To: Richard Orsinger, Chair of Subcommittee considering revisions to Rule 76a
From: Stephen Yelenosky
Re: Suggested revisions and memo
Date: December 7, 2021

Thank you for considering my input.

The Court's referral to the SCAC*: "The Supreme Court requests the Advisory Committee to study and make recommendations on the following matters. 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."*

I. "Time consuming, expensive, discourage or prevent compliance"

a. Notice. The requirements of the existing rule are cumbersome as well as completely ineffective in notifying the public of a motion to seal and their opportunity to speak to it. The rule can be made simple for both movants and the court as well as effective for the public by replacing all the requirements in this section with one requirement: that the movant post the motion on a state-sponsored website that can easily be reviewed by any member of the public and the media. Only the media is likely to have any interest in reviewing postings on any routine basis, but presumably the media would report any motions to seal that concern public health or safety or other matters of possible interest to the public.

b. Hearing. No one, other than the parties, appears at the mandatory hearings except in high-profile cases, which puts a pointless burden on counsel and the court. The proposed revision is to couple the notice with an opportunity for anyone *to request* a public hearing. Unless there is a request, there will be no public hearing.

c. Application to Alleged Trade Secrets. Perhaps the most frequent motions under 76a as well as complaints about it arise from the application of the rule to alleged trade secrets. The Texas Supreme Court held, just this year, in *HouseCanary*, 622 S.W.3d 254 (Tex. 2021), that the presumption of openness stated in Rule 76a does *not* apply to trade secrets but the procedural requirements of Rule 76a *do* apply. Chief Justice Hecht and Justice Bland concurred in the result - a remand to the trial court - but disagreed that Rule 76a procedures apply to trade secrets.

I suggest that the rule be revised to address the applicability of Rule 76a to trade secrets. In the attached revision, the judge would decide whether the motion seeks to seal a trade secret, prior to any public notice or hearing. If the judge finds that it does, the Rule 76a presumption and procedures for notice and public hearing do not apply to the trade secret. This very significant exception could be used by the movant and non-movant as a convenient way to avoid the burdens of public notice and hearing by presented an agreed motion to the court that seeks to seal information that is likely *not* a trade secret. To prevent that circumvention of Rule 76a, the judge court must examine the alleged trade secret and determine whether it is in fact a trade secret regardless of whether the motion to seal information as a trade secret is agreed or unopposed. If the judge identifies a trade secret, the motion to seal exits the Rule 76a process, and the determination of whether to seal it remains with the judge alone. The revision does not attempt to encapsulate the presumption or other statutory and common law regarding trade secrets.

II. "Significantly different from federal court practice"

The federal rules do not include any reference to openness, any requirement of notice to the public, or any standard for determining whether a court record should be sealed. Conforming the state rules to the federal rules would be an abandonment of the Rule 76a's principle of openness of court records. The revisions suggested, if adopted, could significantly ease the burden placed on litigants and courts without abandoning the principle of openness.

An argument that the state rules need be no more demanding of openness does not take into account differences between the federal judiciary and the state judiciary. One difference is that federal trial judges write published opinions that are routinely read by many and might reveal, explicitly or implicitly, at least the existence of sealed information. State trial judges do not publish opinions and most often write orders with little more than decretal language. In addition, how judges are chosen and retained, or not, differs in the two judicial systems. What is acceptable in the federal courts for judges appointed by the president with lifetime tenures subject only to impeachment might not be acceptable in state courts where judges are elected and the openness of court records is a legitimate issue for voters to consider.

III. 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."

a. Definitions: In the proposed revision, both "sealing" and "redacting" are defined and it is explained that prohibiting the former prohibits the latter. This is necessary because some use them interchangeably, which often leads to confusion.

b. Court Orders: The current rule states that "no court order or opinion issued in the adjudication of a case may be sealed." There are statutes that require an order, such as an order of adoption, to be sealed, and others that require the identity of a person to be identified by pseudonym. However, there are orders not subject to any statutory exception that are self-defeating if certain words are not kept confidential. They include orders that require the trade secret itself be stated in full and orders granting a name-change to protect an applicant from threatened violence. The suggestion is that the rule permit that information, not the entire order, to be sealed by elision.

c. Court Records: The proposed revision adds to the definition of court record any documents filed with the court reporter or provided to the judge. This has generally been understood though unsaid. The Supreme Court has held that documents filed with the court reporter are court records. It does not seem to have yet been asked to speak to providing them to the judge. It need be said explicitly because some, based on court experience, do not understand that these practices circumvent Rule 76a.

d. Presumption and Requirements to Seal: The proposed revision renames and relocates the "standard" to this new section. The language is taken from the rule *verbatim* with one change that specifies the "least restrictive means" are to seal only what is necessary to adequately and effectively protect the specific interest asserted. A court record is defined in the rule as "a document," but eliding just a page, paragraph, sentence, word or number is the least restrictive if elision can protect the specific interest.