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School *of* Law™

September 1, 2022

VIA U.S. MAIL
The Honorable Nathan L. Hecht
Chief Justice, Supreme Court of Texas
Post Office Box 12248
Austin, TX 78711

VIA ELECTRONIC MAIL
Charles L. (Chip) Babcock
Chairman, Supreme Court Advisory Committee
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To the Honorable Court and Committee:

I currently serve as the Charles P. Bubany Endowed Professor of Law at Texas Tech University. I write to comment on Paragraph 3(a) of the August 16, 2022, draft changes to Texas Rule of Civil Procedure 76a (enclosed), presented at a recent Supreme Court Advisory Committee meeting. As drafted, Paragraph 3(a) would presumptively seal a wide swath of court records, including all information made secret by agreement or subject to a protective order.[1] It is my understanding that the Court and Committee are currently considering this provision. While there are several parts of the August draft that merit discussion, I have confined my comments to Paragraph 3(a). It should be rejected for at least five reasons.

First, Paragraph 3(a) creates a broad presumption in favor of sealing that conflicts with the longstanding federal presumption of public access to court records.[2] The United States Supreme

[1] Paragraph 3(a) also addresses trade secrets. I recognize the Court's holding in *HouseCanary, Inc. v. Title Source, Inc.* harmonizing Rule 76a with the Texas Uniform Trade Secrets Act's presumption in favor of sealing. *See generally HouseCanary, Inc. v. Title Source, Inc.*, 622 S.W.3d 254 (Tex. 2021). I respect SCAC's efforts to conform Rule 76a to the Court's holding. But Paragraph 3(a)(1) goes much further. Indeed, the draft language would presumptively seal all trade secrets *and* "other proprietary information." Moreover, the TUTSA presumption is confined to misappropriation actions. *See id.* at 260 ("Section 134A.006 of TUTSA provides that trial courts hearing misappropriation actions shall preserve the secrecy of an alleged trade secret by reasonable means.") (internal quotations omitted). Paragraph 3(a)(1), on the other hand, would apparently apply in all civil cases. Moreover, TUTSA's presumptive sealing scheme may itself be subject to a future First Amendment challenge, though the outcome of such a challenge is uncertain.

[2] *See, e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98 (1978) (recognizing the common law right of public access); *Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (Willett, J.) ("The presumption of openness is Law 101: The public's right of access to judicial records is a fundamental element of the rule of law."); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (recognizing the right of public access and observing that "this right is said to predate the Constitution"); *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) ("The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the

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Court and federal circuits "recognize a general right to inspect and copy public records and documents."[3] While this right is not absolute,[4] "the working presumption is that judicial records should not be sealed."[5] A party seeking to seal court records must establish compelling reasons sufficient to overcome the public's access rights.[6] Paragraph 3(a) would reverse this framework and impermissibly shift the burden to the person seeking access. This approach would put Texas in conflict with virtually every jurisdiction, including Texas federal courts hearing Texas state-law claims.[7]

Second, a presumption in favor of sealing may violate the First Amendment. Courts generally agree that the presumption of openness emanates from the common law, or the First Amendment, or both.[8] While the outcome of a First Amendment challenge to Paragraph 3(a)'s sub-parts is admittedly uncertain, the current language raises federal issues and would subject Texas state-court litigants to federal proceedings.

Third, Paragraph 3(a) conflates the standard for issuing protective orders with the high standard for sealing court records.[9] Perhaps the most troubling aspect of Paragraph 3(a) is that it would presumptively seal all "information subject to a confidentiality agreement or protective order." As the Committee and Court are aware, protective orders are routinely entered on a minimal showing of good cause or by stipulation. Bootstrapping party agreements and protective orders into sealing orders directly contravenes the approach recently taken by the Fifth Circuit:

> At the *discovery* stage, when parties are exchanging information, a stipulated protective order under Rule 26(c) may well be proper. Party-agreed secrecy has its place—for example, honoring legitimate privacy interests and facilitating the efficient exchange of information. But at the *adjudicative* stage, when materials

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public to have confidence in the administration of justice.") (internal quotations omitted); *cf. also HouseCanary*, 622 S.W.3d at 263 ("The public's right of access to judicial proceedings is a fundamental element of the rule of law."). *See generally* Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211, 254–60 (2021).

[3] *Nixon*, 435 U.S. at 597.

[4] *See, e.g.*, *Dall. Morning News v. Fifth Ct. of Appeals*, 842 S.W.2d 655, 659 (Tex. 1992) (opinion accompanying order overruling motion for leave to file pet. for writ of mand. and motion for temporary relief) (Gonzalez, J.) (rejecting "the view that the press and the public have an absolute right to immediate physical access to all exhibits introduced into evidence and that this right is paramount over all other rights").

[5] *Le*, 990 F.3d at 419.

[6] *See, e.g.*, *id.* at 421 ("[T]he presumption of openness . . . can be rebutted only by compelling countervailing interests favoring nondisclosure.").

