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Finding a Balance Between Securing Confidentiality and Preserving Court Transparency: A Re-Visit of Rule 76A and Its Application to Unfiled Discovery

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FINDING A BALANCE BETWEEN SECURING CONFIDENTIALITY AND PRESERVING COURT TRANSPARENCY: A RE-VISIT OF RULE 76A AND ITS APPLICATION TO UNFILED DISCOVERY

*The Honorable Craig Smith**, *Grant Schmidt*** and *Austin Smith****

TABLE OF CONTENTS

I.	THE PUBLIC HAS NO ADVOCATE	310
II.	THE RELATIONSHIP BETWEEN COURT TRANSPARENCY, COURT RECORDS, AND UNFILED DISCOVERY	315
	A. THE OPEN COURTS DOCTRINE	315
	B. COMPETING PRIVATE AND PUBLIC INTERESTS	316
III.	HISTORICAL BACKGROUND	317
	A. RULE 76A’S ENACTMENT – COURT RECORDS DEFINED	318
	B. 76A’S EFFECTS ON UNFILED DISCOVERY	319
IV.	THE CURRENT STATE OF 76a’S APPLICABILITY TO UNFILED DISCOVERY	323
	A. <i>GENERAL TIRE V. KEPPLER</i>	323
	1. <i>Case Summary of General Tire</i>	324
	2. <i>The Supreme Court of Texas Reviews General Tire</i>	325
	B. GENERAL TIRE’S ISSUES AND UNANSWERED QUESTIONS	327
	1. <i>Impractical Intervention</i>	328

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2. <i>Confusing Judicial Guidelines and Application – Specifically In Light of Trade Secret Law</i>	329
C. RECENT CASES RELATED TO 76A AND UNFILED DISCOVERY	331
1. <i>BP v. The Houston Chronicle</i>	332
2. <i>Cortez v. Johnston</i>	332
3. <i>ICON Benefit Administrators v. Mullin</i>	333
V. POTENTIAL SOLUTIONS AND RECOMMENDATIONS FOR THE SECRECY CRISIS .	335
A. REVISIT OF GENERAL TIRE	336
1. <i>Specific Proof of Burden to Prove Nexus</i>	337
2. <i>Define “Public Health and Safety”</i>	338
B. GREATER JUDICIAL AWARENESS AND ACCOUNTABILITY	341
1. <i>Losing Control</i>	341
2. <i>Alternative Tools to Aid in Protection – Specifically a Standardized Protective Order</i>	342
C. THE ATTORNEY PROBLEM	343
1. <i>Abuse of Rule 11 Agreements</i>	344
2. <i>Ethical Duty to the Public</i>	345
VI. CONCLUSION	346

I. THE PUBLIC HAS NO ADVOCATE

A significant amount of critical information can be hidden within unfiled discovery. Unfiled discovery can be broadly defined as any document or information exchanged between parties that takes place outside the presence of the courtroom.¹ Protective orders and confidentiality agreements conceal unfiled discovery that may contain information paramount to public health or safety, which undermines the important public policy of court transparency.² On one hand, there is a need to protect trade secrets and other confidential business information exchanged through discovery.³ Of course, a business involved in litigation runs the risk that its confidential business information will be disclosed to the general public, possibly causing the loss of trade secret protection.⁴ Sensitive company (non-trade secret) information also deserves judicial protection from disclosure to a direct competitor.⁵ On the other hand,

1. See TEX. R. CIV. P. 76a(2)(b).

2. See Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1785 (2014).

3. See Jennifer S. Sickler & Micheal F. Heim, *The Impact of Rule 76a: Trade Secrets Crash and Burn in Texas*, 1 TEX. INTELL. PROP. L.J. 95, 97 (1993); see also Lehnhard v. Moore, 401 S.W.2d 232, 236 (Tex. 1966) (noting the importance of protecting trade secrets through protective orders).

