"Shielding Discovery and the Public's Right to Know: Motions to Seal & Protective Orders"

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I. INTRODUCTION

Texas Rule of Civil Procedure 76a, which established the procedure for sealing court records, has been in existence for almost twenty years. Promulgated by the Texas Supreme Court in 1990, Rule 76a "creates a presumption that all court records are open to the public" and allows trial courts to seal court records only if the movant proves that a "specific, serious and substantial interest" outweighs the presumption and no less restrictive means are available. *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 523 (Tex. 1998); TEX. R. CIV. P. 76a(a). The rule establishes a convoluted and time consuming process for sealing court records. While non-court records are theoretically immune from Rule 76a, litigants may be surprised to learn that the Rule defines court records to include unfiled discovery in which there is a public interest. *See* TEX. R. CIV. P. 76a(2)(c).

Moreover, the determination of a motion to seal is itself a public event in which non-parties are entitled to intervene and review the very documents counsel is attempting to shield from public view. Further, Rule 76a is mandatory. Hence litigants cannot attempt to sidestep its procedures by agreement, even with the approval of the court.

This paper examines how Rule 76a has operated in practice over the nineteen years since its inception, including unintended consequences and potential traps for the unwary. This paper also discusses general protective orders under Rule 192.6 for non-court records. However, given the breadth of Rule 76a and the fact that Rule 192.6 reverts to Rule 76a for sealing requests, litigants will likely need to be versed in Rule 76a.

To that end, this paper provides a detailed how-to guide for practitioners who wish to seal court records as well as tips on how to avoid non-filed discovery from becoming a "court record" by default. The paper also discusses the federal approach under Rule 26(c) of the Federal Rules of Civil Procedure and highlights the distinctions with the state court practice for sealing requests. (For the reader's convenience, the full text of each rule is set out in Appendix A.)

II. TEX. R. CIV. P. 76A

A. Overview & Constitutional Issues

Protective orders and sealing orders are, by their nature, restrictions upon speech. Thus, at first blush, First Amendment issues are raised. That is why, absent an order to the contrary, there are no restrictions on dissemination of materials received in a lawsuit. However, the United States Supreme Court has held that as long as a protective order (1) is issued upon a showing of good cause, (2) is limited to pretrial discovery, and (3) does not purport to restrict a party's use of materials obtained outside of discovery, the First Amendment is not offended. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37, 104 S.Ct. 2199, 2209-2210 (1984). Thus, to the extent an order restricts a party's use of material received from a source other than the discovery process, it is constitutionally questionable. *See id.* at 34, 2208.

In Texas, the affirmative guarantee of free speech under the Texas Constitution is arguably broader than the First Amendment. TEX. CONST. art. I, § 8; *see also Davenport v. Garcia* 834 S.W.2d 4, 10 (Tex. 1992). One set of commentators has implied that this broader Texas constitutional provision provides a stronger presumption of openness for consideration in the balancing required under Rule 76a. *See* Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 661 n.83 (1991).

As to traditional court records, there is a presumption of openness based upon a common-law right of access. *See* discussion in Part IV.B.1, *infra*. In Texas, the presumption of openness afforded to court records arguably goes beyond common law because of the "open courts" provision of the Texas Constitution. TEX. CONST. art. I, § 13. This presumption of openness

is expressly recognized in Rule 76a. TEX. R. CIV. P. 76a(1). However, to the extent Rule 76a would make "court records" out of unfiled documents, it does not appear to codify either a Texas constitutional or common-law requirement.

B. Provisions of the Rule

Rule 76a finds its origin in Section 22.010 of the Texas Government Code, which required the Texas Supreme Court to "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." TEX. GOV'T CODE ANN. § 22.010 (Vernon 2004).

The rule has multiple components to which strict adherence is required. The full text of the rule is included in the Appendix, but the following is a snapshot of the Rule's provisions:

Section (1) sets forth the presumption in favor of openness and the standard for a sealing order.

Section (2) defines court records, including among them certain unfiled discovery.

Section (3) states the detailed notice requirements for a motion to seal.

Section (4) describes the mandatory hearing, which is open to the public.

Section (5) provides for temporary sealing orders.

Section (6) states the requirement for orders on motions to seal.

Section (7) entitles the public to intervene at any time before or after judgment to seal or unseal and gives the court continuing jurisdiction over sealing orders.

Section (8) provides for severance and immediate appeal of a sealing order.

Section (9) provides that documents in court files not defined as "court records" continue to be governed by existing law and governs the Rule's application to cases adjudicated or pending before its effective date.

C. What are Court Records?

Paragraph 2 was initially the most controversial part of Rule 76a. It defines "court records" for purposes of the rule. There are three general categories of "court records": filed documents (with a few exceptions), certain settlements agreements, and certain unfiled discovery.

1. Documents filed of record

Under paragraph 2(a), all documents filed in connection with a civil case are "court records" under Rule 76a. There are only three categories of filed documents removed from the definition and thus from the coverage of Rule 76a: (1) documents filed with the court for *in camera* inspection as to their discoverability; (2) documents to which access is otherwise restricted by law (such as, juvenile, adoption and mental health records); and (3) documents filed in an action originally brought under the Family Code.

The most difficult part of this aspect of the definition of "court records' is the exception created for documents submitted for *in camera* inspection. In order to fall under this exception, and thus out of the coverage of Rule 76a, the documents must be submitted "solely for the purpose of obtaining a ruling on the discoverability of such documents." Thus, documents submitted to the court for *in camera* inspection as to whether they are in fact "court records"—such as the submission of unfiled discovery materials to see if they could have a probable adverse effect on the general public health and safety (which is not an issue of discoverability)—are arguably not entitled to this exception and are thus "court records." *See Texas United Educ. Fund v. Texaco, Inc.* 858 S.W.2d 38, 40 (Tex. App.—Houston [14th Dist.] 1993, writ denied). But other courts have not interpreted the *in camera* exception so narrowly. *See Roberts v. West*, 123 S.W.3d 436, 441 (Tex. App.—San Antonio, 2003 pet. denied)

(documents submitted *in camera* should not be considered "court records" until trial court has made that determination).

Questions have also arisen as to whether documents that are "tendered" to the court or clerk, such as exhibits, are "filed documents" and hence "court records." *Compare Nguyen v. Dallas Morning News, L.P.*, 2008 WL 2511183, *4 (Tex. App.—Fort Worth, June 19, 2008, no pet.) (document filed when tendered or delivered to clerk, regardless of whether it is file-stamped), *with, Roberts*, 123 S.W.3d at 441 (neither TEX. R. CIV. P. 14(b) nor TEX. R. APP. P. 13.1 addresses whether *any* document tendered as exhibit considered "filed" with court). But the Supreme Court has stated that exhibits introduced into evidence at trial are *a fortiori* court records. *See Dallas Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655, 659 (Tex. 1992).

2. Settlement agreements

Under paragraph 2(b), settlement agreements—even if they are never filed with the court—are "court records" if they "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." TEX. R. CIV. P. 76a(2)(b).

If a settlement agreement is determined to be a "court record," the rule does provide that "all reference to monetary consideration" is not included and presumably that information may be redacted. *Id.*

While no court to the author's knowledge has addressed the distinction, note that just because an unfiled settlement agreement contains information concerning matters having a probable adverse effect upon health or safety, it is not necessarily a "court record." Paragraph 2(b) would only make such an agreement a court record if it "seek[s] to restrict disclosure of" such information.

> **Practice Tip**: In drafting a settlement agreement which could contain information which could have probable adverse effects upon health and safety, the party desiring to protect such information may want to consider whether it is preferable to not restrict disclosure— especially if, as a practical matter, the opposing party has an incentive to keep the agreement confidential because of some other provision which that party would not want widely known. Of course, the risks of such an approach should be discussed with the client.

3. Unfiled discovery

Sub-paragraph (2)(c) of Rule 76a has received much attention from litigants and courts. It labels as "court records" unfiled discovery "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." 76a(2)(c). TEX. R. CIV. P. 76a(2)(c).

The only exception recognized in the rule is "discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights." *Id.* Note that to fall within this exception, the case must have been "*originally* initiated" for the protection of such intangible rights—asserting such a case by counterclaim is not enough. The exception does not address the possibility that a trade secret claim may be one of many asserted. Presumably, though, the trade secret claim must be a material part of the case and not just a "tag on" claim. Note also that the language of the exception removes from "court records" discovery within such a case and not just that discovery which relates to the trade secret issue.

> **Practice Tip**: Because of this exception, in a commercial dispute where one of several competing claims involves protection of trade secrets, the party with the trade secret claim may want to be the first to the courthouse.

4. Family Law Case Exception

Rule 76a(2)(a)(3) expressly provides that "court records" under the Rule does not include "documents filed in an action originally arising under the Family Code." Not only are such documents not "court records," but the entirety of Rule 76a is inapplicable to sealing of documents in Family Code cases. *See P.T.A. of Fort Worth, Inc. v. Sullivan*, 837 S.W.2d 844, 845-46 (Tex. App.—Fort Worth 1992) (orig. proceeding). This holding may have eased the concern of some family law practitioners who feared that, despite the fact that property agreements are not "court records" under the rule, their incorporation by reference in the final judgment meant that they were available for public view under the provision of Rule 76a(1) which provides that no order may be sealed. *See* TEX. R. CIV. P. 76a(1).

D. Does R.76a apply to determination of whether unfiled documents are "court records?"

When a trial court makes a determination whether unfiled discovery documents are "court records" under Rule 76a, should it do so under Rule 76a or under Rule 192.6, relating to protective orders? That may seem like a simple question. But, if the determination is made under Rule 76a, then the rigmarole of that rule applies, with all of its public notice requirements.

(1) The Rules. Rule 76a does not mention Rule 192.6 or protective orders at all. However, Rule 192.6 provides that any protective order sealing or otherwise protecting the results of discovery "be subject to the provisions of Rule 76a." TEX. R. CIV. P. 192.6 (b)(5). The rule is silent regarding whether "court record" status is a determination to be made under Rule 192.6 or Rule 76a.

(2) In *Kepple*, the Supreme Court held that:

> The special procedures of Rule 76a apply only to the sealing of "court records." The language of the rule does not authorize trial courts to also apply these special procedures to the threshold determination of whether particular unfiled discovery is, indeed, a court record subject to the rule.

970 S.W.2d at 524.

The Court summarized the procedure as follows:

> In summary, we hold that when a party seeks a protective order under Rule 166b(5)(c) [now Rule 192.6] to restrict the dissemination of unfiled discovery, and no party or intervenor contends that the discovery is a "court record," a trial court need not conduct a hearing or render any findings on that issue. If a party or intervenor opposing a protective order claims that the discovery is a "court record," the court must make a threshold determination on that issue. However, public notice and a Rule 76a hearing are mandated only if the court finds that the documents are court records. While a trial court is not *required* to determine whether "unfiled discovery constitutes a court record until requested to do so by a party or intervenor, the court may raise this issue on its own motion. However, as previously discussed, a trial court may not apply the special procedures of Rule 76a (except for intervention) until it determines that the documents are court records.

Id. at 525 (emphasis in original).

And the trial court cannot presume that a document or group of documents are "court records" but must make that determination under Rule 76a if a party disputes whether the discovery at issue is a court record. *BP Prods. N.Am., Inc. v. Houston Chronicle Publ. Co.*, 263 S.W.3d 31, 34 (Tex. App.—Houston 2006, no pet.). The party claiming the documents are open to the public has the burden to prove, by a preponderance of the evidence, that the

documents are "court records." *Id.*; *Roberts*, 123 S.W.3d at 440.

If the court determines the documents are not "court records," the party seeking protection may move for a protective order under the less rigorous standards of Rule 192.6, as discussed in Section III, *infra*. *See Roberts*, 123 S.W.3d at 440

E. Motion and Notice Requirement

Rule 76a(3) requires that records may be sealed "only upon a party's written motion, which shall be open to public inspection." A form which may be used for such a motion is attached to this paper as Appendix B.

The movant is also required to post a public notice of the motion in the place where county government notices are posted. Under the rule, such notice is required to state, at a minimum: (1) that a hearing will be held on the motion in open court, (2) that any person may intervene and be heard concerning the motion, (3) the specific time and place of the hearing, (4) the style and number of the case, (5) a brief and specific description of the nature of the case and of the records sought to be sealed, and (6) the identity of the movant. A form which may be used for such a notice is attached to this paper as Appendix C.

The final task of the movant is to file a verified copy of the public notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas "immediately" after posting the notice.

> **Practice Tip**: The verification may be contained in the same document as the notice, but it is advisable that each court receive an original verification.

