THE HISTORY OF TEX. R. CIV. P. 76a ON SEALING COURT RECORDS

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BEFORE THE ADOPTION OF TEX. R. CIV. P. 76a, there was no recognized procedure for sealing or unsealing court records in Texas courts and the standards that governed the question were uncertain. A representative case is, *Times Herald Printing Company v. Jones,* 717 S.W.2d 933 (Tex. App.–Dallas 1986, writ granted) (en banc), *judgment vacated and cause dismissed,* 730 S.W.2d 648 (Tex. 1987) (per curiam).[1]

In *Times Herald*, before a trial on the merits of a damage suit against a physician could occur, but after a motion for summary judgment was denied, the parties settled on the condition that the case be sealed, which the trial court ordered. The Times Herald filed a motion to unseal the file, which the trial court denied. The newspaper appealed. Sitting en banc on rehearing, the Dallas Court of Appeals issued a Majority Opinion signed by six justices, a Concurring Opinion signed by one Justice, a Dissenting Opinion signed by four Justices, and another Dissenting Opinion signed by one of the four dissenting Justices.

Although the motion to unseal was filed more than five months after the entry of judgment, the Majority Opinion held that the trial court had jurisdiction to rule on the Times Herald's motion. The Majority also held that the appellate court had jurisdiction to consider the Times Herald's appeal of the trial court's order denying the motion to unseal. *Id.* at 936-37.

The justices who joined the Majority Opinion, in an issue of first impression, agreed with the Times Herald, holding that a common-law right of access to court records exists in Texas. *Id.* at 936. The Majority Opinion distinguishes between the media's right to *publish* and the media's right to *access*, rejecting the argument that the Texas Constitution provides a broader right of access to court records than the First Amendment to the U.S. Constitution. *Id.* at 937.

Those justices who joined the Majority Opinion assumed, without deciding, that the public has a right of access to judicial records in civil cases that was equivalent to the access rights recognized by the U.S. Supreme Court in criminal prosecutions. *Id.* at 938. The Majority Opinion recognized a court's power to deny access to court records based on "the private rights of participants [including prospective jurors] or third parties, trade secrets, and national security." *Id.* The Majority Opinion found that "an agreement of the parties to deny public access is not binding on the court." *Id.*

The Majority Opinion also recognized the State's interest in the settlement of litigation. *Id.*, at 939. The Majority Opinion opined that, once a confidentiality order has been entered and relied upon by the parties, it should be modified "only in extraordinary circumstances, or to meet a compelling need." *Id.* According to the Majority Opinion, the trial court's refusal to unseal would not be judged by a higher standard, elevated by the First Amendment, but rather would be reviewed for an abuse of discretion. *Id.* at 940. In *Times Herald*, none of the court records in dispute were relevant to a decision on the merits, except to the extent that the denial of the summary judgment motion indicated that a fact question existed. *Id.*

According to the Majority Opinion, the trial court's refusal to unseal would not be judged by a higher standard, elevated by the First Amendment, but rather would be reviewed for an abuse of discretion.

The Majority noted that the trial court's order discussed both facts and law. *Id.* After looking at the evidence, the record, the findings, and the order, the Majority Opinion concluded that the trial court did not abuse its discretion in refusing to unseal the file. *Id.* The Concurring Justice agreed that the state's interest in facilitating settlement justified the decision not to unseal; and, furthermore, the concurring justice rejected a constitutional right of access to court records. *Id* at 942.

The four Dissenting Justices would have held that the Times Herald had no standing to appeal from a final judgment, where it was not a party; in that circumstance, the dissenting justices would have held that any appeal should be dismissed

for lack of jurisdiction. *Id.* at 942. One dissenting Justice also separately opined that the Times Herald should have no standing to appeal, but if jurisdiction did exist, the single dissent would have reversed the trial court, ordering instead that the records be unsealed. *Id.* at 942.

In a per curiam opinion, the Texas Supreme Court held that it was error to assume jurisdiction, and it dismissed the appeal. *See Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987). The Times Herald case underscores the point that Texas courts lacked clarity, as to the procedure to follow and the substantive law to apply, when asked to seal or unseal court records.