4. See Sickler & Heim, *supra* note 3, at 97.

5. See *Fox v. Anonymous*, 869 S.W.2d 499, 504 (Tex. App.—San Antonio 1993, writ denied) (recognizing right of privacy in various business records as an interest subject to protection under 76a), *rev'd on other grounds*, 970 S.W.2d 520, 526–27 (Tex. 1998).

there may be data and information contained in the same discovery that could have a negative effect on the public's interest in health and safety—documents and information that should not otherwise be protected.⁶

In a civil lawsuit, an attorney's ultimate goal is to maximize the benefits to the client, not to the public.⁷ This means that the attorney has the incentive to pursue the broadest possible protective order to minimize the risk of disclosure of any “confidential information.” This prevents important information, specifically data that may help protect the health and safety of the public, from entering the public view. Thus, in most private litigation, the public has no advocate.⁸

Under Texas law, a *court record* carries the presumption of openness to public view.⁹ This is a positive step in terms of our pursuit of transparent courts; however, this view does not go far enough. Documentation and data recovered through discovery can easily be legally crafted to avoid constituting a court record.¹⁰ The development of new information technology, specifically electronic discovery, dramatically increased the quantity of discovery documents parties in a typical lawsuit currently exchange.¹¹ For large corporations and businesses, overly broad protective orders are considered necessary to protect their confidential information due to the impracticability of reviewing the massive amount of information contained in discovery.¹² In certain circumstances, however, broad protective orders and silent settlement agreements keep “confidential” information out of public view, despite the fact that this information may have a substantial effect on the public's interest in health or safety.¹³ The risk of disclosing harmful information to the public is the economic incentive to keep it a secret.¹⁴

In 1990, the Texas legislature drafted Rule 76a of the Texas Rules of Civil Procedure in an attempt to solve the transparency issue and help alleviate these concerns.¹⁵ Rule 76a sets out the requirements for sealing a court record.¹⁶ The rule establishes the presumption that most court

6. See TEX. R. CIV. P. 76a(2)(c); Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 647–55 (1991).

7. See generally 48 TEX. PRAC., TEX. LAWYER & JUD. ETHICS § 6:6 (2015 ed.) (West).

8. See Doggett & Mucchetti, *supra* note 6, at 647–53.

9. See TEX. GOV'T CODE ANN. § 22.010 (West 2015); TEX. R. CIV. P. 76a(1).

10. See Doggett & Mucchetti, *supra* note 6, at 662. A protective order can be an efficient concealment mechanism. TEX. R. CIV. P. 192.6(b). Rule 192.6 directs that the court may enter an order “[t]o protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights.” TEX. R. CIV. P. 192.6(b).

11. See Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827, 1846–47 (2008).

12. See *id.*

13. See Doggett & Mucchetti, *supra* note 6, at 647–53.

14. See Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 880 (2007).

15. See TEX. GOV'T CODE ANN. § 22.010 (West 2015).

16. See TEX. R. CIV. P. 76a.

records should remain open to public view with limited exceptions.¹⁷ This rule allows courts to grant sealing orders *only after* confirming that the private interest at stake outweighs the extensive public interest in access to information, which is a very high burden for the party seeking to preserve confidentiality.¹⁸ This is an important step that many trial judges may fail to follow. A protective order should not be signed without conducting this analysis. Since court records carry the presumption of openness, once a document has been deemed a court record, it should be an uphill battle to convince the court to grant a sealing order.¹⁹ This burden should be present even if the protective order is “agreed” or stipulated. Generally, trial judges are called upon to resolve a conflict. Absent a conflict, many “agreed” protective orders can be signed without adequate review.²⁰ This should not happen. Even if the protective order is “agreed” to by all parties, trial judges must be aware that the protected documents may conflict with the goals of Rule 76a.

