 76a. That assertion should be examined. What if the confidentiality agreement predates the lawsuit, such as between an employer and an employee? Does the employer’s contractual right to confidentiality limit the employee’s right to make the employer’s information public by filing confidential information with the clerk of the court or marking it as an exhibit or testifying to it during hearings or trial? Where one party has confidential or privileged information that was provided conditioned upon a pre-law suit confidentiality agreement, and then uses a subsequent law suit as a vehicle to make that information public, by attaching confidential or privileged documents to pleadings, motions and responses, or by marking and offering confidential or privileged information as exhibits during hearings, the other party’s contractual right to confidentiality is defeated by the unilateral act of one contracting party, and the other contracting party’s reliance interest is subverted. Once such information is filed, under current TRCP 76a the document become presumptively open to the public and there is an elevated burden of proof to seal those documents. If one party is seeking privileged or confidential information from the adversary through the discovery process, the trial court can protect privileged or confidential information through in camera review, and then denying discovery of the document. However, where one party already has privileged or confidential information as a result of pre-law suit dealings, TRCP 76a gives one party the unilateral power to make the other party’s contractually-privileged or confidential information a court record, which triggers the adverse presumption and elevated burden of proof under Rule 76a.

Hypo 1: Party 1 and Party 2 are strangers. As a result of certain events, Party 2 sues Party 1 for tortious damages. Party 2 requests the production of documents from Party 1. Party 1 withholds the information requested, asserting privileges under the Texas Rules of Evidence and under Federal law, and asserting that some of the information is subject to confidentiality agreements between Party 1 and third parties who are not parties to the lawsuit. To stop dissemination of the information, Party 1 need only show that the information is privileged or subject to a confidentiality agreement. There is no presumption that the

information should be produced to the opposing party, and no weighing of the effect of non-disclosure on the public health or safety.

Hypo 2: Party 1 employs Party 2, and as a condition to employment Party 2 signed a confidentiality agreement. Eventually Party 2 is fired and files an employment discrimination suit against Party 1. Party 2 takes confidential information that is not a trade secret but is embarrassing and potentially could harm the business and attaches it as an exhibit to a response to a motion for summary judgment. Party 1 moves to seal the filing. Because Party 2 filed the documents with the clerk of the court, the confidential information becomes a court record under TRCP 76a, and therefore is presumed to be open, and to seal it Party 1 must prove a specific, serious, and substantial interest that clearly outweighs the presumption of openness and any probable adverse effect that sealing will have upon the general public health or safety.

If a party or third-party has a pre-suit contract right to keep information confidential, that contract right should be respected, even if the two contracting parties end up in a law suit against each other.

The issue has constitutional dimensions. Tex. Const. art. I, § 16, says that “No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.” *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249 (1887); *Zaatari v. City of Austin*, 615 S.W.3d 172, 188 (Tex. App.-Austin 2019, pet. denied); *Ward v. City of San Antonio*, 560 S.W.2d 163, 165 (Tex. App.-San Antonio 1978, writ denied) (“The contract between the parties to this suit prior to September 1, 1975, was for the payment of only 90 days of accumulated sick leave and an effort to apply the provision of the September 1, 1975 amendment to accumulated sick leave in excess of 90 days earned prior to September 1, 1975, would impair the obligation of the contract as it then existed.”). The U.S. Constitution’s Contract Clause, Art. I, § 10, cl. 1, says in part: “No State shall ... pass any ... Law impairing the Obligation of Contracts....” There is a strong argument that where information is made confidential by a pre-lawsuit confidentiality agreement the presumption of openness under TRCP 76a should be reversed.

28. Retroactivity. The Texas Constitution’s prohibition against retroactive laws has two fundamental objectives: “[I]t protects the people’s reasonable, settled expectations”-i.e., “the rules should not change after the game has been played”-and it “protects against abuses of legislative power.” *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-266, 114 S.Ct.

1483, 128 L.Ed.2d 229 (1994)).When originally adopted, TRCP 76a.9 made the rule change prospective only. This avoided an issue of a prohibited retroactive law. In *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971), Justice Pope wrote: “[t]he Texas Constitution, unlike the Federal Constitution, has a specific prohibition against retroactive laws. The provision in the State Constitution broadly protects rights, although they may not be rights in property. A right has been defined to be “a well-founded claim, and a well-founded claim means nothing more nor less than a claim recognized or secured by law.” (Citing *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249 (1887)). The Texas Supreme Court has defined a retroactive law as “a law that acts on things which are past.” *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). “It is well settled in [Texas] that laws may not operate retroactively to deprive or impair vested substantive rights acquired under existing laws, or create new obligations, impose new duties, or adopt new disabilities in respect to transactions or considerations past.” *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981). Any change to TRCP 76a should be made effective prospectively only, to avoid retroactive law and due process of law concerns. This would require Subsection 9 to be rewritten to preserve the prospective-only effect of the original rule and also to provide that the new amendments operate prospectively only.