In 1988, the Dallas Morning News filed suit, seeking declaratory and injunctive relief against Dallas County District Clerk Bill Long, asking the court to establish prospective substantive guidelines and adequate procedural safeguards for sealing court documents, which the newspaper argued were required by the Texas and United States Constitutions, and by the common law for non-child-related cases. At that time, Local Rule 1.33[2] permitted the "suppression of any pleading filed in any action by filing a petition with the Court in which the action is filed showing good cause for such suppression."

Under what was then Local Rule 1.33, a suppression order prohibited public access to "all papers filed in such action." The trial judge issued an Order, part of which the Dallas Morning News agreed with, and part of which it appealed.

The Dallas Morning News' Brief was filed by John H. McElhaney and Thomas S. Leatherbury, of the Locke Purnell Rain Harrell law firm, and was signed by McElhaney. After briefing, the appeal was dismissed without explanation. The court's records were destroyed in 2015.

In 1989, during the Regular Session of the 71st Legislature, Representative Steven Wolens, a lawyer from Dallas, introduced House Bill 698, which would prohibit agreements or court orders that limited public access to information relating to a public hazard. Intentionally or knowingly violating this law would be a Class A misdemeanor (maximum $2,000 fine and one year in jail). Proponents of the bill argued that it would stop parties in products liability suits from sealing information regarding the dangerousness of defective products. Opponents of the bill argued that the definition of a "public hazard" was so vague that it might subject innocent parties to prosecution. In any event, the bill passed the House by a voice vote with one nay, but the bill died in the Senate Jurisprudence Committee.

In the same Regular Session, State Representative Orlando Garcia, an attorney from San Antonio, introduced House Bill 1637, which was enacted, and signed on June 14, 1989, by Governor William Clements, becoming effective on September 1, 1989. The statute adopted Section 22.010 of the Texas Government Code, which 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."

On July 10, 1989, John McElhaney wrote a letter to Luther H. ("Luke") Soules III, the chairperson of the Texas Supreme Court Advisory Committee (SCAC), noting the enactment of HB 1637, and requesting the opportunity to submit a summary of the Dallas Morning News' position on sealing court records, as well as an opportunity to meet with any subcommittee, who may consider language for a new rule. McElhaney enclosed a proposed set of guidelines that he had previously submitted to the Dallas County District Judges.

At a meeting of the SCAC held on July 15, 1989, Soules confirmed with Supreme Court liaison, Justice Nathan Hecht, that the drafting of the rule was assigned to the SCAC. Soules cajoled Charles E. "(Lefty") Morris and Charles ("Chuck") M. Herring, Jr., both of Austin, to co-chair a subcommittee on sealing court records. Soules appointed himself, as well as Judge Solomon Casseb Jr., and Judge David Peeples, both of Bexar County, and Ken Fuller, a family lawyer from Dallas, and "invitee" John McElhaney, to serve on the subcommittee. [7-15-1989 Minutes, p. 00001] .

At the August 12, 1989 SCAC meeting, which was the last meeting of the year, Soules commented briefly on the formation of the subcommittee. He mentioned Representative Orlando Garcia's bill, saying that Garcia was "given a fairly specific proposal to carry, which he did not choose to carry." Soules indicated that Garcia "negotiated with the proponents to just get a resolution and let the Supreme Court" do the rule making. [8-12-1989 Transcript, pp. 344-45] Soules said, "we have been writing letters to senators and representatives" and "doing everything we can to keep communications with the legislature in the best shape we can in this committee, the court on rule making." [*Id.* p. 348]

On November 18, 1989 and December 15, 1989, the subcommittee conducted public meetings. Twenty-seven people appeared and expressed their views.[3] Co-chair, Chuck Herring, in his eventual memorandum to the Supreme Court, wrote that the subcommittee went through several days of

sometimes painful hearings and proceedings, culminating in a proposed draft of Rule 76a and Rule 166b(5).[4] He reported having "received hundreds of pages of letters, drafts and written input, as well as many hours of testimony and spirited debate."