The most revolutionary part of Rule 76a—and perhaps the most controversial—is that *unfiled discovery* can sometimes constitute a *court record*, which would then be subject to a court’s sealing analysis.²¹ In other words, there are many instances in which unfiled discovery should be presumed to be open and accessible. Unfiled discovery is classified as a court record (and therefore presumed to be open) if it concerns “matters that have a probable adverse effect upon the general public health or safety.”²² To visualize the competing interests surrounding court transparency, consider the oil and gas industry’s practice of hydraulic fracturing (fracking).²³ Regulators and scientists have voiced a growing concern that settlement secrecy in fracking lawsuits inhibits their ability to effectively research the environmental effects on public health and safety.²⁴ On one hand, members of the fracking industry contend that the chemical formulas composing fracking fluids constitute valuable trade secrets that should remain protected from competitors in the industry.²⁵ On the other hand, such fracking fluids can contain cancer-causing chemicals such as benzene and chromium, heavy metals, and many other petro-

17. *Id.* § 76a(1).

18. *See id.*; Doggett & Mucchetti, *supra* note 6, at 677–78.

19. *See* TEX. R. CIV. P. 76a(1); Doggett & Mucchetti, *supra* note 6, at 677–78.

20. *See* Doggett & Mucchetti, *supra* note 6, at 646, n.13 (noting that the trial judge who signs an agreed order may not have enough time or familiarity with the case to adequately weigh the competing interests of the need for privacy versus the public’s health and safety).

21. *See* TEX. R. CIV. P. 76a(2)(c); Doggett & Mucchetti, *supra* note 6, at 653–62.

22. TEX. R. CIV. P. 76a(2)(c).

23. *Natural Gas Flowback: How the Texas Natural Gas Boom Affects Health and Safety*, EARTHWORKS 3 (April 2011), <https://www.earthworksaction.org/files/publications/FLOWBACK-TXOGAP-HealthReport-lowres.pdf> [<https://perma.cc/9P4L-F8GY>].

24. *See* Ian Urbina, *A Tainted Water Well, and Concern There May Be More*, N.Y. TIMES (Aug. 3, 2011), http://www.nytimes.com/2011/08/04/us/04natgas.html?_r=0 [<https://perma.cc/4DHD-F8FX>].

25. EARTHWORKS, *supra* note 23, at 8.

leum-derived compounds.²⁶ This is information that should not be hidden from the public. Information that reveals a potential harm to the general public health or safety is not deserving of trade secret protection.²⁷

Let us assume that a fracking operation leases land adjacent to a local family farm.²⁸ After some time, all of the family members become ill and show signs of similar symptoms.²⁹ The family believes that its water supply has been contaminated by the fracking operation and files a lawsuit alleging harms caused by fracking.³⁰ Throughout the litigation, broad protective orders will restrict all discovery information exchanged between parties, although a majority of the documentation probably lacks any trade secret or valuable proprietary information.³¹ The information, although not worthy of judicial protection, is nonetheless kept secret by the protective order, without consideration of the harmful effects on public health and safety.³² Private settlements then keep these contamination claims out of the courtroom, and secrecy provisions of the agreement keep the plaintiffs silent.³³ Therefore, potentially harmful information will forever remain a secret, and the parties to the suit are the only ones who have access.³⁴ With the parties now silent, the information exchanged during discovery remains forever unknown to the public.³⁵

This hypothetical is actually based in part on the recent landmark case *Parr v. Aruba Petroleum, Inc.*, in which a jury returned a verdict in favor of a Texas family alleging harms caused by a fracking operation adjacent to their property.³⁶ The issue that ultimately reached the jury, however,

26. See *id.* at 4. Through the 2005 Energy Policy Act, Congress exempted fracking fluids from the Safe Drinking Water Act. 42 U.S.C. § 300h(d)(1)(B)(ii) (2005).

27. See Steven C. Laird, *Rule 76a: The Public's Crowbar*, TEX. LAW., Dec. 21, 1992, at 12.

28. See generally *Parr v. Aruba Petroleum, Inc.*, No. CC-11-01650-E (Co. Ct. at Law No. 5, Dallas County, Tex. Apr. 22, 2014).