F. The Hearing & Proof

1. Hearing Date

Rule 76a(4) requires that the hearing on the motion to seal be open to the public and be held "as soon as practicable," but the hearing may not be held less than 14 days after the later of the filing of the motion and the posting of the public notice.

2. *In Camera* Review

Paragraph 4 also permits the court, in connection with the hearing, to review the affected records *in camera* and to determine the matter "in accordance with the procedures prescribed by Rule 120a." Rule 120a, among other things, allows for proof by way of pleadings, stipulations, affidavits with attachments and oral testimony and allows the court to continue the hearing if necessary.

> *Caveat*: Rule 120a also requires that affidavits be served at least 7 days before a hearing. While the court's use of Rule 120a is permissive under Rule 76a(4), it is advisable to nonetheless serve the affidavits within the time provided by Rule 120a.

In camera inspection does not convert unfiled discovery to a "court record."

In *Kepple*, the Supreme Court specifically rejected the argument that a document submitted *in camera* lost its status as unfiled discovery, observing that the Rule specifically authorizes *in camera* review where necessary and "[w]ere it otherwise, trial courts could not review the documents themselves in determining how to apply Rule 76a without requiring to relinquish the very relief sought under the rule." 970 S.W.2d at 526.

G. Non-Party Intervention

Paragraph 4 of Rule 76a also addresses intervention. It provides that non-parties may intervene of right in the hearing, upon payment of the fee required for any plea in intervention. There is no apparent requirement that the intervening non-party be threatened with any injury as a result of any sealing or unsealing to have standing. Further, mandamus is appropriate if the trial court refuses a party's or intervenor's motion for a hearing under Rule

76a. *See Eli Lilly & Co. v. Marshall*, 829 S.W.2d 157, 158 (Tex. 1992) ("Eli Lilly I").

Even after the hearing and at any time before or after judgment, a non-party may intervene for the limited purpose of requesting that the court seal or unseal court records—whether or not any party has sought such relief. TEX. R. CIV. P. 76a(7). However, a non-party who had notice of an earlier Rule 76a hearing, but declined to participate, may not later intervene and challenge the trial court's order. *Public Citizen v. Insurance Serv. Office*, 824 S.W.2d 811, 813 (Tex. App.—Austin 1992, no writ). Also, one court has held that an intervenor's plea may be prevented from being considered more than thirty days after judgment if the trial court, during the time it had plenary jurisdiction, did not conduct any Rule 76a hearing. *See Texas United Educ. Fund*, 858 S.W.2d at 40-41.

In *Kepple*, the Supreme Court expressly recognized the right of intervenors to be heard on whether unfiled documents are "court records." 970 S.W.2d at 524-525. Even though the Court said that the other aspects of Rule 76a should not be followed in making that determination, if intervenors are aware of the issue being considered (presumably in the context of a protective order hearing), they may intervene on the issue. However, they may not review the questioned documents until the court has made its determination that they are court records which cannot be sealed. *Id.*

A form which may be used for a plea in intervention to unseal documents previously sealed by the trial court is attached to this paper as Appendix D. With appropriate modifications, it may also be useful in the preparation of interventions seeking other relief available to an intervenor under Rule 76a.

H. Standard for a Sealing Order

Once a document has been determined to be a "court record," it is presumed to be open to the public. The burden to rebut the presumption of openness is on the party seeking to have court records sealed. *BP Prods.*, 263 S.W.3d at 35. The party must first prove 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 and safety; [and]

Id.; TEX. R. CIV. P. 76a(1).

1. Specific, Serious & Substantial Interest

The rule does not describe the nature of the interests which might be asserted to support a sealing, other than to say that they must be "specific, serious and substantial." By conspicuously using different language than Rule 192.6, which permits a protective order to be based upon consideration of such interests as avoiding "harassment or annoyance," it seems that the interests to support the sealing of court records must meet a higher standard by being more "serious and substantial." TEX. R. CIV. P. 192.6; 76a.

a. *Privileged Documents*

The Texas Supreme Court has identified trade secrets as one interest meeting the threshold of "serious and substantial." *Eli Lilly & Co.*, 829 S.W.2d at 158 ("Eli Lilly I"); *see also Upjohn Co. v. Freeman*, 906 S.W.2d 92, 96 (Tex. App.—Dallas 1995, no pet.). In a related case, the Supreme Court held that federal regulations establishing the confidentiality of doctors who reported adverse drug reactions did not preempt Texas discovery law or, presumably, Rule 76a, but that the trial court is obligated to consider federal policy expressed in such regulations as an interest to be balanced under Rule 76a. *Eli Lilly & Co. v. Marshall* 850 S.W.2d 155, 160 (Tex. 1993)("Eli Lilly II"), *on subsequent mandamus proceeding*, 850 S.W.2d 164 (Tex. 1993) ("Eli Lilly III").

Appellate courts have held that parties have an interest in limiting access to "communications and documents intended to have been confidential and privileged." *In re Browning-Ferris Indus., Inc.*, 267 S.W.3d 508, 513 (Tex. App.—Houston [14th Dist.] 2008) (orig. proceeding) (attorney-client and work product materials related to on-going proceedings qualified as "specific, serious and substantial interest"); *but see Stroud Oil Properties, Inc. v. Henderson*, 2003 WL 21404820 (Tex. App.—Fort Worth 2003, pet. denied) (trial court's refusal to unseal documents from prior case an abuse of discretion because party had waived any privilege by voluntarily disclosing documents in open court in prior litigation and had failed to show specific, serious, and substantial interest as required under Rule 76a).

> **Practice Tip:** Counsel should not take action that is inconsistent with later asserting that there is a "specific, serious and substantial interest" in having the documents sealed from public view, such as affirmatively usig the documents.

b. *Right to Privacy*

Other recognized interests include an individual's constitutionally protected privacy interest in avoiding disclosure of personal matters such as "[m]arital relationships, procreation, contraception, family relationships, child rearing and education, and medical records." *Nguyen*, 2008 WL 2511183 at *4.

Similarly, employment records and personnel files may contain personal information that is within the protected zone of privacy and hence may qualify as a "specific, serious and substantial interest." *Id.* But there are limits on the right to non-disclosure of personal or intimate information. *Id.* Thus, in *Nguyen*, the court held that there was a legitimate public concern in criminal allegations of sexual misconduct against a Catholic priest and thus publication of diocese personnel files and records did not violate the priest's right to privacy of that information. *Id.* The court also held that the trial court properly redacted privileged information related to the priest's medical and mental health treatment. *Id.* at *5.

2. Adverse Effect

A recent decision acknowledged the difficulty of proving a negative, *i.e.*, the absence of a probable adverse effect. *See Browning-Ferris Indus., Inc.*, 267 S.W.3d at 513. The court's solution was to take note that no opposing party or intervenor had argued that sealing would probably have an adverse effect on public health or safety and hence, in the absence of any such argument, "it would be unwarranted to assume that any such probable effects would be so great that the movant's identified interest [in sealing attorney-client and work product information] could not clearly outweigh them." *Id.* at 513. Thus, the court held that the movant had met its burden of overcoming the presumption of openness. *Id.*

3. No Less Restrictive Means

In addition to proving the movant's interest and that it outweighs any probable adverse effects on public health or safety, the movant must also show that:

> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

TEX. R. CIV. P. 76a(1)(b); *BP Prods.*, 263 S.W.3d at 35. As with the adverse effect element, the *Browning-Ferris* decision took the absence of any indication in the court's record that less restrictive means were available as satisfaction of the movant's burden of proof. 267 S.W.3d at 514. But it may also be important to note that in that case, the non-movant did not oppose the motion to seal in the trial court. *Id.* at 512. Where the motion is opposed, the movant likely must establish affirmatively that no less restrictive option is available as, for example, in a case involving the BP refinery explosion. *See BP Prods.*, 263 S.W.3d at 35 (concluding BP did not meet its burden).

The *BP* case is also interesting because BP's voluntary production of redacted documents proved detrimental to its ability to establish "no less restrictive means" were available. Following the explosion, BP had conducted an internal investigation, including obtaining fifteen witness statements. *Id.* BP produced the statements to the personal injury plaintiffs pursuant to a protective order; however, the Houston Chronicle and a Galveston paper intervened and moved to unseal the discovery in the case which, because it was not a "court record" had not been sealed according to Rule 76a. *Id.* The papers then moved to compel, or in the alternative, for the court to find that the discovery was a court record. *Id.* The court designated the witness statements as court records after an *in camera* inspection and subsequently denied BP's motion to seal the records pursuant to Rule 76a. *Id.* Despite a stay of the court's order by the appellate court, BP then voluntarily removed the confidential designation from the witness statements and produced them to the plaintiffs and the Chronicle in redacted form. *Id.* at 33-34. Nonetheless, BP continued its appeal of the court's Rule 76 order.

Not surprisingly, the appellate court found that by voluntarily producing the witness statements, BP had effectively made them available to the public, thus rendering the issue of whether the redacted portions were court records moot. *Id.* at 35. As for BP's burden to show that "no less restrictive means" existed other than to seal the statements, the court concluded that "by tendering the 15 redacted witness statements, BP effectively conceded that a less restrictive alternative—redaction—was available to the broad sealing order it requested." *Id.* The *BP* case largely turned on BP's waiver of its motion to seal while the trial court's order was stayed pending appeal. Nonetheless, redacting the documents weakened the argument that no less restrictive means were available.

Practice Tip: If the documents you wish to shield are largely non-confidential in nature but contain some private or personal information, consider redaction instead of a motion to seal. On the other hand, if you wish to avoid producing the document, move to seal it in its entirety. *See, e.g., BP Prods. N. Am., Inc.*, 263 S.W.3d at 35 (for sealing purposes, test involves whether documents as a whole are court records concerning matters with a "probable adverse effect upon the general public health or safety," and determination will not be made as to portions of the documents in isolation). Finally, be aware that by redacting a document, you may be inadvertently showing that a less restrictive means than sealing exists. *See id.*

I. Motion for Temporary Sealing Orders

Paragraph 5 of Rule 76a provides for a temporary sealing order. Such an order may be issued upon a showing "of 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" before the hearing and notice provisions of paragraphs 3 and 4 can be accomplished. TEX. R. CIV. P. 76a(5)(emphasis added). A motion for a temporary sealing order must be served upon all parties who have answered. A form which may be used for such a motion is attached to this paper as Appendix E.

A temporary sealing order must set the time for the hearing under paragraph 4 and must direct that the movant give immediate public notice under paragraph 3. Upon motion by any party or intervenor, with notice to the parties, the court may modify or withdraw the temporary sealing order. A form which may be used for a temporary sealing order is attached to this paper as Appendix F.

While paragraph 5 concerns only temporary sealing orders issued by the trial court, it has been held that courts of appeals also may also temporarily seal documents during any consideration of an appeal from an order denying a sealing request. *Dallas Morning News*, 842 S.W.2d at 658-660.

J. The Sealing Order

Rule 76a(6) requires that the order on a motion to seal court records—whether the decision was to seal or not to seal: (1) be in writing, be open to the public; (2) be a separate document; (3) contain "specific reasons for finding and concluding" whether the required showing had been made; and (4) if sealing any documents, describe the specific portions of the court records to be sealed and state the length of time they will be sealed. A form which may be used for an order granting a motion to seal is attached to this paper as Appendix G.

K. Continuing Jurisdiction and Modification

Rule 76a(7) provides that "a court that issues a sealing order" retains continuing jurisdiction after judgment "to enforce, alter, or vacate" a sealing order.

Because the continuing jurisdiction is vested in a court "that issues a sealing order," it could be argued that a court which never issued a sealing order has no post-judgment continuing jurisdiction to issue one. It could be argued that this is an oversight because this same paragraph gives a non-party the right to intervene at any time "before or after judgment to seal or unseal" court records. (emphasis added). On the other hand, it could be argued just as persuasively that it was not an oversight and that the intervenor's right to seek a post-judgment sealing is restricted by the sentence which limits the court's continuing jurisdiction to those instances where some sort of sealing order was issued.

This issue was presented, but not resolved, in *In re Dallas Morning News, Inc.*, 10 S.W.3d 298 (Tex. 1999) (per curiam). There, an intervenor sought access to documents after judgment had been entered and where no sealing order had been previously rendered, although the parties had filed a Rule 11 confidentiality agreement with the court. *Id.* at 298-99. But four justices would have held that a trial court did have continuing jurisdiction to hold a Rule 76a hearing on the intervenor's request for access to unfiled discovery and trial exhibits, rejecting the argument that Rule 76a(8) predicated such jurisdiction on a previous order sealing or unsealing records. *See id.* (J. Abbott, concurring) at 299; *but see Texas United Educ. Fund*, 858 S.W.2d at 40 (continuing jurisdiction provision of Rule 76a did not apply where trial court had never conducted Rule 76a hearing, no showing that protective order involved "court records," and documents submitted for *in camera* inspection and thus expressly excluded from Rule 76a).