29. Tax Returns are Privileged. In *Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959), the Supreme Court held that Federal income tax returns are privileged from discovery except for portions of the returns that were relevant and material to the issues in the suit. The remainder of the tax returns was held to be privileged and not discoverable.

In *Maresca v. Marks*, 362 S.W.2d 299, 301 (Tex.1962), the Supreme Court wrote:

Subjecting federal income tax returns of our citizens to discovery is sustainable only because the pursuit of justice between litigants outweighs protection of their privacy. But sacrifice of the latter should be kept at a minimum, and this requires scrupulous limitation of discovery to information furthering justice between the parties which, in turn, can only be information of relevancy and materiality to the matters in controversy.

While the question in *Maresca v. Marks* was the extent to which Federal income tax returns were discoverable, the Supreme Court has recognized that Federal income tax returns are privileged, and are discoverable only as to the portions that are relevant and material to the law suit. However, the privilege applied to disinterested members of the public has no relevancy exception.

In *Tilton v. Marshall*, 925 S.W.2d 672, 683 (Tex. 1996), the Supreme Court considered privacy surrounding “tithing records” of an evangelist minister. The Court said: “Here, the burden imposed by the discovery order derives from the fact that the documents ordered disclosed are not only irrelevant but also highly sensitive and personal. In many respects, this request resembles those for tax returns.” The Supreme Court characterized tax returns as “highly sensitive” and “personal.” This reflects the public policy in this state that Federal income tax returns are confidential, privileged, and not subject to discovery (absent limited exceptions) much less subject to disclosure to the public at large through the artifice of attaching Federal tax returns to a petition and filing it with a court. The Court went on to say: “We are similarly reluctant to allow unnecessary disclosure of a litigant’s tithing records, which contain information of a highly personal and private nature and which in many cases may be a subset of a person’s tax records.” Id at 683. Here the Supreme Court reaffirms the “highly personal and private nature” of Federal income tax returns. The Court went on:

As we held regarding the forced production of tax records, where the irrelevant portions of which were not safeguarded from discovery, “[a] litigant so subjected to an invasion of privacy has a clear legal right to an extraordinary remedy since there can be no relief on appeal; privacy once broken by the inspection and copying ... by an adversary cannot be retrieved.” *Maresca*, 362 S.W.2d at 301.

There is a strong argument that tax returns and other highly sensitive personal information constituting court records should reverse the burden of proof under Rule 76a.

30. Trial Exhibits and Trial Aids. It unclear from Rule 76a itself whether and how the rule applies to exhibits that are marked and offered during a hearing or trial, whether admitted into evidence or not. Court records are defined as “all documents of any nature filed in connection with any matter before any civil court” (subject to exceptions). Does having a court reporter mark an exhibit constitute filing? Does showing an exhibit to a witness constitute filing? Does offering an exhibit into evidence constitute filing? If an offer is rejected, is the exhibit filed? If the exhibit is admitted into evidence, is it filed? See *Dallas Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655, 657 (Tex. 1992) (orig. proceeding), in which some of the Justices who issued Opinions assumed that TRCP 76a applied to exhibits. If a lawyer uses a Power Point Slide Show during voir dire, opening argument, during the evidence phase, or in closing argument, was the PPT filed and thus become a court record?

31. Depositions. Are unfiled depositions “court records”? Are exhibits marked during depositions “court records”? What if the exhibit is not marked but it is shown to a

deponent and is discussed? TRCP 192.6(b)(4) says that the results of discovery can be sealed “subject to the provisions of Rule 76a.”

32. Closing the Proceeding. What is the effect, if any, of Rule 76a on closing courtrooms to public view for certain testimony? The present Rule 76a centers on the concept of “court records.” Should we rewrite the rule to focus in “information” and not just “records”? Should we have a separate Rule 76b, on closing courtrooms in civil matters, that clarifies the somewhat confusing case law on open courts in civil cases?