29. See generally *id.*

30. See generally *id.*

31. See Laird, *supra* note 27.

32. See *id.*

33. See Jim Efstathiou, Jr. & Mark Drajem, *Drillers Silence Fracking Claims with Sealed Settlements*, BLOOMBERG (Jun. 5, 2013 11:00 p.m.), <http://www.bloomberg.com/news/articles/2013-06-06/drillers-silence-fracking-claims-with-sealed-settlements> [https://perma.cc/37HT-VZFM] (explaining that settling fracking contamination claims and imposing confidentiality “make[] it difficult to challenge the industry’s claim that fracking has never tainted anyone’s water”); see Urbina, *supra* note 24.

34. See Doggett & Mucchetti, *supra* note 6, at 648–50.

35. See Efstathiou, Jr. & Drajem, *supra* note 33.

36. *Parr v. Aruba Petroleum, Inc.*, No. CC-11-01650-E (Co. Ct. at Law No. 5, Dallas County, Tex. Apr. 22, 2014); see David Blackmon, *Parr v. Aruba—The Fracking Case That Wasn't*, FORBES (June 3, 2014, 6:57 PM), <http://www.forbes.com/sites/davidblackmon/2014/06/03/parr-v-aruba-the-fracking-case-that-wasnt/#14101a2a1cff> [https://perma.cc/W9T8-S652]. Although hailed as a “landmark” case by anti-fracking activists, due to the lack of scientific proof for the fracking claims, the issue that ultimately reached the jury was an intentional nuisance claim. *Id.*; Mica Rosenberg, *Texas Judge Upholds \$3 Million Fracking Verdict*, REUTERS (July 15, 2014, 5:44 PM), <http://www.reuters.com/article/us-usa-fracking-idUSKBN0FK2JE20140715> [https://perma.cc/MZ5F-4NWK]. Interestingly, the family’s neighbors had already settled with the same gas company but were prohibited from discussing their allegations. David Hasemeyer, *Damage Award in Texas Fracking Case Raises Stakes in Air Quality Debate*, INSIDE CLIMATE NEWS (May 28, 2016), <http://insidecli->

was an intentional nuisance claim, not the claims involving fracking.³⁷ This is due to the difficulty in obtaining and producing enough scientific information or data to link the fracking to their specific harms.³⁸ The family later learned that their neighbors had already settled with the same fracking company over similar allegations derived from the same timeline of events.³⁹ Unfortunately, the family was barred by a confidentiality agreement from discussing their case.⁴⁰ This restriction on disclosure has also been an issue in many other cases involving dangerous automotive defects, scandalous judicial activities, and statewide events such as the West fertilizer explosion.⁴¹ The authors of this Article wholeheartedly prioritize the importance of protecting trade secrets, confidential information, and privileged documents; however, the authors also want the trial courts to engage in a balanced approach in applying Rule 76a.

It is time for the court to revisit Rule 76a and provide litigants with better clarity. In April 2015, the *Dallas Morning News* noted that “[s]ince 2004, the Supreme Court has agreed to consider at least three cases in which companies were unhappy with how judges were following the court’s earlier decision on sharing [information] between attorneys. Each time, the companies and those who sued them resolved their disagreements before the high court could make a decision.”⁴²

Part II of this Comment further details the relationship between court transparency and the competing interests involved in discovery.⁴³ Part III examines the historical background and relevant case law that spurred the development of Rule 76a.⁴⁴ Part IV dissects the Texas Supreme Court’s analysis in *General Tire v. Kepple*, the precedential case controlling Rule 76a’s applicability to *unfiled discovery*.⁴⁵ Part IV also evaluates *General Tire*’s effect on recent case law.⁴⁶ Finally, Part V offers recommendations to current judges and practicing attorneys for how to apply Rule 76a and how to balance the competing interests of court trans-

matenews.org/news/20140528/damage-award-texas-fracking-case-raises-stakes-air-quality-debate [https://perma.cc/3MPV-YJBB].