In order for there to be continuing jurisdiction over a sealing order, one court has held that the procedures of Rule 76a had to have been followed and that later attempts to characterize an ordinary protective order as a Rule 76a order are ineffective to create continuing jurisdiction. *Stroud v. VBFSB Holding Corp.*, 917 S.W.2d 75, 83-84 (Tex. App.—San Antonio 1996, writ denied).

Paragraph 7 also provides that reconsideration of any sealing motion may not be sought by any party or intervenor who had actual knowledge of the original hearing, absent a showing of "changed circumstances materially affecting the order." TEX. R. CIV. P. 76a(7).

L. Immediate Appeal

Paragraph 8 of Rule 76a provides for an immediate appeal from "any order (or portion of an order or judgment) relating to sealing or unsealing court records." The order is "deemed to be severed from the case" and "may be appealed by any party or intervenor who participated in the hearing." TEX. R. CIV. P. 76a(8). The appellate court reviews Rule 76a decisions under an abuse of discretion standard,

which parallels the standard for protective orders. *Kepple*, 970 S.W.2d at 526.

As with the continuing jurisdiction provision, questions have emerged regarding whether the appeal provision of Rule 76a(8) applies absent a sealing order. The per curiam opinion in *In re Dallas Morning News* did not resolve the issue, but in a concurrence and dissent, Justice Baker argued that the trial court's hearing on the post-judgment intervenor's request and its order setting the issue for a Rule 76a hearing was "any order" "relating to sealing or unsealing" and hence, an appeal was available under Rule 76a(8). *See In re Dallas Morning News, Inc.*, 10 S.W.3d at 307-08 (J. Baker concurring, dissenting).

The Fourth Court of Appeals has also held that an appeal was ripe from a protective order which authorized sealing without compliance with Rule 76a, despite the fact that no records had actually been sealed pursuant to the order. *See Clear Channel Communications, Inc. v. United Servs. Auto. Ass'n*, 195 S.W.3d 129, 132-33 (Tex. App.—San Antonio 2006, no pet.) (Rule 76a(8) allowed for appeal of any order relating to sealing; distinguishing *In re Dallas Morning News* as trial court not asked to, and did not, order sealing of court records).

Pending appeal, the movant may request that the appellate court issue a stay of a trial court's order denying a motion to seal. *See, e.g., BP Prods.*, 263 S.W.3d at 33.

As for sealing the appellate record, an appellate court may seal the record on an agreed motion when the trial court has properly ordered court records sealed. But at least one court has held that appellate courts do not have authority to determine motions to seal on appeal where the movant did not first seek an order from the trial court. *See Environmental Procedures, Inc. v. Guidry*, 2009 WL 237063, *24 (Tex. App.—Houston [14th Dist.] Feb. 3, 2009, no pet. h.) (noting Rule 76a did not expressly give appellate courts the authority to make the fact-intensive determination required to seal records); *see also Navasota Res.s, L.P. v. First Source Tex., Inc.*, 206 S.W.3d 791, 794 (Tex. App.—Waco 2006, no pet.) (J. Gray, dissenting) (disagreeing with court's decision to file brief under seal pursuant to trial court's protective order where trial court had not first conducted Rule 76a proceeding).

M. Unintended Consequences

While *Kepple* arguably limited the reach of Rule 76a with regard to unfiled discovery, a subsequent case has carved out a sizeable exception for discovery that is filed, as discussed next.

1. *Compaq*: A Case Study

The plaintiffs instituted a state court class action against Compaq after pursuing a similar case in federal court. *Compaq Computer Corp. v. LaPray*, 75 S.W. 3d 669, 670-71 (Tex. App.—Beaumont 2002, no pet.). The parties entered into a protective order regarding discovery previously exchanged in the federal court case. The protective order required plaintiffs to file "'Protected Information,' including confidential documents, discovery answers, or depositions, with a motion for a temporary sealing order under TEX. R. CIV. P. 76a(5)." *Id.* at 671. A separate discovery control order set a deadline for plaintiffs to file their motion for class action certification with existing evidence. *Id.* Plaintiffs timely filed their motion for class action certification along with a Rule 76a(5) request for temporary sealing order for the supporting exhibits. *Id.* They subsequently posted public notice that the court had granted their sealing request and set a 76a(4) hearing. *Id.* Following the hearing, the trial court ruled that the confidential discovery was a court record and that Compaq failed to carry its burden to have the discovery sealed. *Id.* at 672.

The Beaumont Court of Appeals affirmed and in a sweeping decision held that the plaintiffs' mere act of filing the thousands of pages of confidential discovery with the motion for a temporary sealing order transformed "un-filed discovery" into "court records." *Id.* at 673-

74. Thus, the court did not address Compaq's evidentiary sufficiency issue regarding whether the discovery "concern[]ed 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." *See id.* at 674. Because the discovery became a "court record" automatically upon filing, the court had no reason to address the trial court's alternative finding under subsection (2)(c). While the holding is the logical result of the express terms of Rule 76a(2)(a), which deems "all documents of any nature filed" to be court records, it seems unlikely that the Supreme Court in promulgating the rule or narrowing its reach in *Kepple* had this result in mind.

a. Did Compaq *alter the Burden on Establishing Court Records?*

The court's holding is likely to supplant the careful approach of the Supreme Court in *Kepple*. In that case, the Court rejected the notion that any discovery in a products liability case, for example, "concerns matters that have a probable adverse effect upon the general public health or safety" and instead held that the party seeking to classify un-filed discovery as "court records" had to prove a nexus between the specific document and the alleged product defect. *Kepple,* 970 S.W.2d at 527. The *Kepple* court expressly concluded as follows:

> A party cannot demonstrate that a manufacturer's proprietary design, research, and testing records have a *probable* adverse effect on the public health or safety, as Rule 76a requires before documents are "court records", merely by producing evidence of a defect in the manufacturer's products. Rather, the party must, at a minimum, demonstrate some nexus between the alleged defect and the documents at issue. Because Kepple failed to demonstrate any such nexus, the district court abused its discretion in classifying the documents as "court records" under Rule 76a(2)(c).

Id.

But with the *Compaq* holding, once discovery has become a "court record" by default, a movant arguably has a more difficult burden to establish that the interest in sealing them from public view outweighs the presumption of openness. Indeed, the court appeared to make short shrift of Compaq's arguments regarding safeguarding its trade secrets. The court stated Compaq's hurdle as follows:

> Rule 76a(1), (7) mandates that Compaq, the party seeking to seal records, had the burden to show **both** that (a) it had a "specific, serious and substantial interest" clearly outweighing (1) the presumption of openness afforded by the rule to court records, as well as (2) any probable adverse effect that sealing would have on the general publish health or safety **and** that (b) there was no less restrictive means other than sealing that would adequately and effectively protect its specific, asserted interest.

Compaq, 75 S.W.3d at 674 (emphasis in original). The court distinguished *Kepple* on the ground that the court was concerned with the harm of allowing intervenor access to *unfiled* discovery "prior to its having been determined to be a court record" (or having become a court record by default as in that case), and thus did not conduct the document-by-document review as did the Supreme Court in *Kepple*. *See id.* at 674-75.

b. No Less Restrictive Means

The *Compaq* case also demonstrates the difficulty of establishing that "no less restrictive means" other than sealing are available. *See id.* at 675. Interestingly, the trial court had ordered that the redacted portions of some of the documents be sealed, which Compaq argued constituted a finding that redaction was a less restrictive approach than sealing. *See id.* The appellate court rejected the argument, stating that "the issue is not whether there was a 'less

restrictive means' available other than sealing to protect Compaq's interest, but whether Compaq showed there was no 'less restrictive' means available." *Id.*

> ***Query***: Could the *Compaq* result have been avoided if the parties' protective order had not expressly referenced a temporary sealing order or Rule 76a? No. Courts routinely incorporate Rule 76a expressly in the parties' agreed protective order. And even if not explicit in the order, Rule 76a is mandatory. *Clear Channel Communications, Inc.*, 195 S.W.3d at 136. Its provisions cannot be avoided or waived by agreement; nor are they mooted by settlement or trial. *Cf. Chandler v. Hyundai Motor Co.*, 844 S.W.2d 882, 883 (Tex. App.—Houston [1st Dist.] 1992, no writ).

2. Possible Solutions and Practical Pointers

a. Require Prior Notice

To prevent a *Compaq*-like result, one option is to include in your agreed protective order a provision whereby no party will file confidential documents unless that party gives advance notice to the opposing parties. The primary problem with this approach involves imminent filings, for example, a motion for summary judgment that must be filed by a certain deadline. In such cases, advance notice may be impractical. What's worse is that the opposing party has no means to enforce compliance with the provision in such cases.

Rule 76a is intended to remedy such situations with its temporary sealing order provision. *See Clear Channel Communications, Inc.*, 195 S.W.3d at 133 (the precise function of Rule 76a's temporary sealing order provision is "to protect the confidentiality of information until the trial court rules on a pending motion to seal"). But in *Clear Channel*, neither party had made any attempt to seal any documents. *See id.* at 131-32. In *Compaq*, in contrast, the plaintiffs filed the confidential discovery with their motion for a temporary sealing order.

b. Improperly Obtained Documents

A decision by the Fourth Court of Appeals suggests another means by which to prevent a "court records by default" scenario. *See Roberts*, 123 S.W.3d 436. The *Roberts* case involved a San Antonio lawyer who was subsequently criminally convicted based on his attempts to blackmail individuals with whom his wife had had extra-marital affairs. Documents concerning the scheme were removed from Roberts' office by his former law partner, who attempted to use them in litigation against Roberts. *See id* at 438. The San Antonio Express News intervened to oppose Roberts' request to seal the documents and related pleadings that referenced them. *Id.* at 439.

The court, apparently sensitive to the fact that the documents had been improperly obtained by West, acknowledged the difficulty that arises when documents the owner wishes to seal have not been produced in the normal course of discovery but nonetheless are in the possession of the other party:

> The 202 documents in this case may be compared to unfiled discovery tendered *in camera* to the court, which are not considered "court records" under Rule 76a. However, the 202 files are not discovery documents. They were not in the custody of the party who sought to seal them, as is customarily the case. Roberts could not tender then *in camera* because he did not have custody of them. West did not tender them *in camera* because he wanted them in the record.

123 S.W.3d at 441. As a solution to this quandary, the court suggested that the movant in such a case should request the adverse party to tender the documents *in camera*. While the party with custody typically would seek *in camera* review, the court stated that there should be no difference in application of the law:

"Otherwise, merely be tendering a disputed document, the party with custody of the documents can 'trigger an elaborate, expensive process' that could 'easily become a tool for delay and gamesmanship." *Id.* (quoting *Kepple*, 970 S.W.2d at 524). Upon such a request and agreement by the trial court to accept the documents *in camera*, "the documents should not be considered 'court records' until the trial court has made that determination." *Id.* (emphasis added).

In another case in which the movant alleged that the documents at issue had been improperly obtained (by theft of an employee--an issue the court noted but did not address because of the lack of a developed appellate record), the Fourth Court again relied on the *in camera* provision of Rule 76a. *See In re Coastal Bend College*, 2008 WL 4594092 (Tex. App.—San Antonio, Oct. 15, 2008) (orig. proceeding). There it was the non-movant who had tendered the documents for an *in camera* review. *Id.* at *3. Despite the fact that the documents had also been filed with the court with the employee's application for receivership, the court ruled that the submission of the documents for an *in camera* review prevented them from becoming "court records." *Id.* "We therefore hold that tendering the records with the application for receivership did not convert the records to 'court records' under Rule 76a(2)." *Id.*

> **Practice Tip:** To prevent documents which have been improperly obtained from becoming "court records" by default, include with the motion to seal a request for an *in camera* review, or, if the documents are not in the movant's possession, a request that the opposing party tender the documents *in camera*.

III. RULE 192.6

A. Rule 192.6's role vis-à-vis Rule 76a

The focus of Rule 76a is on "openness" and the public's right to information. But if documents at issue are not court records, the party may move for a protective order under Rule 192.6 and the trial court may then restrict access to the documents under that rule as opposed to the more rigorous standards of Rule 76a. *Kepple*, 970 S.W.2d at 525; *Roberts*, 123 S.W.3d at 440. A movant must establish a "particular, specific, and demonstrable injury" but "there is no requirement that the injury be balanced against the presumption of open access to court records as required by Rule 76a." *Roberts*, 123 S.W.3d at 440.