On November 30, 1989, the Supreme Court held an unprecedented public administrative session "to consider proposed changes to the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence." All nine Justices participated in the session, and statements were taken on the record from twenty-seven speakers, ten of whom addressed the sealing of court records.[5]

The first speaker on sealing, Chip Babcock, said that "indiscriminate and wholesale sealing of court records is unconstitutional" and "a threat to our democratic form of government." [*Id*. p. 166-67].

The next speaker was John McElhaney, who told the Court that he and Tom Leatherbury had submitted a proposed rule for sealing court records. [*Id*, p. 190] McElhaney said "[t]he problem is that that [current sealing practice] is overkill and overbreadth, because the entire case file is sealed and nobody knows what it's about." [*Id.* p. 193] McElhaney also noted that he was not attempting to eliminate agreed protective orders during discovery, which have the salutary effect of reducing the number of disputes that have to be ruled upon by court. [*Id.* p. 195-96] McElhaney also spoke of "an irresponsible opponent [who] decided he would plead many trade secrets that he had gotten hold of and just make them public records." [*Id*. at 204]

McElhaney's law partner, Tom Leatherbury, spoke next, saying that the draft of the proposed rule was just a first draft, and it had since been revised after a meeting with the SCAC subcommittee, which explained how the rule would operate. [*Id*. 201-ff]

Next was David Donaldson, an Austin attorney, speaking on behalf of Texas Media, a non-profit coalition of professional journalism groups. [*Id*. at 220-ff] Donaldson received probing questions and comments from members of the Court.

Next was Tommy Jacks, a plaintiff's attorney from Austin, who said that discovery in products liability cases was routinely sealed upon settlement by agreement of the parties; thus, concealing the hazards posed by dangerous products. [*Id.* p. 238-ff]

Next to speak was Tom Smith, who was the director of the Austin office of Public Citizen, a national consumer organization founded by Ralph Nader. [*Id.* p. 268-ff] Smith focused on product safety and open records in courts and regulatory agencies, and the sharing of discovery among plaintiffs. Secrecy, Smith argued, "keeps bad products on the market long after they should have been pulled off." [*Id.* p. 276] He also noted that secrecy increases the cost of litigation, where the same pre-trial discovery against the same defendants (General Motors for example) must be pursued over and over again. [*Id*.]

Next to speak was Mack Kidd, an Austin plaintiff's attorney, who said he had just concluded a products liability case against a major automobile manufacturer and was required by the agreed protective order to return all documents at the conclusion of the case, which prohibited him from sharing those materials with other lawyers. [*Id.* p. 286] Kidd described a "conflict of interest" between the lawyer's duty to the client and a duty to protect the public. [*Id.* p. 288] Kidd urged the Court to include information obtained through discovery as records open to the public. [*Id.* p. 291] He called the McElhaney draft a "step in the right direction." [*Id.* p. 294]

Howard Nations, a plaintiff's attorney from Houston, was the next speaker. [*Id.* p. 295-ff] Nations said that the sealing of court records was a top concern of the Association of Trial Lawyers of America's board of governors. [*Id.* p. 296] He urged the Court to include discovery as part of court records. [*Id.* p. 297] Nations described a series of cases involving a manufacturer of fork-lifts that tipped over, which managed to keep its design defect a secret for 34 years, until a trial court refused to seal the file. The information became public and, according to Nations, the manufacturer made a $34 change in design that eliminated the problem. [*Id.* p. 299-302]

Chuck Herring, from Austin, was next, and he passed on the opportunity to speak, other than to say that his subcommittee was in agreement with most of the structural rule, and he thought they would have a good proposal for the Court to consider [*Id.* p. 306]

SCAC Chair Luke Soules, from San Antonio, spoke next, who stated that he did mostly business litigation. [*Id.* p. 307-ff] Soules said that the legal system deals with "the most sensitive problems of human nature," and "there has to be consideration to those human concerns and the need, in many of those human problems, for privacy." [*Id.* p. 307] Soules also said that existing Tex. R. Civ. P. 166b(5)(c) addressed discovery, with a "good cause shown" requirement

to limit dissemination of discovery. [*Id.* p. 308]