37. See *Parr*, No. CC-11-01650-E.

38. See Blackmon, *supra* note 36.

39. See Hasemeyer, *supra* note 36.

40. See *id.*

41. See *Cortez v. Johnston*, 378 S.W.3d 468, 475 (Tex. App.—Texarkana 2012, pet. denied); *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 524 (Tex. 1998); Dustin B. Benham, *Benham: Texas Court Should Reject Lawsuit Secrecy*, AUSTIN AMERICAN-STATESMAN (July 30, 2014, 6:00 PM), <http://www.mystatesman.com/news/news/opinion/benham-texas-court-should-reject-lawsuit-secrecy/ngq6z/#c204f3c2.3829553.735444> [https://perma.cc/XV46-VCW8].

42. Sue Ambrose, *Could Texas’ High Court Curb Trade-Secret Sharing in Safety Lawsuits?*, DALLAS MORNING NEWS (last updated Apr. 21, 2015, 3:47 PM), <http://www.dallasnews.com/news/metro/20150418-experts-expect-attempt-to-curb-trade-secret-sharing-in-suits.ece> [https://perma.cc/LUK4-RJMF].

43. See *infra* Part II.

44. See *infra* Part III.

45. See *infra* Part IV.

46. See *infra* Part IV.

parency and the protection of confidential client information.⁴⁷

II. THE RELATIONSHIP BETWEEN COURT TRANSPARENCY, COURT RECORDS, AND UNFILED DISCOVERY

Discovery serves many purposes. Among the litigants, it serves as an efficient procedural tool for the exchange of information necessary to develop a case and to provide full disclosure in order to eliminate surprise.⁴⁸ Many question whether those purposes are also meant to coexist with the public's interest in maintaining a transparent and open court system.⁴⁹ The Supreme Court of Texas stated that “the ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.”⁵⁰ Unfiled discovery, however, often helps parties avoid that ultimate purpose.

A. THE OPEN COURTS DOCTRINE

The Texas Constitution states that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”⁵¹ The “Open Courts Provision” of the Texas Constitution “ensures that Texas citizens bringing common-law causes of action will not unreasonably be denied access to the courts.”⁵² In *Garcia v. Peebles*, the Supreme Court of Texas found that Article I, § 8 of the Texas Constitution mandates that “Texas courts should be guided by a principle encouraging the free exchange of information and ideas.”⁵³ Court transparency and the open courts doctrine are pillars of the judicial system that have been contemplated throughout Texas’s legal history.⁵⁴

Major policy considerations support the open courts doctrine.⁵⁵ Our democratic society favors court transparency to encourage public confidence in our judicial system and avoid the perception that our courts are “star chambers.”⁵⁶ The public has a strong interest in an open court sys-

47. See *infra* Part V.

48. See *Lopez v. La Madeleine of Texas, Inc.*, 200 S.W.3d 854, 860 (Tex. App.—Dallas, 2006, no pet.).

49. See *Doggett & Mucchetti*, *supra* note 6, at 647–55.

50. *Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984).

51. TEX. CONST. ART. I, § 13.

52. *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) (stating that the open courts doctrine is “quite plainly, a due process guarantee”).

53. *Garcia v. Peebles*, 734 S.W.2d 343, 349 (Tex. 1987); see TEX. CONST. ART. I, § 8 (“Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.”).

54. See *generally Sax*, 648 S.W.2d at 664; *McCrary v. City of Odessa* 482 S.W.2d 151, 153 (Tex. 1972); *Dillingham v. Putnam*, 14 S.W. 303, 304–05 (Tex. 1890).