B. Authority of Court

Rule 192.6 may be used to prevent or limit discovery that invades one's personal, constitutional, or property rights. TEX. R. CIV. P. 192.6(b). The term "confidentiality order," which parties frequently use in seeking to protect confidential information or trade secrets, does not appear in the rules. Rather, a "confidentiality order" is a short-hand reference to one type of protective order. Rule 192.6(b) describes the power of the court:

> to protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may — among other things — order that:
>
> (1) the requested discovery not be sought in whole or in part;
>
> (2) the extent or subject matter of discovery be limited;
>
> (3) the discovery not be undertaken at the time or place specified;
>
> (4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;
>
> (5) the results of the discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

TEX. R. CIV. P. 192.6 (The full text of the rule appears in Appendix A.) Thus, consideration of a confidentiality order relates not to the discoverability of information, but rather to its use by the party receiving it.

Rule 192.6 gives a court wide discretion to balance one party's legitimate need for discovery with another party's need for the discovered information to remain confidential. The only express limitation on the court's broad authority under Rule 192.6 is that a protective order directing that the discovery be sealed or protected from disclosure, is "subject to the provisions of Rule 76a." TEX. R. CIV. P. 192.6 (b)(5). [For purposes of the remainder of this discussion of Rule 192.6, unless otherwise expressly stated, it will be assumed that Rule 76a does not apply, *i.e.*, that the documents covered under the confidentiality order are not "court records." If court records are involved, then Rule 76a is implicated. *See* Part II.A., *supra.*]

C. Who May Seek an Order

A motion under Rule 192.6 must be made by "a person from whom discovery is sought." Non-parties, as well as parties, from whom discovery is sought may seek relief. For example, in *In re Shell E&P, Inc.*, 179 S.W.3d 125, Tex. App.—San Antonio, 2005, no pet.), an oil company which had been a defendant in a former suit by the plaintiffs was allowed to argue its discovery objections in the plaintiffs' fee suit against their former attorneys. The oil company argued that it was the legal owner of the confidential documents in the attorneys' files, which had been produced in the prior suit pursuant to a protective order, and that the attorneys had only temporary custody. *Id.* at 129-30. The court held that while Shell was a non-party and had not filed an appearance, it had standing under Rule 192.6 to assert its objections at the hearing to compel. *Id.* at 130.

The *Shell* case also demonstrates the force of a protective order after the litigation in which it was entered has terminated. The court easily rejected the plaintiffs' arguments that the order was not before the trial court in the fee dispute case, stating that the judge was entitled to take judicial notice of his prior order in a related case between substantially the same parties. As for its effect, the court noted that Rule 192.3(b) requires a person to produce documents within the person's "possession, custody, or control," which for purposes of discovery means physical possession or a right to possession that is equal to or superior to the person who has physical possession. *Id.* at 131 (citing TEX. R. CIV. P. 192.7(b); *GTE Communications Sys. Corp. v. Tanner,* 856 S.W.2d 725, 729 (Tex. 1993)). The court relied on *In re Kuntz,* 124 S.W.3d 179 (Tex. 2003) (orig. proceeding), which held that an employee's mere access to its employer's documents did not equate to "possession, custody or control," particularly where disclosure would violate a confidentiality agreement and subject the employee to a suit for damages. Likewise, the Fourth Court noted that requiring production would violate the protective order and subject the attorneys to a suit for damages in that case. *Id.* at 131. Thus, the protective order prevented the attorneys from having "legal possession" of the documents for the purposes of Rule 192.3(b). *Id.*

> **Practice Tip:** When a suit is settled or finally resolved, be aware of the provisions of any protective order regarding the status of documents produced pursuant thereto. The order may require that documents be returned or destroyed. Also be aware of any restrictions on use of the documents in subsequent litigation. As the *Shell* case demonstrates, the termination of litigation does not eviscerate the effectiveness of a protective order in other proceedings. Also, rather than produce under threat of compulsion, the better approach is to assert objections or to notify the owner of the documents if not a party to the litigation in which the discovery is being sought.

D. Motion Required

Rule 192.6(a) requires a motion to be made "within the time permitted for response to the discovery request." But it also expressly includes this language:

> A person should not move for protection when an objection to written discovery [term defined in Rule 162.7 or an assertion of privilege] is appropriate.

If a person asserting an objection or a privilege does file a motion, though, the rule reassures the movant that the motion does not waive the objection or privilege. In other words, "should not" does not mean "shall not."

E. Content of Motion and Order

While not express in Rule 192.6, a movant must show specific grounds for protection and a demonstrable injury, *i.e.*, good cause. *See Masinga v. Whittington*, 792 S.W.2d 940, 940-941 (Tex. 1990). There is no precise definition of "good cause," and Texas courts have been encouraged to look for guidance in federal interpretations of Rule 26(c) of the Federal Rules of Civil Procedure. *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987).

When specifying your grounds for "good cause," keep in mind the Supreme Court's requirement that there be a demonstration of "a particular, articulated and demonstrable injury, as opposed to conclusory allegations." *Id.* Thus, a motion should do more than merely allege that unrestricted disclosure would invade "personal, constitutional, or property rights," even though that is the express language of the rule. *See Masinga*, 792 S.W.2d at 940-941. It also should do more than merely state that the information sought is "highly confidential and proprietary and a trade secret." To meet the required showing, the motion should, by way of specific examples and/or articulated reasoning, give the court the necessary facts upon which to base an order. Also, failure to timely plead and prove entitlement to protection can result in waiver of any objection or claimed privilege. *See In re Gore*, 251 S.W.3d 696, 700-01 (Tex. App.—San Antonio 2007, no pet.).

Where the basis of the motion is protection from the time and place of the discovery, the movant "must state a reasonable time and place for discovery with which the person will comply." TEX. R. CIV. P. 192.6(a).

Rule 192.6 also provides that the movant "must comply with a request to the extent protection is not sought." The only exception is if compliance with the remainder of it prior to a court ruling "is unreasonable under the circumstances."

With regard to proof, Rule 192.6 does not expressly encourage affidavits and other proof in making the requisite showing. But they are a good idea and there is nothing to prohibit *in camera* inspections, which can be useful in making the required showing to the court.

Keep in mind that a motion for protective order is a discovery motion, triggering a requirement of a certificate to the court indicating that counsel had attempted to work out the issue before approaching the court for relief. *See* TEX. R. CIV. P. 191.2.

> **Practice Tip relating to the Order:** While the court need not make detailed findings, an opposed protective order is less subject to later attack if it recites that the order was entered upon motion, contains a finding that a particularized showing of good cause has been established, and contains a finding that the order is no more restrictive than is necessary to balance the interests of the parties and public policy. If the parties or the court desire to provide for procedures relating to any future modification of the order, other than what would be the case normally, the order should also set forth any such procedures.

F. Trade Secrets and Rule 192.6

Rule 507 of the Texas Rules of Evidence provides for a trade secret privilege as follows:

> A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interest of the holder of the privilege and of the parties and the furtherance of justice may require.

TEX. R. EVID. 507.

Thus, under Rule 192.6, if a trade secret is sought in written discovery, the resisting party need not file a motion for protection, but may timely assert the privilege as a reason for not responding to the discovery request. Then, in the context of a motion to compel (or a motion for a protective order if one is nonetheless filed), the court will address the trade secret objection. In the context of a deposition, of course, the person need only assert the privilege.

The question then arises as to the procedure the court is to use in evaluating trade secret objections. In *Re Continental General Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998), the Supreme Court adopted a balancing approach which weighs the need to safeguard proprietary information with the right to a full and fair trial:

> We therefore hold that a trial court should apply Rule [of Evidence] 507 as follows. First, the party resisting discovery must establish that the information is a trade secret. The burden then shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claims. If the requesting party meets this burden, the trial court should ordinarily compel disclosure of the information, subject to an appropriate protective order. In each circumstance, the trial court must weigh the degree of the requesting party's need for the information with the potential harm of disclosure to the resisting party.

Id. at 613.

In that case, Continental Tire had argued that a protective order for trade secrets would, as a practical matter, be ineffective, since the trial court could later determine that the documents were "court records" and make them available to the public under Rule 76a. The Supreme Court was not persuaded. It noted that just because the unfiled discovery documents were trade secrets did not necessarily mean that they were "court records" and, even if they were determined to be court records, Rule 76a still allowed them to remain sealed upon certain findings. *Id.* at 614. Applying its balancing test, the court determined that the plaintiffs had not met their burden to establish that the trade secret information—Continental Tire's skim stock chemical formula—was necessary for a fair adjudication of the product defect claim. *Id.* at 615.

But had the Supreme Court ruled otherwise (or had the trial court in a subsequent attempt by the plaintiffs to discover the formula, which the Supreme Court observed was authorized under its decision, *see id.* at 615-16), Continental Tire's concern over the effectiveness of a protective order reflects the differing burden under a Rule 76a analysis. According to Continental Tire, Rule 76a would almost always result in production of trade secret information as, once having been shown to be necessary to a personal injury case, the court would likely find the requisite "probable adverse effect upon the general public health or safety" to permit public disclosure. *Id.* at 614 (citing TEX. R. CIV. P. 76a).

While such a result is not automatic, Continental Tire's concern was obviously directed at the more stringent burden in a Rule 76a proceeding to overcome the nebulous presumption of openness and prove the absence of less restrictive means than sealing even for highly sensitive proprietary data. Further, the protections of a protective order become moot once a document has been designated a court record (or becomes one upon filing). Still, truly proprietary information without sufficient nexus to the case is undiscoverable. But trade secret privileged information that may be relevant is both (1) discoverable and, by virtue of Rule 76a(2), potentially public. Thus, the case underscores that while Rule 192.6 exists to protect the disclosure of truly sensitive information, a party does not have an absolute right to confidentiality of its documents.

G. "Umbrella" Confidentiality Orders

While the language of Rule 192.6 is geared toward consideration of discovery requests on an individual basis to determine whether protection is necessary, it is not uncommon for one party or all parties to seek an interim or "umbrella" confidentiality order. Such an order is entered without individual consideration of each document or discovery request and allows a party to designate any document or product of discovery as "confidential" and thereby place it under the aegis of the confidentiality order without further action by the court. A practical effect of such an order is to shift to the party receiving the discovery the burden of approaching the court if the order is unacceptable with respect to such document or discovery product. However, while the recipient theoretically has this burden, the producing party risks the discovery becoming a "court record" if it simply waits for the recipient to challenge the designation or to file the document under exigent circumstances, as discussed above.

Umbrella orders also typically address which party has the burden in connection with any modification of the order with respect to such documents. One approach would be to place the burden on the producing party to defend the protection for the document. Another would be to place the burden upon the party believing that the existing order is unacceptable with respect to a particular document. Unless the order provides otherwise, the burden to remove a document from coverage of the order will likely lie with the party seeking the modification.

Umbrella confidentiality orders have been widely hailed as promoting efficiency in the conduct of civil litigation, particularly document-intensive cases. *See* discussion of benefits of such orders in Part IV.A.8 below relating to "umbrella" confidentiality orders in federal court. While such orders are not provided for in the rules, the Texas Supreme Court implicitly approved what it called "blanket" protective orders in *Garcia*, 734 S.W.2d at 348 as long as such an order was narrowly tailored to protect proprietary interests while allowing exchange of covered documents.

> **Practice Tip:** It is good practice to include a reference to Rule 76a with regard to filing confidential documents under seal, including the temporary sealing order provision. A general provision that the parties "will file under seal" or that "the court clerk is directed to file documents under seal" will likely be struck as inconsistent with Rule 76a's specific procedures.
>
> Texas practitioners are likely familiar with the standing agreed protective order in the U.S. District Court for the Western District (discussed *infra*). While largely amenable to use in state court, be advised that the provisions relating to seal are unsuitable for use in state court and are unlikely to be approved by the state court. The solution is to simply omit the specific paragraphs regarding sealing and instead reference Rule 76a. A copy of the Western District standard order, as

well as a copy of the order with suggested revisions for state court practice, are attached to this paper as Appendices H and I.

H. Modification of a Protective Order

Any protective order may be modified upon some showing of good cause. However, reliance upon the original order by one or more parties will be considered. In the context of an agreed confidentiality order, one court has held that once the agreed order is entered by the court and relied upon by a party, it can be modified only in "exceptional circumstances or to meet a compelling need." *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933, 938 (Tex. App.—Dallas 1986), *vacated* 730 S.W.2d 648 (Tex. 1987). Although the Supreme Court vacated this decision, it is a good indication of the burden that a party seeking modification will face under these circumstances.