Under *Garcia v. Peeples*, outsiders could come into court and have a redetermination of whether discovery should be open to the public. [*Id.*] Soules mentioned *Houston Chronicle v. Hardy*, which was a nuclear plant piece of litigation, where the trial court sealed discovery, and was affirmed by the court of appeals, the Texas Supreme Court, and the U.S. Supreme Court. [*Id.* p. 309] Soules said the area of need was information of "significant individual sensitivity" used in open court. [*Id.* p. 310] Upon a question from Justice Gonzalez, Soules indicated that he opposed including discovery in the definition of "court records." [*Id.* p. 311] Soules indicated that the "good cause shown" standard for sealing discovery "were critical words negotiated in the rule making process of that rule." [*Id.* p. 314]

The last to speak was Bryan Webb, a family lawyer from Dallas. [*Id.* p. 315] Webb advocated for a standard "that would apply to divorce and family law cases in such a way that it would allow people to preserve their privacy and their dignity." [*Id.* p. 317] He spoke of a concern that depositions in family law cases, when made public, would not only expose private matters to public scrutiny, but also could lead to children of the parties reading, years later, the details of their parents' divorce. Webb also supported Ken Fuller's suggestion of an ex parte procedure to seal records until a hearing could be had.

At the February 9, 1990 SCAC meeting, Chuck Herring reported on the progress of the subcommittee. He articulated the elements of the working draft of the subcommittee's rule that has been submitted by Locke Purnell on 12/26/1989. [*Id.* p. 116] Alternative versions submitted by David Perry and David Chamberlain were distributed to the SCAC, but were not discussed. [*Id.* p. 79] There followed 218 pages of robust debate over different aspects of the Locke Purnell rule, with a few votes.

Approximately two hours were spent debating whether to include unfiled discovery in court records. However, at the conclusion of the discussion, a 11-to-9 majority voted to table the question.[6] At 5:40 p.m., the committee recessed until 8 a.m. the next morning.

On February 10, 1990 there were 28 SCAC members who were present, and 7 who were absent. Votes were taken on twenty-three rules, but Rule 76a was not one of them. The Committee decided to meet again on February 16, 1990, starting at 8:00am.

On February 16, 1990, the meeting began at 8:00a.m. Twenty-one members were present and 13 were absent. An 11-to-4 majority of the members present voted to amend the Rule 76a provision relating to appeal. [*Id.* at 163] A 12-to-3 majority voted to recommend Rule 76a, as revised, to the Supreme Court. [*Id.* p. 177] A 10-to-7 majority voted to amend Rule 166(b)(5) to subject discovery protective orders to Rule 76a.[7] Luke Soules criticized this last vote-- in his 3-1-1990 Report to the Supreme Court--because the proposal was never considered by the discovery subcommittee, and was rejected by the Rule 76a subcommittee, which never put the issue on the agenda in advance of the SCAC meeting, and the proposal had been expressly tabled in the SCAC's 2-9-1990 meeting, only to be reopened on February 16, 1990 by a majority of less than half of the committee; and, finally, because the proposal was not published for comment from the bench and bar.[8]

On March 5, 1990, Chuck Herring forwarded to the Supreme Court his *Memorandum regarding Proposed Rule 76a and companion amendments to Rule 166b(5).* This memorandum is the best way for the interested reader to get a sense of the SCAC's deliberations, short of reading the meeting transcripts. Herring acknowledges that he voted against Rule 76a and the amendment to Rule 166b(5).