[7] *See, e.g.*, *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 521 (5th Cir. 2022) ("To decide whether something should be sealed, the court must undertake a document-by-document, line-by-line balancing of the public's common law right of access against the interests favoring nondisclosure.") (internal quotations omitted).

[8] *See, e.g.*, *Bernstein*, 814 F.3d at 141 ("The presumption of access to judicial records is secured by two independent sources: the First Amendment and the common law.") (internal quotations omitted); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004) ("The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment."). *Cf. HouseCanary*, 622 S.W.3d at 263 ("[Rule 76a's] procedures serve our fundamental commitment to open courts, which is rooted in the common law and the First Amendment.") (internal quotations omitted).

[9] *See, e.g.*, *Le*, 990 F.3d at 419 (fretting about "the growing practice of parties agreeing to private discovery and presuming that whatever satisfies the lenient protective-order standard will necessarily satisfy the stringent sealing-order standard").

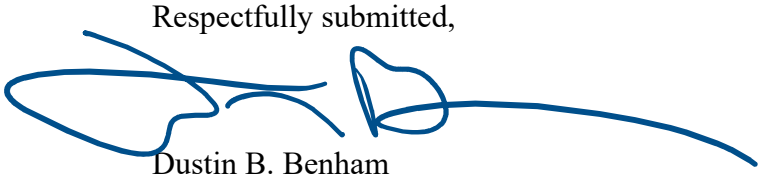
> enter the court record, the standard for shielding records from public view is far more arduous.[10]

Courts distinguish between protective orders and sealing orders for good reason—filed materials often deal with the merits of a case. And the public and press have a special stake in observing merits disputes to ensure that courts execute their duties with competence and integrity.[11]

Fourth, Paragraph 3(a) would cede control of the sealing process to the parties, contrary to the wisdom of federal courts that have roundly condemned overreliance on agreed sealing.[12] Understandably, litigants want privacy. But civil lawsuits are brought in public courts. The public is, as a practical matter, absent from most proceedings. This state of affairs ordinarily leaves the judge as the only steward of the public's access rights. As such, judges are obligated to closely consider sealing requests and reject unwarranted agreed sealing.[13]

Fifth, the federal Advisory Committee on Civil Rules is considering proposals to amend the Federal Rules of Civil Procedure and create a uniform national sealing procedure.[14] One of the most prominent proposals recognizes the presumption of public access and directly conflicts with Paragraph 3(a).[15] While the ultimate timeline and substance of the federal process are uncertain, prudence would counsel that Texas take additional time to observe and gain insight from federal rulemaking on this issue.

Respectfully submitted,



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[10] *See, e.g.*, *id.* at 420 (emphasis in original); *see also June Med. Servs.*, 22 F.4th at 521 ("The district court here also used the wrong legal standard for sealing documents. Different legal standards govern protective orders and sealing orders.").

[11] *See, e.g.*, *June Med. Servs.*, 22 F.4th at 519 ("This right serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.") (internal quotations omitted).

[12] *See, e.g.*, *Brown v. Maxwell*, 929 F.3d 41, 46 (2d Cir. 2019) (unsealing summary judgment record and observing that district court "[s]ealing [o]rder that effectively ceded control of the sealing process to the parties themselves").

[13] *See, e.g.*, *June Med. Servs.*, 22 F.4th at 521 ("The district court also erred by failing to evaluate all of the documents individually. It is the solemn duty of the judge to scrupulously examine each document sought to be sealed. It is not easy, but it is fundamental.") (internal citations omitted).

[14] *See generally Advisory Committee on Civil Rules*, (Oct. 5, 2021), https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf.

[15] Letter from Eugene Volokh, Gary T. Schwartz Professor of Law, UCLA Sch. of L., to Members of the Advisory Committee (Aug. 7, 2020).

Subcommittee's Proposed Revision of Rule 76a**. Sealing Court Records**

8-16-22

1. **Standard for Sealing Court Records**. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed**, except as provided below. Information in other** court records**, except for information under Paragraph 3, is** presumed to be open to the general public and may be sealed only **if there is** a showing of all of the following:

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

(1) this presumption of openness;

(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 adequately and effectively protect the specific interest asserted.

2. **Court Records.** For purposes of this rule, court records **are**:

(a) all documents of any nature filed**, or sought to be sealed before filing,** in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents to which access is otherwise restricted by law;

(3) court orders required to be sealed by statute

(4) documents filed in an action originally arising under the Family Code**;**

(b) 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.

(c) 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.

3. **Information Presumed to meet the Standard of Sealing.**

(a) It is presumed that the following information within a court record meets the standard for sealing as prescribed in Paragraph 1:

(1) trade secrets or other proprietary information of a party or non-party;

(2) information that is confidential under a constitution, statute, or rule;

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(3) information subject to a confidentiality agreement or protective order;

(4) information subject to a pre-suit non-disclosure agreement with a non-party; and

(5) an order changing the name of a person to protect that person from a well-founded fear of violence.