55. See *generally Sax*, 648 S.W.2d at 664; *McCrary*, 482 S.W.2d at 153; *Dillingham*, 14 S.W. at 304–05.

56. See *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1129 (5th Cir. 1991). The term “star chambers” is the theoretical description of court orders and rulings that cannot be questioned and lack accountability. *Id.* See also *Doggett & Mucchetti*, *supra* note 6, at 652 (upholding that “greater access strengthens democracy”).

tem that applies the rule of law equally and fairly.⁵⁷ For example, the Texas Public Information Act (the Act) provides that any information collected, assembled, or maintained by or for a governmental entity in connection with the transaction of its official business is open to the public, with certain limited exceptions.⁵⁸ Judicial records, however, are not subject to the Act, but are instead subject to the rules promulgated by the Supreme Court of Texas.⁵⁹ Thus, the public's right of access to court records is not guaranteed.⁶⁰ This lack of guarantee provides room for protective orders and confidentiality agreements to contract around open access, limit the public availability of unfiled discovery, and prevent the public from accessing information that may impact their health and safety. This is precisely why the presumption of openness established by Rule 76a was a significant step in the right direction.

B. COMPETING PRIVATE AND PUBLIC INTERESTS

Should the public have access to documents filed with the court or discovery exchanged between private parties? Proponents of public access to court records argue that since courts are publicly-funded resources, the public is entitled to the information contained in discovery documents.⁶¹ Opponents of public access argue that the only purpose for discovery is the efficient exchange of litigant information, and that the public should have no interest in unfiled discovery.⁶²

Once discovery documentation is properly filed with the county clerk's office, that documentation becomes a *court record*.⁶³ Actual discovery documentation is rarely filed independently with the court.⁶⁴ Typically, attorneys attach discovery to motions filed with the court, which then become part of the court record.⁶⁵ Section 191.006 of the Local Government Code states: "All records belonging to the office of the county clerk to which access is *not otherwise restricted by law or by court order* shall be open to the public at all reasonable times. A member of the public may make a copy of any of the records."⁶⁶ The danger confronting court trans-

57. See Doggett & Mucchetti, *supra* note 6, at 651–52.

58. TEX. GOV'T CODE ANN. § 552.001 (West 2015).

59. *Id.* § 552.0035(a).

60. See generally *id.*

61. See Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1579 (2004) ("A court, after all, is a publicly-funded institution; its main function should be to serve the broader interests of the public.").

62. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 432 (1991) (detailing the viewpoint that there is no need for legislation to make sealing court records more difficult to do); see also Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 458–59, 468 (1991).

63. See TEX. LOC. GOV'T CODE ANN. § 191.006 (West 2015); TEX. R. CIV. P. 76a(2)(a).

64. See Doggett & Mucchetti, *supra* note 6, at 659.

65. See generally TEX. R. CIV. P. 75a. Such motions are typically a motion to compel, motion for sanctions, and motion for summary judgment. See *id.*

66. TEX. LOC. GOV'T CODE ANN. §191.006 (emphasis added).

parency is not discovery that is filed with the court.⁶⁷ Rather, the danger is *unfiled discovery* (information only exchanged between the parties and not filed with the court) dressed in a cloak of confidentiality, protected from the view of the courtroom and the public.⁶⁸ Given the advances in technology and the ease of accessing documents, requests for documents have become broader and the quantity of unfiled discovery has become much larger, thus heightening this threat to court transparency.

III. HISTORICAL BACKGROUND

Issues involving the sealing of court documents and the subsequent effect on court transparency first gained considerable public cognizance in 1987, when the *Dallas Morning News* published a series of articles on the increasing trend of routine sealing of court files by judges in Dallas County.⁶⁹ A six-month investigation revealed that 282 cases in Dallas County have been sealed since 1920.⁷⁰ Over 200 of those cases were sealed after 1980 and another thirty-five cases were sealed in 1986.⁷¹ Judges “routinely sealed the cases at the mutual requests of the parties without extensively questioning the need to seal them,” tending to show a preference for the individual litigant over the public.⁷²

While most of the records remained hidden from the public, and likely still do, the *Dallas Morning News* discovered that “[m]any of the sealed files came from cases that appeared to have significant interest to the public,” including dangerous defective products, industry-caused environmental harm, doctors’ sexual misconduct with patients, and “‘sensitive’ issues involving politically connected parties.”⁷³ The *Dallas Morning News* articles set the stage for public questioning of the sealing policy.⁷⁴ Similar reports of sealed cases shortly followed in other parts of Texas, eventually prompting legislative action.⁷⁵

Note that this investigation mainly focused on the sealing of documents that were *filed* with the court. If courts were allowing documents that were filed with a *public* court to be sealed, it was inevitable that courts were going to hold *unfiled discovery* as protected and confidential as well.

