IN THE SUPREME COURT OF TEXAS

AMENDMENTS TO THE TEXAS RULES OF CIVIL PROCEDURE, TEXAS RULES OF APPELLATE PROCEDURE, AND TEXAS RULES OF CIVIL EVIDENCE

ORDERED:

1. That Texas Rules of Civil Procedure 3a, 4, 5, 10, 13, 18a, 18b, 21, 21a, 26, 45, 47, 57, 60, 63, 67, 87, 106, 107, 113, 120a, 166, 166a, 166b, 167, 167a, 168, 169, 183, 200, 201, 206, 208, 215, 216, 223, 237a, 245, 248, 269, 294, 296, 297, 298, 299, 301, 305, 306c, 308a, 534, 536, 571, 687, 749a, 749c, 751, 769, 771, 781, and 792 are amended as set forth below.

2. That Texas Rules of Civil Procedure 72, 73, 184, 184a, and 260 are repealed.

3. That Texas Rules of Civil Procedure 18c, 21b, 76a, 299a, and 536a are added as set forth below.

4. That Texas Rules of Appellate Procedure 1, 3, 4, 5, 9, 12, 15a, 17, 20, 40, 41, 43, 46, 47, 49, 51, 52, 53, 54, 56, 57, 59, 72, 74, 79, 90, 91, 100, 130, 131, 132, 133, 134, 135, 136, 140, 160, 170, 172, 181, 182, 190, 202, and 210, and certain captions and an appendix, are amended as set forth below.

5. That Texas Rule of Appellate Procedure 21 is added as set forth below.

6. That Texas Rule of Civil Evidence 703, and the comment to Rule 604, are amended as set forth below.

7. That these changes in the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence shall take effect September 1, 1990.

8. That the comments appended to these changes are incomplete, that they are included only for the convenience of the bench and bar, and that they are not a part of the rules.

9. That the Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

10. That the Clerk shall file an original of this Order in the minutes of the Court to be preserved as a permanent record of the Court.

SIGNED AND ENTERED in duplicate originals this ~~16th~~ 24th day of April, 1990.

Thomas R. Phillips, Chief Justice

Franklin S. Spears, Justice

C. L. Ray, Justice

Raul A. Gonzalez

Oscar H. Mauzy

Eugene A. Cook

Jack Hightower

Nathan L. Hecht

Lloyd Doggett

CONCURRING AND DISSENTING STATEMENT BY JUSTICE GONZALEZ AND JUSTICE HECHT

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.