(b) After fourteen days from the date of the notice required under Paragraph 5, the information shall be ordered sealed unless a hearing has been requested or the judge determines that the information is not any of those listed in Paragraph 3(a). If a hearing is requested, the information shall be ordered sealed unless a person objecting to sealing or moving to unseal the information shows that sealing would have a probable adverse effect on the general public health or safety. If the judge determines that Paragraph 3(a) does not apply, the movant may file a new motion that does not rely on the presumption in Paragraph 3.

4. Notice of Intent to File Confidential Information Unsealed: Any party or person who intends to file information described in Paragraph 3 without requesting that it be sealed must give notice to all parties, to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest in the confidentiality of the information is otherwise known. The information may not be filed unsealed for 14 days from the date of the notice, and the notice must state that the recipient has until then to file a motion to seal. If a timely motion to seal is filed, Paragraph 5 applies.

5. Motion to Seal and Notice: A request for a final sealing order is made by filing a stand-alone motion. A motion to seal must give a brief but specific description of both the nature of the case and the records which are sought to be sealed **and must state that any person may request a hearing to be heard in opposition to the motion. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter a final order sealing the records.**

6. Motion to Unseal and Notice: A request for an order unsealing court records is made by filing a stand-alone motion. A party or person who files a motion to unseal must attach the original motion to seal and the sealing order. The motion must be electronically filed on the website maintained by the State of Texas for posting public notices (https://topics.txcourts.gov/) for at least 14 days before any judge may enter an order unsealing the records. Within three days of receiving a motion to unseal, each party must forward it to any third-party who produced the document in discovery, to those whose interest in the confidentiality of the information is evident from the document containing the information, and to those whose probable interest is otherwise known. If a hearing is requested within 14 days of the public notice, a judge may not sign an order unsealing the records until the hearing has been held.

7. Hearing. If a hearing is requested, a hearing, open to the public, 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. Any party **to the case, any non-party who filed a motion to seal or unseal, and any person who requested the hearing** may participate in the hearing **in a manner determined by**

Deleted: 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;

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the court. At the court's discretion, other members of the public may speak on the issue before the court.

8. Temporary Sealing Order. A temporary sealing order may issue **only if there is** a showing of **a** compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant. The temporary order shall direct the movant **to** immediately give the public notice required by **P**paragraph **5. A** temporary **sealing order expires after 14 days, and if no final sealing order has been filed, the clerk shall unseal the information as soon as the clerk becomes aware of the expiration.**

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9. **Order. An order** sealing or unsealing **a** court **record must** be **filed and** open to the public. **It must** state the **applicable standard** and **burden and give** specific reasons for finding and concluding whether **that standard** has **or has not** been **met by the party with the burden. An order that seals a court record must also reference** the specific portions of court records which are to be sealed **by document title, exhibit number, paragraph number, or redaction shown in the context of the unsealed portion. A sealing order must also state** the time period for which the sealed portions of the court records are to be sealed**, which may be permanently, subject to the court's continuing jurisdiction. An order that unseals a court record shall include the record within the order or attached to the order, or by reference to its location within the court files.** 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.

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10. 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. **If a** court **has previously ruled** on **a request to seal or unseal filed documents, the movant** who **seeks to seal or unseal** the **filed documents at a later time must show a material and substantial change in** circumstances affecting the **prior ruling since the time of the prior ruling.** Such circumstances need not be related to the case in which the order was issued. **If there is a showing of material and substantial change in circumstances, the court must then consider the request to seal or unseal the filed documents under the appropriate standard applying to the documents at issue.**

11. **Appeal**. 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**, any non-party who filed a motion to seal or unseal, and any person who requested the hearing and** participated in the hearing preceding issuance of such order **it**. 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.

12. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. 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.

13. Sanctions. Non-compliance with this rule is subject to sanctions pursuant to rule 13 and Chapters 9 or 10 of the Texas Civil Practice and Remedies Code. Non-compliance subject to sanctions includes, but is not limited to, misrepresentations to the court regarding the nature of information sought to be sealed and filing information presumed to meet the standard for sealing, described in Paragraph 3, without an order permitting it.

Comment: The presumption of openness to the general public, when it applies to the information at issue, requires a judge to consider the merits of a motion without regard to any agreement of counsel. A judge has this responsibility because the general public is not represented by anyone in the proceeding, though some members of the public may participate, and no member of the public can see the information sought to be sealed.

Comment: Paragraph 3(a) resolves the conflict between the rule's prohibition on sealing court orders and legal requirements that an order be sealed or that some information within an order be concealed. For example, Chapter 82 of the CPRC gives the plaintiff the option of concealing her identity by using a pseudonym. Though not otherwise required by law, Paragraph 3(a)(5) permitting certain name change orders to be sealed, like Chapter 82, is intended to protect a person from violence.

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