> **Practice Tip**: Before a party seeks a modification of an order, that party should review the order to determine whether it specifies the manner in which a modification may be sought, the standards to be applied to any modification, and who has the burden to seek a modification. Such modification provisions are common in agreed or "umbrella" orders.

I. Confidentiality Agreements Without Orders

Rule 11 of the Texas Rules of Civil Procedure provides that no agreement between attorneys or parties will be enforced unless it is in writing and filed, or unless it is made of record in open court. Tex. R. Civ. P. 11. A Rule 11 agreement is a handy way to accomplish an agreed protective order, particularly when it relates to such things as scheduling of discovery. Keep in mind, though, that parties cannot operate in violation of and contrary to the Texas Rules of Civil Procedure, even if the trial court has approved the agreement. *See Missouri Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 872 (Tex. 1972).

When the Rule 11 agreement relates to protection of confidential information or trade secrets, though, most counsel still prefer the supposed added assurance of an agreed court order, especially if there is a possibility that Rule 76a may be implicated and there is some desirability to a court finding that "records" are not involved.

IV. THE FEDERAL APPROACH TO SEALING AND PROTECTIVE ORDERS

The federal court practice with respect to protective orders is similar in most respects to state court practice. As with Rule 192.6, Federal Rule of Civil Procedure 26(c) gives the district court wide discretion to limit discovery. Also, as in state court, a movant must establish that good cause exists for the order.

There are much more appreciable differences between state and federal court practice with regard to sealing. The Federal Rules of Civil Procedure do not contain the equivalent of a Rule 76a for motions and orders to seal. Thus, documents are routinely filed under seal as long as a protective order is in place. Further, there are no procedural requirements of notice and a hearing as with Rule 76a.

But federal courts similarly recognize a "presumption of openness" to judicial proceedings and a right of access to court records by the public. This right is deeply rooted in the English common law traditions that were made a part of the American judicial system. The federal courts do not, however, treat all court records the same. Rather, they employ a hierarchical approach, in which the greatest access is given to court orders and opinions and lesser access to information that is not filed with the court, but merely exchanged between the parties (such as non-filed discovery and settlement agreements).

Protective orders and sealing pursuant thereto are discussed first, followed by a discussion of challenges to sealing orders by non-parties.

A. Rule 26(c)

The federal equivalent of Rule 192.6 of the Texas Rules of Civil Procedure is Rule 26(c) of the Federal Rules of Civil Procedure.

1. Authority of the Court

Rule 26 establishes a two-pronged approach to protect sensitive but discoverable, *i.e.*, relevant information. *Pearson v. Miller*, 211 F.3d 57, 65 (3d Cir. 2000). Rule 26(b) expressly limits the scope of discovery to non-privileged material. FED. R. CIV. P. 26(b). Thus, privileged materials are necessarily protected by Rule 26(b). *Pearson*, 211 F.3d at 65. Where a privilege is not available, Rule 26(c) authorizes the court to fashion the appropriate order to allow as much relevant information as possible to be discovered while preventing "unnecessary intrusions into the legitimate interests—including privacy and other confidentiality interests—that might be harmed by the release of the material sought." *Id.* at 65.

The authority of the federal court to issue a confidentiality order derives from the following language of Rule 26(c):

> [T]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]

FED. R. CIV. P. 26(c). The Rule gives district courts "broad latitude" to "prevent disclosure of materials for many types of information, including, *but not limited to*, 'trade secret[s] or other confidential research, development, or commercial information.'" *Phillips v. General Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002) (emphasis in original) (observing protective orders consistently granted for many types of information including attorney-client correspondence detailing case evaluation inadvertently sent to opposing counsel, medical and psychiatric records confidential under state law, confidential settlement agreements, and federal and grand jury secrecy provisions); *see also Pearson*, 211 F.3d at 72 ("Legitimate interests in privacy are among the proper subjects of this provision's protection.").

2. Showing Required

"Good cause" is required to be shown to obtain any protective order. FED. R. CIV. P. 26(c); *Pearson*, 211 F.3d at 72-73; *Landry v. Airline Pilots Ass'n*, 901 F.2d 404, 435 (5th Cir. 1990). The movant must show a particular and specific need for such an order and may not rely upon a conclusory allegation of good cause. *Pearson*, 211 F.3d at 73; *Phillips*, 307 F.3d at 1210-11; *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978).

3. Who May Seek an Order

As in state court, the movant need not be a party to the lawsuit. Rule 26(c) provides that the motion may be made "by a party or any person from whom discovery is sought." FED. R. CIV. P. 26(c)(1).

4. Where to Seek an Order

Rule 26(c) provides that the order may be issued by "the court where the action is pending—or as an alternative, on matters relating to a deposition, in the court for the district where the deposition will be taken." *Id.*

5. Requirement of a Motion

Rule 26(c) requires that any type of protective order be issued upon motion. The court also has authority to enter appropriate protection in the context of a motion to compel in the absence of a motion for protection. Under Rule 37(a)(5)(B) and (C), if a motion to compel is denied, or is granted in part and denied in part, "the court may enter any protective order authorized under Rule 26(c)." FED. R. CIV. P. 37(a)(5).

6. Content of a Motion

The person seeking a confidentiality order must plead and establish the existence of the required "good cause." The movant must show with specificity the harm which would result from disclosure. For example, where it is alleged that disclosure of a purported trade secret would put the disclosing party at a competitive disadvantage, the motion should, through examples and/or affidavits, describe how harm would result. A mere allegation that a document contains a trade secret is not enough.

Rule 26(c) does not expressly mention the submission of supporting affidavits and documents, but the submission of such materials is by no means prohibited. In fact, affidavits are useful for the court. On the other hand, affidavits are not required and the court can determine the extent of any potential harm from disclosure of the documents "either from consideration of the documents alone or against the court's understanding of the background facts. The court's common sense is a helpful guide." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981).

A motion for a protective order must also contain "a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." FED. R. CIV. P. 26(c)(1). This certification is a minimum requirement and does not obviate the need to comply with any applicable local rule relating to certification which may require additional matters such as the time and manner of order any conference. Note also that the conference must be had with "affected parties," which, especially in the context of non-party discovery, may be broader than parties to the lawsuit.

7. Content of an Order

While the court is not required to make detailed proper findings, it is advisable for the order to recite that it was entered upon motion and that the requisite good cause has been shown. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) (finding abuse of discretion in district court's denial of motion to modify protective order without articulated basis for doing so). Except in the context of an agreed or "umbrella" order, the order should also consider addressing any award of expenses. *See* discussion in Part IV.A.9, *infra*. Finally, if the parties or the court intend to specify a manner of seeking modification other than that a party seeking modification may seek it with the requisite good cause to modify any order, the order should spell out any such modification procedures.

Protective orders are reviewed for abuse of discretion. *Seattle Times Co.*, 467 U.S. at 36; *Phillips*, 307 F.3d. at 1210; *Foltz*, 331 F.3d at 1134.

8. "Umbrella" Confidentiality Orders

While not expressly provided for in Rule 26(c), federal courts have welcomed umbrella or blanket confidentiality orders. In fact, the standard protective order of the Western District of Texas (*see* Part IV.C, *infra*) is such an order. They are especially useful, and typically agreed to, in most cases "of even a modicum of complexity." *Zenith Radio Corp.*, 529 F. Supp. at 889; *see also Pearson*, 211 F. 3d at 73.

As discussed below, however, a blanket protective order will not be immune from later scrutiny should a non-party assert a right of access to the shielded information. *See Foltz*, 331 F.3d at 1131 (particularized showing necessary once intervenors challenged contention that documents belonged under seal).

9. Award of Expenses

Rule 26(c), unlike its Texas counterpart, expressly addresses the award of expenses and attorneys fees in connection with a motion for a protective order. It provides that "Rule 37(a)(5) applies to the award of expenses." FED. R. CIV. P. 26(c)(3).

Under Rule 37(a)(5)(A) and (B), upon the granting or denial of the motion, the court

"must, after giving opportunity to be heard" require the losing party to the motion to pay the other side's reasonable expenses, including attorneys' fees, unless the court finds that the making of the motion, or opposing it (as the case may be), "was substantially justified or that other circumstances make an award of expenses unjust." If the court grants the motion in part and denies it in part, then the court "may, after opportunity to be heard, apportion the reasonable expenses." FED. R. CIV. P. 37 (a)(5).

10. Modification of an Order

Federal confidentiality orders may, like their Texas counterparts, be modified upon a showing of good cause by the party seeking the modification. *Pearson,* 211 F.3d at 73. However, before seeking a modification of an order, practitioners should carefully review the order to determine whether the order itself specifies the manner in which a modification may be sought, the standards to be applied to any modification, and who has the burden. Such modification provisions are particularly common in agreed or "umbrella" orders.

Where the order was agreed to and/or has been relied upon by the party opposing modification, modification will be more difficult and the party seeking modification will generally be held to a higher showing. *See generally Zenith Radio Corp.*, 529 F. Supp. at 875; *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979).

Note that a protective order may also be subject to a post-resolution modification request made by a non-party seeking access pursuant to the presumption of openness. *See generally Foltz,* 331 F.3d 1122; *Phillips*, 307 F.3d 1206.

B. Sealing in Federal Court

While there is no counterpart to Rule 76a in federal court, the federal rules address sealing with regard to protecting private information in the context of the electronic docketing system. *See* FED. R. CIV. P. 5.2(a) (redacting), (d) (sealing). Some local rules also address sealing of documents. For example, the local rules of the Western District of Texas state that "a sealed document in a civil case requires leave of the Court before being filed." *See* Administrative Policies and Procedures for Electronic Filing in Civil and Criminal Cases in the U.S. District Court for the Western District of Texas, § 10; *see also* Western District's Amended Privacy Policy and Public Access to Electronic Files, § II. Thus, it is recommended that counsel consult the relevant District's local rules prior to filing a document under seal. Also, various federal statutes may address sealing particular documents, notably in the criminal context, which is beyond the scope of this paper. *See generally, In re Sealing & Non-Disclosure of Pen/Trap/2703(D) Orders,* 562 F. Supp. 2d 876 (S.D. Tex. 2008).

The remainder of this paper focuses on the general principles applicable to sealing and challenges to sealing orders.

1. Public's Right of Access

It is undisputed that there is a First Amendment right of access to courtroom proceedings. *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 605-07, 102 S.Ct. 2613, 2609-2260 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 2829 (1980). The right of access is rooted in "centuries of unbroken legal history" first in English courts and carried over the colonial American system. *Richmond Newspapers,* 448 U.S. at 567, 100 S.Ct. at 2822; *In re Sealing,* 562 F. Supp. 2d at 888. "Indeed, the tradition of publicity is one of most ancient features of our common law system, predating not only the constitution but also the Magna Carta itself." *In re Sealing,* 562 F. Supp. 2d at 888. Publicity performs several functions, including discouraging misconduct by the litigants and improving the quality of witnesses' testimony, serving as a check on the abuse of judicial power, and promoting the public's confidence in the judicial system. *Id.* at 889.

The Supreme Court has also recognized a common law right of access to court records.

Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 & n.8 (1978); *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 429-430 (5th Cir. 1981). Sealing documents and court files thus implicates the common law right of access and, potentially, the First Amendment. *See In re Sealing*, 562 F. Supp. 2d at 887 (while sealing of judicial records imposes limit on public access rather than direct restriction on speech, First Amendment may also provide right of public access to court files).

2. The "Filing Cabinet "

However, "the right to inspect and copy judicial records is not absolute." *Nixon*, 98 S.Ct. at 1312, 435 U.S. at 598 (court supervisory power over own records and files and may deny access where files used for improper purpose). And not all judicial records are deemed of equal value to the public's right to know. Instead, the federal courts envision a "filing cabinet" whereby the top drawer consists of "documents authored or generated by the court itself in discharging its public duties, including opinions, orders, judgments, [and] docket sheets." *Id.* at 890-91. Appellate courts are particularly loath to sealing orders that effectively conceal the workings of the court from public view. *See Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3rd Cir. 1984) (to limit public's right to civil trials, must show limitation serves important governmental interest and no less restrictive means); *In re Continental Ill. Sec. Litig.*, 732 F.2d at 1313 (hybrid summary judgment proceeding equivalent to trial which was presumptively open to public).

The middle drawer contains "pleadings, documents, affidavits, exhibits, and other materials filed by a party or admitted into evidence by the court." *In re Sealing*, 562 F. Supp. 2d at 890. Within this category, "dispositive documents" *i.e.*, "documents that influence or underpin the judicial decision," are have the greatest public interest. *Id.; see also Foltz*, 331 F.3d at 1135 (distinguishing dispositive and non-dispositive motions); *Phillips*, 307 F.3d at 1213.