67. See Doggett & Mucchetti, *supra* note 6, at 647–55.

68. See *id.*

69. See Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, DALLAS MORNING NEWS, Nov. 22, 1987, at 1A, 1987 WLNR 1954693. The district clerk who supervised the sealed records stated: “From my understanding, a lot of those records were sealed for other than judicial reasons, probably political considerations, maybe favoritism with certain law firms.” *Id.*; see also Steve McGonigle, *Sealed Lawsuits Deal with Poisonings, Sex, Surgery*, DALLAS MORNING NEWS, Nov. 23, 1987, at 1A, 1987 WLNR 1955656 (noting that none of the cases involved family law or child related litigation).

70. See McGonigle, *Secret Lawsuits Shelter*, *supra* note 69.

71. See *id.*

72. See *id.*

73. See Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 394–95 (2006) (citing McGonigle, *Sealed Lawsuits Deal*, *supra* note 69).

74. See generally McGonigle, *Sealed Lawsuits Deal*, *supra* note 69.

75. See Goldstein, *supra* note 73, at 395.

This is particularly troublesome because business documents collected during discovery are precisely the types of documents that the public should be aware of in many instances.

A. RULE 76A'S ENACTMENT—COURT RECORDS DEFINED

In 1989, as a response to the widespread improper sealing practices among Texas courts, the Texas Legislature passed a law requiring the Supreme Court of Texas 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.”⁷⁶ After the court submitted the issue to its Advisory Committee, public hearings sparked substantial debate over whether the new rule should apply to *unfiled discovery*.⁷⁷

At the conclusion of the public hearings, the Advisory Committee offered a recommendation to the Supreme Court of Texas.⁷⁸ In 1990, the court adopted Rule 76a by a 5–4 vote, with the goal of creating greater access to civil judicial records to promote public health and safety.⁷⁹ In an attempt to balance the competing interests, the court “appl[ie]d Rule 76a’s procedural protections only to those forms of unfiled discovery that are of special interest to the public.”⁸⁰

Rule 76a adopts the presumption that all *court records* are open to the public and allows trial courts to seal court records only upon a showing 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.⁸¹

Under the terms of Rule 76a, subject to certain limited exceptions, *court records* include “all documents of any nature filed in connection with any matter before any civil court,” even if the documents contain confidential information, including exhibits admitted into evidence or even proffered at trial.⁸² The rule requires the party seeking to seal a

76. TEX. GOV'T CODE ANN. § 22.010 (West 2015).

77. See Goldstein, *supra* note 73, at 395.

78. See Doggett & Mucchetti, *supra* note 6, at 646–47. The recommendation was then “revised substantially by the supreme court.” *Id.* at 647.

79. See *id.* at 647.

80. See Goldstein, *supra* note 73, at 418; TEX. R. CIV. P. 76a(2)(b)–(c).

81. TEX. R. CIV. P. 76a(1); see also *Upjohn Co. v. Freeman*, 906 S.W.2d 92, 96, 101–02 (Tex. App.—Dallas 1995, writ denied) (applying Rule 76a and affirming the trial court’s order sealing documents).

