

DRAFT REVISION OF RULE 76a FOR DISCUSSION

THIS IS NOT A COMPUTER-GENERATED REDLINE. THIS MANUAL REDLINE DOES NOT INDICATE THAT A SENTENCE OR A PARAGRAPH HAS BEEN MOVED OR THE SYNTAX HAS BEEN CHANGED.

1. Definitions. “Sealing” is the official act of a judge ordering that a court record be made unavailable, in whole or in part, to the public. “Redacting” is a physical act of any person making something illegible, whether by deletion, masking, or otherwise. Where, in this rule, sealing of a court record is prohibited, no judge may order it and no person may redact it.

2. Court Orders. No court order or opinion issued in the adjudication of a case may be sealed in its entirety unless required or permitted by law. An order may be sealed in part only to protect a trade secret, to protect the identity of a person when required by law, or to protect a person who has been granted a name-change order because of a threat of violence.

3. Court Records. For purposes of this rule, “court records” means all documents of any nature filed with the court clerk, ~~the court reporter, or provided to the judge,~~ in connection with any matter before any civil court, except:

- (a) documents ~~filed with a court~~ **provided to a judge *in camera***, solely for the purpose of a ruling on whether **a document is a “court record,” is privileged, or** is discoverable;
- (b) documents in court files to which access is otherwise restricted by law;
- (c) documents filed in an action originally arising under the Family Code.
- (d) “sensitive information” as defined by TRCP 21(c)(a).**

In addition “court records” includes settlement agreements, not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information 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, and 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.

Court records may not be removed from court files except as permitted by statute or rule. Court records may be sealed only by written order upon a party's written motion.

3. Exception for Trade Secrets. Any party may move to seal information that the party alleges is a trade secret. The judge may temporarily seal the information by order, which expires after [___] days. The judge will conduct any hearing in a manner that protects the confidentiality of the alleged trade secret. Regardless of whether the motion is agreed, unopposed, or opposed, the judge will review the information *in camera* and determine whether the information is, in whole or in part, a trade secret. If the judge determines that all or part of the information is a trade secret, the remaining paragraphs of this rule do not apply to that trade secret. Without further proceedings under this rule the judge will determine, pursuant to applicable statutory and common law, whether to issue a sealing order that protects the trade secret. The order may seal only what is necessary to adequately and effectively protect the specific interest asserted. Any other information may be sealed only pursuant to all the requirements of this rule.

4. Presumption and Requirements to Seal: Court records, ~~as defined in this rule~~ other than information that the court has sealed as a trade secret, are presumed to be open to the general public, and may ~~not~~ be sealed ~~only upon~~ unless there is a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness, and

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) ~~no less restrictive means than sealing records will~~ the information to be sealed is only what is necessary to adequately and effectively protect the specific interest asserted.

The showing must be made by the movant whether or not the motion is agreed or unopposed.

5. Temporary Sealing Order. The judge may issue a temporary order sealing any part of a court record only upon a showing, by affidavit, a compelling need from specific facts that ~~immediate~~ and irreparable injury will result to a specific interest of the applicant before notice can be posted

and any hearing held and a showing that the movant is likely to meet the “Presumption and Requirements” of paragraph 4 at final hearing. A temporary order expires [___] and may not be extended.

6. Motion for Final Sealing Order, Posting. ~~Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.~~ A Motion for a Final Sealing Order must be in a document separate from any other, and the _____ must post the motion on the public site online established for that purpose. Any person may request a public hearing within [___] days from the date the motion is posted, and is not required to intervene to do so. If any person requests a public hearing, the court will set it with at least three days of notice to the requestor and the parties and the public by posting. The hearing must occur no sooner than [___] days and no later than [___] days from the date of the request.

7. Public Hearing and Decision. ~~A hearing, open to the public, on a motion 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. A “public hearing” means a hearing held in open court pursuant to a request from a member of the public through the online public site. Any party may participate in the hearing. Non-parties may intervene in the hearing as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. At the hearing members of the public may speak at court’s discretion. However, if no party opposes the motion to seal, at least one member of the public who does oppose it may speak for a period of time determined at the court’s discretion. The court may inspect court~~

records *in camera* but may not close the courtroom. The court will issue and post its order on the public site within [___] days of the hearing.

8. Order on a Motion to Seal Final Sealing Order. ~~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. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings. 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; 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 other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.~~ **If granted in whole or in part, a sealing order must state:** the specific reasons for finding **that the motion should be granted in whole or in part and** the specific portions of court records to be sealed. An order granting or denying the motion is a final, appealable judgment. For clarity, it should be in a document of its own but regardless it is deemed severed, final, and appealable.

9. Denial by Operation of Law, and Stay.

If a party has moved for a Final Sealing Order and the judge has not filed a Final Sealing Order after [___] days, the motion is denied by operation of law and is a final and appealable judgment. If the court denies the motion by written order or it is denied by operation of law, the order is automatically stayed by the filing of an appeal subject to further order of the appellate court.

10. Intervention and Appeal. As a matter of right any person may intervene. An 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. ~~The appellate court may abate~~

~~the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.~~

11. Continuing Jurisdiction. ~~Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records.~~ A court that issues a sealing order retains continuing jurisdiction ~~to enforce, alter, or vacate that order.~~ An order sealing or unsealing court records shall not be reconsidered **unless the movant first on the motion of any party or intervenor who had actual notice of the hearing preceding the order without first showing shows** changed circumstances materially affecting the order. **The circumstances may include but are not limited to the passage of time or other reason that diminishes or increases the weight of a factor in paragraph 4. Such The changed** circumstances ~~need not~~ **do not need to** be related to the case in which the order was issued. ~~However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records.~~ **To prevail, a movant seeking to seal a court record that was previously filed unsealed, must comply will all requirements and meet all applicable burdens of this rule. To prevail, a movant seeking to unseal a record has the burden of showing a probable adverse effect upon the general public health or safety clearly outweighs any specific, serious, and substantial interest in keeping the record sealed.**

12. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law, This rule **as amended** does not apply to any court records sealed in an action in which a final judgment was ~~entered~~ **signed** before the effective date **of this rule as amended.** **Those court records are governed by the then existing law.** This rule applies to cases already pending on its effective date only with regard to:**(a)** all court records filed or exchanged after the effective date;**(b)** any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Comment to 2. Some statutes require the use of pseudonyms instead of sealing. "Or provided to a judge" has been added to prevent circumvention of this rule. If a court record is shown to a judge or jury unredacted, it must be filed unredacted unless it has been sealed pursuant to the

requirements of this rule. Likewise, if a demonstrative is shown to the court but not filed, the evidence necessary to support consideration of the demonstrative must be of record.

Comment to 3 and 4(b). This may mean only a page of a document, words of a page, or numbers.