The lower drawer consists of unfiled documents generated by the discovery process which, until filed with the court, are not presumptively available to the public. *See Seattle Times Co.*, 467 U.S. at 33; *In re Sealing*, 562 F. Supp. 2d at 890. By rule, discovery responses are not filed in federal court until they are used in the proceeding or unless ordered by the court. FED. R. CIV. P. 5(d). Thus, the concerns regarding unfiled discovery that are raised vis-a-vis Texas Rule of Civil Procedure 76a are not automatically present in federal court. But once discovery material is filed with the court, "its status changes [and] [i]f the documents are not among those which have 'traditionally been kept secret for important policy reasons,'' the presumption of public access applies. *Foltz*, 331 F.3d at 1134 (internal citation omitted).

3. Procedure

Procedurally, sealing is typically addressed in the protective order itself and, if applicable, the local rules of the District. Further, the "good cause" standard generally applicable to protective orders likewise governs sealing requests. *See Foltz*, 331 F.3d at 1135 (sealing must meet good cause standard of Rule 26(c)); *Phillips*, 307 F.3d at 1213. However, there are limits to a court's authority to maintain documents under seal. *See In re Sealing*, 562 F. Supp. 2d 876 (holding indefinite duration of sealing order of wiretap-related information unjustified). What's more, sealed documents may be subject to challenge even if the parties and court agree to maintain documents under seal, as discussed next.

4. Challenges to Sealing Orders

a. Members of the Public & Media

A non-party may seek to intervene to gain access to sealed documents, including after dismissal of the case. *See Foltz*, 331 F.3d at 1135 (non parties sought access to sealed documents after settlement of case); *Phillips*, 307 F.3d at 1209 (newspaper sought access to sealed documents after dismissal). Once that occurs, the good

cause standard gives way and the court must balance the public interest underlying the presumption of openness against the litigant's interest in confidentiality. *See Foltz*, 331 F.3d at 1131, 1135; *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1311-1313 (7th Cir. 1984) (good cause standard for protective order governing discovery did not apply to material introduced as evidence).

Relevant factors on the one hand include the general interest in understanding disputes presented in a public forum, the public's interest in ensuring courts and the judiciary are fair and honest, and the right of access to matters affecting the public interest. *In re Continental Ill. Sec. Litig.*, 732 F.2d at 1314. These factors are weighed against any relevant privileges and other harmful consequences that the litigant proves would result from disclosure. *Id.*

Overcoming the right of access generally depends on the type of material at issue, with a presumption automatically attaching to documents that reflect the court process itself. *See id.* at 1314 (balance weighed in favor of documents used in adjudication stages of litigation). Further, dispositive documents and discovery attached to such documents are, on balance, of greater interest to the public and thus less likely to be sealed. *Compare Foltz*, (presumption of access not rebutted where documents filed under seal as attachments to dispositive motion), *with Phillips*, 307 F.3d at 1213 (when party attached a sealed discovery document to nondispositive motion, usual presumption of public access rebutted).

b. Collateral Litigants

In addition to the media or other members of the public, litigants in other lawsuits may also be able to gain access to protected information. *See generally Foltz*, 331 F.3d 1131-32 ("This court strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation."); *see also Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130 (5th Cir. 1986). "Where reasonable restrictions on collateral disclosure will continue to protect an affected party's legitimate interests in privacy, a collateral litigant's request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted." *Foltz*, 331 F.3d at 1132. The collateral litigant must establish to the satisfaction of the court that issued the protective order the relevance of the protected information. *Id.* The collateral count retains the power to decide questions of discoverability in that proceeding. *Superior Oil Co.*, 785 F.2d at 130.

5. Standard of Review

A trial court's decision regarding sealing of court records will be overturned only "for abuse of discretion." *Belo Broad. Corp. v. Clark*, 654 F.2d at 431.

C. Local Rules and Standard Orders

While the parties may continue to fashion their own agreed protective orders for presentation to the court and may seek whatever relief is appropriate under Rule 26(c), it is always wise to consult the Local Rules of the applicable federal district. In an effort to reduce delay and promote efficiency, some federal districts have adopted standard form protective orders.

As discussed above, the United States District Court for the Western District of Texas has such a standard order. Local Rule CV-26(c) provides that, upon the motion of any party, the court "shall enter a protective order in the form set out in Appendix H, absent a showing of good cause by any party opposing entry of the order." W.D. Rule CV-26(c). *See* Appendix H for full text of the order. The rule also provides that where the parties agree, the standard order is approved. *Id.*

> **Practice Tip**: The Western District's standard form is a handy checklist for possible provisions for inclusion in protective orders in other jurisdictions.

V. APPENDICES

A. TEX. R. CIV. P. 76a and 192.6; FED. R. CIV. P. 26(c)

B. Motion to Seal Court Records

C. Notice of Motion to Seal Court Records

D. Plea in Intervention and Motion to Unseal Court Records

E. Motion for Temporary Sealing Order

F. Temporary Sealing Order

G. Order Granting Sealing of Court Records

H. Standard Protective Order of the Local Rules of the United States District Court for the Western District of Texas

I. Standard Protective Order of the Local Rules of the United States District Court for the Western District of Texas as modified for state court practice in Travis County

Rule 76a. Sealing Court Records

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. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon 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 means:

(a) all documents of any nature filed 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 in court files to which access is otherwise restricted by law;

(3) 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. **Notice.** 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.

4. **Hearing.** 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. Any party may participate in the hearing. Non-parties may intervene 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. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. **Temporary Sealing Order.** A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of 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 before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. **Order on Motion to Seal Court Records.** 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.

7. **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 on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not 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.

8. **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 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.

9. **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.

Added by order of April 24, 1990, eff. Sept. 1, 1990.

Comment—1990

New rule to establish guidelines for sealing certain court records in compliance with Government Code § 22.010.

192.6. Protective Orders

(a) *Motion.* A person from whom discovery is sought, and any other person affected by the discovery request, may move within the time permitted for response to the discovery request for an order protecting that person from the discovery sought. A person should not move for protection when an objection to written discovery or an assertion of privilege is appropriate, but a motion does not waive the objection or assertion of privilege. If a person seeks protection regarding the time or place of discovery, the person must state a reasonable time and place for discovery with which the person will comply. A person must comply with a request to the extent protection is not sought unless it is unreasonable under the circumstances to do so before obtaining a ruling on the motion.

(b) *Order.* To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that:

(1) the requested discovery not be sought in whole or in part;

(2) the extent or subject matter of discovery be limited;

(3) the discovery not be undertaken at the time or place specified;

(4) the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court;

(5) the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

Added Aug. 5, 1998, and amended Nov. 9, 1998, eff. Jan. 1, 1999.

RULE 26. DUTY TO DISCLOSE; GENERAL PROVISIONS GOVERNING DISCOVERY

(c) **Protective Orders.**

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

NO. _____

_____,	§	IN THE DISTRICT COURT
Plaintiff,	§	
V.	§	_____ JUDICIAL DISTRICT
_____,	§	
Defendant.	§	_____ COUNTY, TEXAS

MOTION TO SEAL COURT RECORDS

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff/Defendant files this Motion to Seal Court Records (the "Motion") and requests the Court to enter an Order sealing certain documents and materials ("Court Records") listed below, and in support of this motion would show the Court as follows:

1. [Describe the procedural background or the facts that give rise to the need for sealing].

2. Plaintiff/Defendant requests that this Court seal the following Court Records: [Specify the records sought to be sealed].

3. Plaintiff/Defendant has a specific, serious, and substantial interest, as set out below, which clearly outweighs the presumption of openness and any probable adverse effect this sealing will have upon the general public health or safety. The specific, serious, and substantial interest of Plaintiff/Defendant is as follows: [Describe interest and affidavits offered in support of motion].

4. For the following reasons, there is no less restrictive means than sealing records which will adequately and effectively protect the specific interests identified herein. [Specify reasons].

5. Plaintiff/Defendant asks this Court to set a hearing on this Motion so that public notice of the hearing can be posted at the place where notices for meetings of county governmental bodies are required to be posted. Plaintiff/Defendant will also file a verified copy of the posted notice

CERTIFICATE OF SERVICE

Service of the Motion to Seal Court Records has been made on all parties by mailing or delivering a copy thereof to their attorney of record on this _____ day of _____, 20 ___ Additionally, a verified copy of the Notice of the Motion to Seal Court Records has been filed this _____ day of _____, 20___ with the Clerk of the Supreme Court of Texas and the Clerk of the Court in which this case is pending as required by TEX. R. CIV. P. 76a(3).

_____

with the Clerk of the Supreme Court and the District Clerk of _____ County, Texas as required by Rule 76a(3).

[6. Add if necessary: A Motion seeking a Temporary Sealing Order is being contemporaneously filed with this Motion].

WHEREFORE, PREMISES CONSIDERED, Plaintiff/Defendant prays that the Court set a time for a hearing and upon hearing grant the Motion to Seal Court Records and seal the records described herein, and for such other and further relief to which Plaintiff/Defendant may be justly entitled.

Respectfully submitted,

_____
_____
_____
_____

_____
State Bar No. _____

ATTORNEYS FOR _____

CAUSE NO. _____

_____	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
VS.	§	_____COUNTY, TEXAS
	§	
_____	§	
	§	
Defendant	§	_____ JUDICIAL DISTRICT

NOTICE OF MOTION TO SEAL COURT RECORDS

Pursuant to Rule 76(a) of the Texas Rules of Civil Procedure, take notice that Plaintiff/Defendant _____, filed a Motion to Seal Court Records in Cause No. _____ _____ pending in the District Court of _____ County, Texas on the _____ day of _____, 20___, at _____ ___.m. in the courtroom of the _____ Judicial District Court, _____ County, Texas. Pursuant to Rule 76a(3), any person may intervene and be heard concerning the sealing of these Court Records.

A brief and specific description of the nature of this case is as follows: [Briefly describe nature of case].

The Court Records that Plaintiff/Defendant seeks to seal are [Briefly describe records sought to be sealed].

SIGNED AND ENTERED this _____ day of _____, 20 __.

Respectfully submitted,

_____

_____

_____

_____

_____

State Bar No._____

ATTORNEYS FOR _____

VERIFICATION

I certify that a verified copy of the foregoing Notice to the Public of Motion to Seal Court Records has been posted this day at the place where notices for meetings county governmental bodies are required to be posted, and a verified copy of the foregoing Notice is being filed with the Clerk of the Court in which the case is pending and with the Clerk of the Supreme court of Texas.

_____

(Attorney)

SWORN TO AND SUBSCRIBED before me on this _____ day of _____ _____, 20___.

_____

Notary Public, State of Texas

CERTIFICATE OF SERVICE

Service of the Notice of Motion to Seal Court Records has been made on all parties by mailing or delivering a copy thereof to each attorney of record on this _____ day of _____, 20____. Additionally, a verified copy of the Notice of Motion to Seal Court Records has been filed this ____ day of _____, 20___ with the Clerk of the Supreme Court of Texas and the Clerk of the Court in which this case is pending as required by TEX. R. CIV. P. 76A.

_____

NO. _____

_____,	§	IN THE DISTRICT COURT
Plaintiff,	§	
V.	§	_____ JUDICIAL DISTRICT
_____,	§	
Defendant.	§	_____ COUNTY, TEXAS

PLEA IN INTERVENTION AND MOTION TO UNSEAL COURT RECORDS

Intervenor _____, files this Plea in Intervention and Motion to Unseal Court Records in the above-styled cause, and respectfully shows the Court as follows:

1. This Court entered a Sealing Order on _____, 20 ___, sealing the following records ("Court Records") in the above-styled cause: [list records, if known]. Under that Sealing Order, these Court Records have been sealed and removed from public inspection.

2. Pursuant to Texas Rule of Civil Procedure 76a, Intervenor has a right to intervene in this cause to unseal the above-described Court Records. There is a presumption that Court Records be open to the public. Sealing Court Records in this cause violates Rule 76(a) because [Include any of the following if applicable:] (adverse party) has not shown a specific, serious and substantial interest which clearly outweighs the presumption of openness. Additionally, (adverse party) has not shown that any specific, serious, and substantial interest outweighs any probable adverse effect that sealing court records in the above-styled cause will have upon general public health or safety.

3. [Include, if applicable, allegations that adverse party failed to show that no less restrictive means than sealing the above-described court records will adequately and effectively protect any specific interest asserted].

4. [Include allegations if public notice was not properly given, or if a public hearing was not held, or if the original sealing order did not comply with the requirements of the rule if applicable].

5. [Include allegations about whether intervenor had actual notice of the hearing on original motion for sealing order or about changed circumstances if applicable].