33. Court Reporter’s Record. Is the Court Reporter’s record of a hearing or trial a court record under TRCP 76a?

34. Intervenor’s Role. “Nonparties can intervene as a matter of right for the limited purpose of participating in the proceedings” TRCP 76a.4. Can an intervenor send written discovery relating to the scope of privilege, confidentiality, and sealing under Rule 76a? Can an intervenor issue a notice to take or attend depositions of witnesses and expert witnesses who are expected to testify at a Rule 76a hearing on the subject of the scope and enforceability of a trade secret or pre- or post-filing confidentiality agreement? Can an intervenor cross-examine witnesses at the Rule 76a hearing, and can it call its own witnesses?

35. Type of Appellate Review. Is it time to reconsider whether appellate review of a Rule 76a sealing order should be by interlocutory appeal, appeal of a severed final judgment, or mandamus?

36. Sealing in Appellate Courts. Since TRCP 76a is a trial court rule, it does not apply to appellate courts. See *Envtl. Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 636 (Tex. App.--Houston [14th Dist.] 2009, pet. denied) (“On its face, Texas Rule of Civil Procedure 76a, entitled ‘Sealing Court Records,’ does not give appellate courts the authority to find the necessary facts and to determine motions to seal on appeal, and the parties have not cited any statute, rule, or case stating that appellate courts have this authority”). In *Navasota Res., L.P. v. First Source Tex., Inc.*, 206 S.W.3d 791, 794 (Tex. App.--Waco 2006, no pet.) (Gray, C.J., dissenting), our esteemed committee-member Chief Justice Tom Gray argued that the principles of TRCP 76a should apply to appellate courts. There is also the question about how to treat appellate briefing that refers to information sealed by the trial court. See *R.V.K. v. L.L.K.*, 103 S.W.3d 612, 614 (Tex. App.--San Antonio 2003, no pet.) (appellate court ordered clerk to seal parties’ briefs detailing portions of the appellate record that were “sealed” at the trial). What do we do about sealing records in original proceedings filed in the appellate courts? Can a party

file a motion to seal? Can “interventors” in the appeal file a motion to unseal?

37. Federal Practice. Is there something about the Federal procedure for sealing court records that we should adopt into Texas practice?

Respectfully submitted,

Richard R. Orsinger
Chair of the Rules 16-165a Subcommittee

End Notes

1. The Ad Hoc Sealing Records Subcommittee was chaired by Lefty Morris and Chuck Herring, and as members had Judge Solomon Casseb, Jr.; Ken Fuller; Justice David Peeples; Luther Soules III; Chip Babcock; Bill Boyce; David Chamberlain; Justice Lloyd Doggett; David Donaldson, Jr.; Representative Orlando Garcia (sponsor of the bill enacting the Government Code provision requiring the Supreme Court to adopt a rule on sealing); Senator Bob Glasgow; Jett Hanna; John Hildreth; Tommy Jacks; Sharon Jayson; Tom Leatherbury; John McElhaney; Larry McGinnis; David L. Perry; Gale R. Peterson; Anita Rodeheaver (Harris County Clerk); Professor Ed Sherman; Tom Smith; David Swindle (Dallas Morning News); Henry Voegtle (asst. D.A. Dallas).
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf> [Tab C - pp. 481-87].
2. The full Supreme Court Advisory Committee consisted of 33 members, plus four judges, and the chair of the State Bar of Texas's Rules of Evidence Committee.
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf> [Tab C - p. 532].
3. Minutes of the Supreme Court Advisory Committee, February 9, 1990
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/minutes/sc02091990.pdf>.
4. Supreme Court Advisory Committee meeting February 16, 1990 (morning)
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/transcripts/sc02161990a.pdf>
5. Minutes of the Supreme Court Advisory Committee February 1, 1990
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/minutes/sc02161990.pdf> pdf p. 3.
6. Luther Soules' letter of March 1, 1990 [Tab C - pp. 533-36].
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf> pdf p. 527-29.
7. *New Rule Proposed Concerning Sealing Court Records* Texas Bar Journal 338 (April 1990).
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1990/supplementary/sc02091990.pdf> [Tab C - pp. 488-98].
8. Concurring and dissenting statement by Justice Gonzalez and Justice Hecht to the adoption of Rule 76a
<https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/90/04-24-1990_002.pdf> [Tab C - p 499 & 646].

9. Texas Judicial Council, *Public Access to Judicial Records*
<https://www.senate.texas.gov/cmtes/75/c702/c702_IC9ApxC.pdf>

10. Texas Judicial Council proposed rule
<https://senate.texas.gov/cmtes/75/c702/c702_IC9ApxC-A.pdf> p. 3.