The April 1990 Texas Bar Journal contained three articles which either praised or criticized the proposed Rule. John H. McElhaney & Thomas S. Leatherbury, *An Overview: Proposed Rule 76a*;[9] Gale R. Peterson, *Proposed Rule 76a: A Radical Turning Point for Trade Secrets*;[10] and David E. Chamberlain, *Proposed Rule 76a: An Elaborate Time-Consuming, Cumbersome Procedure*.[11]

On April 14, 1990, the Texas Supreme Court promulgated Rule 76a, in an Order that also adopted a number of other changes to the rules of trial and appellate procedure. Justices Gonzalez and Hecht dissented from the adoption of Rule 76a and the concomitant amendment to Rule 166b.5.c., saying: "On balance, we believe that the adopted rules do not afford litigants adequate protection of their legitimate right to privacy." They commented that Rule 76a and 166b.5.c. were "probably more controversial than any rules ever adopted by this Court,"... and that "adoption of rules like these two is unprecedented." They also commented that "the Court has not invited the same public comment on these two rules as it has on the others."

In 1990, Justice Lloyd Doggett received the Society of Professional Journalists' national First Amendment Award for his work, both as a state senator and a supreme court justice

on governmental issues. The board also commended Justice Doggett for his role in drafting new rules that restrict the sealing of court records and which would allow cameras in Texas court rooms.[12] The Freedom of Information Foundation of Texas gave its James Madison Award for outstanding achievements and distinction in open government and First Amendment rights to: Robert W. Decherd (CEO, Dallas Morning News) in 1989; Texas Supreme Court Justice Lloyd Doggett in 1990; Chip Babcock, David Donaldson, and Tom Leatherbury, among others in 1991.

As courts attempted to work through the procedural aspects of Rule 76a, it would spawn a number of appellate opinions in the 1990s. Since its adoption, Rule 76a has periodically arisen in a few appellate decisions, but the rule has remained unchanged since its adoption thirty-two years ago.

On October 25, 2021, Chief Justice Hecht sent a letter of referral to the SCAC, saying: "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."

As of this writing, the review process is ongoing.

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1 One of the lawyers representing the Times Herald Printing Company was Charles L. ("Chip") Babcock, later a proponent of Rule 76a and currently Chair of the Texas Supreme Court Advisory Committee ["SCAC"].

2 The relief requested in *The Dallas Morning News Company v. Bill Long, District Clerk, Dallas County, Texas*, is quoted from Appellant's Brief in the appeal of the case, No. 05-88-01131-CV (Tex. App.–Dallas, no writ), filed on 10-20-1988. The newspaper sought unsealing of both pleadings and unfiled discovery, but dropped discovery on appeal. 1-16-1990 SCAC meeting transcript pp. 179-80. May 24, 2022

3 Chuck Herring's 2-9-1990 Memorandum to the SCAC.

4 Chuck Herring, 3-5-1990 Memorandum dated 5-5-1990 to the Texas Supreme Court.

5 11-30-1989 Transcript of the Supreme Court's Administrative Session to consider rule changes, pp. 163-320 <https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/1989/transcripts/sc11301989.pdf> [5-24-2022].

6 2-9-1990 SCAC meeting transcript, p. 309; Chuck Herring's 3-5-1990 Memorandum to the Supreme Court, p. 5.

7 *Id*.

8 Luther H. ("Luke") Soules, III's Final Report from the SCAC to the Supreme Court.

9 McElhaney & Leatherbury, *An Overview: Proposed Rule 76a*, 53 Tex. B. J. 340 (April 1990) <https://heinonline.org/HOL/PrintRequest?public=true&handle=hein.barjournals/texbarj0053&div=52&start_page=340&collection=texbarj&set_as_cursor=1&men_tab=srchresults&print=section&format=PDFsearchable&submit=Print%2FDownload> [5-24-2022].

10 Gale R. Peterson, *Proposed Rule 76a: A Radical Turning Point for Trade Secrets*, 53 Tex. B.J. 344 (April 1990) <https://heinonline.org/HOL/Page?handle=hein.barjournals/texbarj0053&id=346&collection=texbarj&index=> [5-24-2022].

11 David E. Chamberlain, *Proposed Rule 76a: An Elaborate Time-Consuming, Cumbersome Procedure*, 53 Tex. B.J. 348 (April 1990) <https://heinonline.org/HOL/Page?handle=hein.barjournals/texbarj0053&id=350&collection=texbarj&index=> [5-24-2022].

12 53 Tex. B. J. p. 898 (Sep. 1990)