WHEREFORE, PREMISES CONSIDERED, Intervenor, _____, prays that the Court grant its Motion to Unseal Court Records, vacate the Sealing Order, and make the above-described Court Records available to the public, and grant it such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

_____
_____
_____
_____

_____
State Bar No. _____

ATTORNEYS FOR _____

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion was forwarded to all parties of record on this _____ day of _____, 20__.

_____

NO. _____

_____,	§	IN THE DISTRICT COURT
Plaintiff,	§	
V.	§	_____ JUDICIAL DISTRICT
_____,	§	
Defendant.	§	_____ COUNTY, TEXAS

MOTION FOR TEMPORARY SEALING ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff/Defendant files this Motion for Temporary Sealing Order pursuant to Texas Rule of Civil Procedure 76a(5), and requests the Court to enter a Temporary Order sealing certain documents and materials ("Court Records"), and in support thereof would show the Court as follows:

1. Plaintiff/Defendant filed, contemporaneous with this Motion, a Motion to Seal Court Records pursuant to Rule 76a. In its Motion to Seal Court Records, Plaintiff/Defendant moves this Court to seal the following Court Records: [Describe records sought to be sealed]. Plaintiff/Defendant bases its Motion to Seal Court Records on a specific, serious, and substantial interest which outweighs the presumption of openness and any probable adverse effect the sealing will have upon the general public health or safety as described therein.

2. Plaintiff/Defendant has a compelling need for this Court to issue a Temporary Sealing Order sealing the Court Records listed above, because immediate and irreparable injury will result to a specific interest of Plaintiff/Defendant before notice can be posted and a hearing held on the Motion to Seal Court Records if a Temporary Sealing Order is not issued. [Describe specific injury and affidavits and/or verified petition showing specific injury].

3. Plaintiff/Defendant requests that in its Temporary Sealing Order the Court (1) set the hearing date for the Motion to Seal Court Records, and (2) direct Plaintiff/Defendant to immediately post the notices required by Rule 76a(3).

WHEREFORE, PREMISES CONSIDERED, Plaintiff/Defendant prays that the Court grant this Motion for Temporary Sealing Order and seal the above-listed Court Records, and for such other and further relief to which Plaintiff/Defendant may be justly entitled.

Respectfully submitted,

_____
_____
_____
_____

_____
State Bar No. _____

ATTORNEYS FOR _____

CERTIFICATE OF SERVICE

Service of this Motion for Temporary Sealing Order has been made on all parties who have answered in this cause in accordance with Texas Rules of Civil Procedure 20 and 21, by mailing or delivering a copy thereof to their attorney of record on this _____ day of _____, 20__.

_____

NO. _____

_____,	§	IN THE DISTRICT COURT
Plaintiff,	§	
V.	§	_____ JUDICIAL DISTRICT
_____,	§	
Defendant.	§	_____ COUNTY, TEXAS

TEMPORARY SEALING ORDER

Plaintiff/Defendant _____ filed a Motion for a Temporary Sealing Order and has presented [affidavits or a verified petition] supporting the motion. The Court finds that notice of the request for Temporary Sealing Order was properly given under Texas Rule of Civil Procedure 76a to [list parties receiving notice].

The Court finds that Plaintiff/Defendant made the required showing of compelling need from the specific facts set forth in [his/her/its] [petition/affidavit] and Plaintiff/Defendant is entitled to the issuance of this Temporary Sealing Order. The Court further finds that, unless the Court Records are sealed before notice can be posted and a hearing can be held on the Motion to Seal Court Records as otherwise provided for in Rule 76(a), immediate and irreparable injury will result to a specific interest of Plaintiff/Defendant in that, among other things, [Briefly describe injury and specific interest].

IT IS, THEREFORE, ORDERED that the following Court Records in this cause shall be temporarily sealed until and pending the hearing on the Motion to Seal Court Records: [List records to be sealed].

IT IS FURTHER ORDERED that the Motion of Plaintiff/Defendant _____ to Seal Court Records shall be heard in open court on _____, 20___,

at_____ o'clock ___.m., in the courtroom of the _____ Judicial District Court, _____ County, Texas.

Plaintiff/Defendant _____ shall immediately give the public notice required by Rule 76(a)(3).

SIGNED this _____ day of _____, 20___, at _____ o'clock ____.m.

_____
JUDGE PRESIDING

NO. _____

_____,	§	IN THE DISTRICT COURT
Plaintiff,	§	
V.	§	_____ JUDICIAL DISTRICT
_____,	§	
Defendant.	§	_____ COUNTY, TEXAS

ORDER GRANTING SEALING OF COURT RECORDS

On this the _____ day of _____, 20__, in the above-styled and numbered cause, came on to be heard the Motion to Seal Court Records filed by Plaintiff/Defendant pursuant to Texas Rule of Civil Procedure 76a. Plaintiff appeared herein by and through [his/her/its] attorney of record, _____, and Defendant appeared herein by and through [his/her/its] attorney of record, _____, and the Court finds that no other parties or persons have intervened herein, and no parties or persons have appeared in Court and asked to be heard concerning the sealing of the records. All parties before the Court having announced ready, the Court proceeded to conduct an open and public hearing on the Motion to Seal Court Records, and the Court, having read and examined the motion and heard the evidence, argument of counsel, and examined the records on file herein, FINDS as follows:

The public notice, as required by Rule 76a(3), was properly posted at the place where notices for meetings of county governmental bodies are required to be posted for _____ County, Texas, at on _____ _____, 20__, and said notice contained all recitations required by Rule 76a(3); and

The Court further finds that a verified copy of the posted notice was filed with the Clerk of the Supreme Court of Texas and filed with the Clerk of the District Court of _____

County, Texas, on _____ ____, 20__, and that all procedural requisites to sealing under Rule 76a have been met; and

The Court further specifically finds pursuant to Rule 76a(6) that Plaintiff/Defendant, _____, has made the showing required by Rule 76a(1) by showing a specific, serious, and substantial interest in having the documents and other information identified in this Order placed under seal of this Court, by establishing the following: [Describe interests to be protected and harm that may occur from the disclosure. Also briefly describe how the facts were provided to the Court (*i.e.* - affidavits, etc.)].

This Court further finds that this above-described interest clearly outweighs both the presumption of openness, and any probable adverse effect that sealing will have upon the general public health or safety. The Court further finds that Plaintiff/Defendant has also made the required showing that there are no less restrictive means than sealing the Court Records set out in this Order which will adequately and effectively protect the specific interests asserted by establishing the following: [Specify]. It is therefore:

ORDERED, ADJUDGED, AND DECREED that immediately, and hereafter, and forever, or until further order of this Court upon notice and hearing, that the following Court Records shall be sealed:

1. [List documents and/or other information to be sealed]

IT IS ORDERED, ADJUDGED, AND DECREED that the above-listed Court Records are ordered removed from Court files and are ordered to be sealed by the District Clerk of _____ County, Texas, and ordered not to be opened, disclosed, or disseminated by or to any person. The above-listed Court Records shall not be included in the public records of this cause, and shall not be otherwise disclosed or permitted to come into the possession, control, or knowledge of any person other than the attorneys of record for the parties in this cause and the regular staff of said attorneys, certified court reporters and their staff, and the personnel of this Court. All persons coming into possession of records sealed pursuant to this Order shall not

disclose, transfer, or in any way allow said documents to come into the possession of any other person at any time; provided, that nothing in this Order shall be construed as a limitation or restriction on Plaintiff/Defendant, its employees, officers, agents, authorized representatives, or attorneys concerning use, possession, control or disclosure of the documents or other information subject to this Order.

IT IS FURTHER ORDERED that this Order shall not be included in any judgment or other order in the above-styled and numbered cause but shall be a separate document in this cause.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction as provided by law to enforce, alter, or vacate this Order before or after judgment in this cause.

IT IS FURTHER ORDERED that the Clerk of this Court shall take notice of this Order and institute procedures to insure that the terms of this Order are complied with by the personnel of this Court, including, but not limited to, appropriately marking the Court Records subject to this Order to identify those records as being under the seal of this Court and subject to this Order, and removing those records from the Court files.

IT IS FURTHER ORDERED that any violation of this Order shall result in contempt of this Court.

SIGNED this the _____ day of _____, 20__.

_____

JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
_____ DIVISION

_____ Plaintiff,	)	
v.	)	No. _____
_____ Defendant	)	

PROTECTIVE ORDER

Upon motion of all the parties for a Protective Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure,

It is hereby ORDERED that:

1. All Classified Information produced or exchanged in the course of this litigation shall be used solely for the purpose of preparation and trial of this litigation and for no other purpose whatsoever, and shall not be disclosed to any person except in accordance with the terms hereof.

2. "Classified Information," as used herein, means any information of any type, kind or character which is designated as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by any of the supplying or receiving parties, whether it be a document, information contained in a document, information revealed during a deposition, information revealed during a deposition, information revealed in an interrogatory answer or otherwise. In designating information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), a party will make such designation only as to that information that it in good faith believes contains confidential information. Information or material which is available to the public, including catalogues, advertising materials, and the like shall not be classified.

3. "Qualified Persons," as used herein means:

(a) Attorneys of record for the parties in this litigation and employees of such attorneys to whom it is necessary that the material be shown for purposes of this litigation;

(b) Actual or potential independent technical experts or consultants, who have been designated in writing by notice to all counsel prior to any disclosure of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information to such persons, and who

have signed a document agreeing to be bound by the terms of this protective order (such signed document to be filed with the Clerk of this Court by the attorney retaining such person);

(c) The party or one party representative (in cases where the party is a legal entity) who shall be designated in writing by the party prior to any disclosure of "Confidential" information to such person and who shall sign a document agreeing to be bound by the terms of this protective order (such signed document to be filed with the Clerk of this Court by the party designating such person); and

(d) If this Court so elects, any other person may be designated as a Qualified Person by order of this Court, after notice and hearing to all parties.

4. Documents produced in this action may be designated by any party or parties as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by marking each page of the document(s) so designated with a stamp stating "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only").

In lieu of marking the original of a document, if the original is not produced, the designating party may mark the copies that are produced or exchanged. Originals shall be preserved for inspection.

5. Information disclosed at (a) the deposition of a party or one of its present or former officers, directors, employees, agents or independent experts retained by counsel for the purpose of this litigation, or (b) the deposition of a third party (which information pertains to a party) may be designated by any party as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by indicating on the record at the deposition that the testimony is "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") and is subject to the provisions of this Order.

Any party may also designate information disclosed at such deposition as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only) by notifying all of the parties in writing within thirty (30) days of receipt of the transcript, of the specific pages and lines of the transcript which should be treated as "Confidential or "For Counsel Only" (or "Attorneys' Eyes Only") thereafter. Each party shall attach a copy of such written notice or notices to the face of the transcript and each copy thereof in his possession, custody or control. All deposition transcripts shall be treated as "For Counsel Only" (or "attorneys' Eyes Only") for a period of thirty (30) days after the receipt of the transcript.

To the extent possible, the court reporter shall segregate into separate transcripts information designated as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), with blank, consecutively numbered pages being provided in a nondesignated main transcript. The separate transcript containing "Confidential" and/or "For Counsel Only" (or "Attorneys' Eyes Only") information shall have page numbers that correspond to the blank pages in the main transcript.

6. (a) "Confidential" information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons. Information designated as "For Counsel Only" (or "Attorneys' Eyes Only") shall be restricted in circulation to Qualified Persons described in Paragraphs 3(a) and (b) above.

(b) Copies of "For Counsel Only" (or "Attorneys' Eyes Only") information provided to a receiving party shall be maintained in the offices of outside counsel for Plaintiff(s) and Defendant(s). Any documents produced in this litigation, regardless of classification, which are provided to Qualified Persons of Paragraph 3 (b) above, shall be maintained only at the office of such Qualified Person and only working copies shall be made of any such documents. Copies of documents produced under this Protective Order may be made, or exhibits prepared by independent copy services, printers or illustrators for the purpose of this litigation.

(c) Each party's outside counsel shall maintain a log of all copies "For Counsel Only" (or "Attorneys' Eyes Only") documents which are delivered to any one or more Qualified Person of Paragraph 3 above.

7. Documents previously produced shall be retroactively designated by notice in writing of the designated class of each document by Bates number within thirty (30) days of the entry of this order. Documents unintentionally produced without designation as "Confidential" may be retroactively designated in the same manner and shall be treated appropriately from the date written notice of the designation is provided to the receiving party.

Documents to be inspected shall be treated as "For Counsel Only" (or "Attorneys' Eyes Only") during inspection. At the time of copying for the receiving parties, such inspected documents shall be stamped prominently "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by the producing party.

8. Nothing herein shall prevent disclosure beyond the terms of this order if each party designating the information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") consents to such disclosure or, if the court, after notice to all affected parties, orders such disclosures. Nor shall anything herein prevent any counsel of record from utilizing "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information in the examination or cross-examination of any person who is indicated on the document as being an author, source or recipient of the "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information, irrespective of which party produced such information.

9. A party shall not be obligated to challenge the propriety of a designation as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") at the time made, and a failure to do so shall not preclude a subsequent challenge thereto. In the event that any party to this litigation disagrees at any stage of these proceedings with the designation by

the designating party of any information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), or the designation of any person as a Qualified Person, the parties shall first try to resolve such dispute in good faith on an informal basis, such as production of redacted copies. If the dispute cannot be resolved, the objecting party may invoke this Protective Order by objecting in writing to the party who has designated the document or information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"). The designating party shall be required to move the Court for an order preserving the designated status of such information within fourteen (14) days of receipt of the written objection, and failure to do so shall constitute a termination of the restricted status of such item.

The parties, may, by stipulation, provide for exceptions to this order and any party may seek an order of this Court modifying this Protective Order.

10. Nothing shall be designated as "For Counsel Only" (or "Attorneys' Eyes Only") information except information of the most sensitive nature, which if disclosed to persons of expertise in the area would reveal significant technical or business advantages of the producing or designating party, and which includes as a major portion subject matter which is believed to be unknown to the opposing party or parties, or any of the employees of the corporate parties. Nothing shall be regarded as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information if it is information that either:

(a) is in the public domain at the time of disclosure, as evidenced by a written document;

(b) becomes part of the public domain through no fault of the other party, as evidenced by a written document;

(c) the receiving party can show by a written document that the information was in its rightful and lawful possession at the time of disclosure; or

(d) the receiving party lawfully receives such information at a later date from a third party without restriction as to disclosure, provided such third party has the right to make the disclosure to the receiving party.

11. In the event a party wishes to use any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information in any affidavits, brief, memoranda of law, or other papers filed in this Court in this litigation, such "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information used therein shall be filed under seal with the Court.

12. The Clerk of this Court is directed to maintain under seal all documents and transcripts of deposition testimony and answers to interrogatories, admissions and other pleadings filed under seal with the Court in this litigation which have been designated, in

whole or in part, as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by a party to this action.

13. Unless otherwise agreed to in writing by the parties or ordered by the Court, all proceedings involving or relating to documents or any other information shall be subject to the provisions of this order.

14. Within one hundred twenty (120) days after conclusion of this litigation and any appeal thereof, any document and all reproductions of documents produced by a party, in the possession of any of the persons qualified under Paragraphs 3(a) through (d) shall be returned to the producing party, except as this Court may otherwise order or to the extent such information was used as evidence at the trial. As far as the provisions of any protective orders entered in this action restrict the communication and use of the documents produced thereunder, such orders shall continue to be binding after the conclusion of this litigation, except (a) that there shall be no restriction on documents that are used as exhibits in Court unless such exhibits were filed under seal, and (b) that a party may seek the written permission of the producing party or order of the Court with respect to dissolution or modification of such protective orders.

15. This order shall not bar any attorney herein in the course of rendering advice to his client with respect to this litigation from conveying to any party client his evaluation in a general way of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced or exchange herein; provided, however that in rendering such advice and otherwise communicating with his client, the attorney shall not disclose the specific contents of any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced by another party herein, which disclosure would be contrary to the terms of this Protective Order.

16. Any party designating any person as a Qualified Person shall have the duty to reasonably ensure that such person observes the terms of this Protective Order and shall be responsible upon breach of such duty for the failure of any such person to observe the terms of this Protective Order.

SIGNED AND ENTERED this _____ day of _____, 20__.

_____

UNITED STATES DISTRICT JUDGE

APPROVED AND AGREED:

_____

Counsel

ATTORNEYS FOR PLAINTIFFS

_____

_____

Counsel

ATTORNEYS FOR DEFENDANTS

CAUSE NO. _____

_____	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
VS.	§	_____COUNTY, TEXAS
	§	
_____	§	
	§	
Defendant	§	_____ JUDICIAL DISTRICT

PROTECTIVE ORDER

Upon motion of all the parties for a Protective Order pursuant to Rule 192.6(b) of the Texas Rules of Civil Procedure,

It is hereby ORDERED that:

1. All Classified Information produced or exchanged in the course of this litigation shall be used solely for the purpose of preparation and trial of this litigation and for no other purpose whatsoever, and shall not be disclosed to any person except in accordance with the terms hereof.

2. "Classified Information," as used herein, means any information of any type, kind or character which is designated as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") by any of the supplying or receiving parties, whether it be a document, information contained in a document, information revealed during a deposition, information revealed during a deposition, information revealed in an interrogatory answer or otherwise. In designating information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), a party will make such designation only as to that information that it in good faith believes contains confidential information. Information or material which is available to the public, including catalogues, advertising materials, and the like shall not be classified.

3. "Qualified Persons," as used herein means:

(a) Attorneys of record for the parties in this litigation and employees of such attorneys to whom it is necessary that the material be shown for purposes of this litigation;

(b) Actual or potential independent technical experts or consultants, who have been designated in writing by notice to all counsel prior to any disclosure of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information to such persons, and who

have signed a document agreeing to be bound by the terms of this protective order (such signed document to be filed with the Clerk of this Court by the attorney retaining such person);

(c) The party or one party representative (in cases where the party is a legal entity) who shall be designated in writing by the party prior to any disclosure of "Confidential" information to such person and who shall sign a document agreeing to be bound by the terms of this protective order (such signed document to be filed with the Clerk of this Court by the party designating such person); and

(d) If this Court so elects, any other person may be designated as a Qualified Person by order of this Court, after notice and hearing to all parties.

4. Documents produced in this action may be designated by any party or parties as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by marking each page of the document(s) so designated with a stamp stating "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only").

In lieu of marking the original of a document, if the original is not produced, the designating party may mark the copies that are produced or exchanged. Originals shall be preserved for inspection.

5. Information disclosed at (a) the deposition of a party or one of its present or former officers, directors, employees, agents or independent experts retained by counsel for the purpose of this litigation, or (b) the deposition of a third party (which information pertains to a party) may be designated by any party as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by indicating on the record at the deposition that the testimony is "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") and is subject to the provisions of this Order.

Any party may also designate information disclosed at such deposition as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only) by notifying all of the parties in writing within thirty (30) days of receipt of the transcript, of the specific pages and lines of the transcript which should be treated a "Confidential or "For Counsel Only" (or "Attorneys' Eyes Only") thereafter. Each party shall attach a copy of such written notice or notices to the face of the transcript and each copy thereof in his possession, custody or control. All deposition transcripts shall be treated as "For Counsel Only" (or "Attorneys' Eyes Only") for a period of thirty (30) days after the receipt of the transcript.

To the extent possible, the court reporter shall segregate into separate transcripts information designated as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), with blank, consecutively numbered pages being provided in a nondesignated main transcript. The separate transcript containing "Confidential" and/or "For Counsel Only" (or "Attorneys' Eyes Only") information shall have page numbers that correspond to the blank pages in the main transcript.

6. (a) "Confidential" information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons. Information designated as "For Counsel Only" (or "Attorneys' Eyes Only") shall be restricted in circulation to Qualified Persons described in Paragraphs 3(a) and (b) above.

(b) Copies of "For Counsel Only" (or "Attorneys' Eyes Only") information provided to a receiving party shall be maintained in the offices of outside counsel for Plaintiff(s) and Defendant(s). Any documents produced in this litigation, regardless of classification, which are provided to Qualified Persons of Paragraph 3 (b) above, shall be maintained only at the office of such Qualified Person and only working copies shall be made of any such documents. Copies of documents produced under this Protective Order may be made, or exhibits prepared by independent copy services, printers or illustrators for the purpose of this litigation.

(c) Each party's outside counsel shall maintain a log of all copies "For Counsel Only" (or "Attorneys' Eyes Only") documents which are delivered to any one or more Qualified Person of Paragraph 3 above.

7. Documents previously produced shall be retroactively designated by notice in writing of the designated class of each document by Bates number within thirty (30) days of the entry of this order. Documents unintentionally produced without designation as "Confidential" may be retroactively designated in the same manner and shall be treated appropriately from the date written notice of the designation is provided to the receiving party.

8. Nothing herein shall prevent disclosure beyond the terms of this order if each party designating the information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") consents to such disclosure or, if the court, after notice to all affected parties, orders such disclosures. Nor shall anything herein prevent any counsel of record from utilizing "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information in the examination or cross-examination of any person who is indicated on the document as being an author, source or recipient of the "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information, irrespective of which party produced such information.

9. A party shall not be obligated to challenge the propriety of a designation as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") at the time made, and a failure to do so shall not preclude a subsequent challenge thereto. In the event that any party to this litigation disagrees at any stage of these proceedings with the designation by the designating party of any information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"), or the designation of any person as a Qualified Person, the parties shall first try to resolve such dispute in good faith on an informal basis, such as production of redacted copies. If the dispute cannot be resolved, the objecting party may invoke this Protective Order by objecting in writing to the party who has designated the document or

information as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only"). The designating party shall be required to move the Court for an order preserving the designated status of such information within fourteen (14) days of receipt of the written objection, and failure to do so shall constitute a termination of the restricted status of such item.

The parties, may, by stipulation, provide for exceptions to this order and any party may seek an order of this Court modifying this Protective Order.

10. Nothing shall be designated as "For Counsel Only" (or "Attorneys' Eyes Only") information except information of the most sensitive nature, which if disclosed to persons of expertise in the area would reveal significant technical or business advantages of the producing or designating party, and which includes as a major portion subject matter which is believed to be unknown to the opposing party or parties, or any of the employees of the corporate parties. Nothing shall be regarded as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information if it is information that either:

(a) is in the public domain at the time of disclosure, as evidenced by a written document;

(b) becomes part of the public domain through no fault of the other party, as evidenced by a written document;

(c) the receiving party can show by a written document that the information was in its rightful and lawful possession at the time of disclosure; or

(d) the receiving party lawfully receives such information at a later date from a third party without restriction as to disclosure, provided such third party has the right to make the disclosure to the receiving party.

~~11. In the event a party wishes to use any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information in any affidavits, brief, memoranda of law, or other papers filed in this Court in this litigation, such "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information used therein shall be filed under seal with the Court.~~

~~12. The Clerk of this Court is directed to maintain under seal all documents and transcripts of deposition testimony and answers to interrogatories, admissions and other pleadings filed under seal with the Court in this litigation which have been designated, in whole or in part, as "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information by a party to this action.~~

11. ***If a party wishes to file any document designated as "Confidential" or "for counsel only" in whole or in part, that party shall first move for a Temporary Sealing Order under Rule 76a and shall file the document only after the Court rules on the motion.***

12. Unless otherwise agreed to in writing by the parties or ordered by the Court, all proceedings involving or relating to documents or any other information shall be subject to the provisions of this order.

13. Within one hundred twenty (120) days after conclusion of this litigation and any appeal thereof, any document and all reproductions of documents produced by a party, in the possession of any of the persons qualified under Paragraphs 3(a) through (d) shall be returned to the producing party, except as this Court may otherwise order or to the extent such information was used as evidence at the trial. As far as the provisions of any protective orders entered in this action restrict the communication and use of the documents produced thereunder, such orders shall continue to be binding after the conclusion of this litigation, except (a) that there shall be no restriction on documents that are used as exhibits in Court unless such exhibits were filed under seal, and (b) that a party may seek the written permission of the producing party or order of the Court with respect to dissolution or modification of such protective orders.

14. This order shall not bar any attorney herein in the course of rendering advice to his client with respect to this litigation from conveying to any party client his evaluation in a general way of "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced or exchange herein; provided, however that in rendering such advice and otherwise communicating with his client, the attorney shall not disclose the specific contents of any "Confidential" or "For Counsel Only" (or "Attorneys' Eyes Only") information produced by another party herein, which disclosure would be contrary to the terms of this Protective Order.

15. Any party designating any person as a Qualified Person shall have the duty to reasonably ensure that such person observes the terms of this Protective Order and shall be responsible upon breach of such duty for the failure of any such person to observe the terms of this Protective Order.

SIGNED AND ENTERED this _____ day of _____, 20__.

_____

DISTRICT JUDGE

APPROVED AND AGREED:

_____

Counsel

ATTORNEYS FOR PLAINTIFFS

_____

_____

Counsel

ATTORNEYS FOR DEFENDANTS