82. TEX. R. CIV. P. 76a(2); see also TEX. R. CIV. P. 75a (“The court reporter . . . shall file with the clerk of the court all exhibits which were admitted in evidence . . . during the course of any hearing, proceeding, or trial.”); *Dallas Morning News v. Fifth Circuit Court of Appeals*, 842 S.W.2d 655, 659 (Tex. 1992) (“[E]xhibits introduced into evidence are . . . court records.”).

court record to (1) file a written motion with the trial court that is accessible on the court's public docket and (2) post detailed notice of the motion with both the trial court and the Supreme Court.⁸³ An "agreed" protective order is no longer sufficient to seal documents, and the courts should not allow the implementation of a protective or confidentiality order without following the Rule 76a procedure—even if the order is agreed to. The goal of these two requirements was to create awareness of the proposed sealing and possibly create a database concerning the extent of sealing requests statewide.⁸⁴

Additionally, the court must hold a hearing for oral arguments, which is open to the public.⁸⁵ The party seeking the sealing order must post public notice of the hearing at least fourteen days in advance.⁸⁶ Such notice must state the time and place of the hearing and must contain a "specific description of both the nature of the case and the records . . . sought to be sealed."⁸⁷ Rule 76a gives courts continuing jurisdiction over sealing orders and allows intervenors to challenge sealing requests of records or to unseal court records for public view.⁸⁸ This provision is designed to allow the public to have an advocate. At the conclusion of a sealing hearing, the court must grant or deny the motion in a written opinion, which becomes immediately appealable under Rule 76a(8).⁸⁹

When considering a sealing request, courts must not focus exclusively on the private interests advanced by the parties.⁹⁰ Courts must weigh such private interests against the broader public interest.⁹¹ Former Justice Lloyd Doggett of the Supreme Court of Texas, who drafted Rule 76a, wrote that the rule is "intended to address those instances where the public need is greatest."⁹² Justice Doggett went on to state that "the argument against access to pretrial discovery ignores the larger role that courts, no less than the other branches of government, play in contributing to an informed populace."⁹³

B. 76A'S EFFECTS ON UNFILED DISCOVERY

As mentioned above, Rule 76a's most controversial aspect involves its applicability to *unfiled discovery*.⁹⁴ Subject to certain limited exceptions, court records generally include documents that are actually filed in the record of a civil case.⁹⁵ Although the term generally does not include

83. TEX. R. CIV. P. 76a(3).

84. See Doggett & Mucchetti, *supra* note 6, at 679.

85. TEX. R. CIV. P. 76a(4).

86. *Id.*

87. TEX. R. CIV. P. 76a(3).

88. TEX. R. CIV. P. 76a(7).

89. TEX. R. CIV. P. 76a(8).

90. See Doggett & Mucchetti, *supra* note 6, at 657–58.

91. *See id.*

92. *See id.* at 654.

93. *See id.*

94. *See id.* at 653–55.

95. *See supra* note 82.

unfiled discovery, Rule 76a extends to “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.”⁹⁶ As a result, the first concern of a party seeking to preserve the confidentiality of such information would be to “minimize the number of discovery documents . . . that [may] fall within the definition of court records.”⁹⁷ In practice, the easiest way to limit the dissemination of discovery materials is to negotiate a protective order with the opposing party.⁹⁸ A party can draft a protective order with the necessary language to circumvent the requirements of Rule 76a and keep certain unfiled discovery private.⁹⁹ For example, a confidentiality provision could prevent the dissemination of any documents concerning matters that have a probable adverse effect on the general public health or safety, thereby avoiding the identification of any exchanged documents as “court records.”¹⁰⁰

Rule 76a’s application to *documents filed with the court* varies from its application to *unfiled discovery documents*.¹⁰¹ When handling *documents filed with the court*, Rule 76a becomes relevant when a party seeks to seal a document filed with the court.¹⁰² Documents filed with the court are automatically classified as “court records” under Rule 76a.¹⁰³ They are, therefore, automatically presumed to be open, and are sealed only after the court engages in the sealing procedure set forth in Rule 76a(1).¹⁰⁴

When handling *unfiled discovery documents*, Rule 76a becomes relevant when a party wants unfiled discovery documents to be available to the public (as opposed to *documents filed with the court* where parties are seeking to *seal*).¹⁰⁵ First, the court decides if the unfiled discovery is a court record by determining whether it has a probable adverse effect on the general public health and safety.¹⁰⁶ If it does have that effect, it is then considered a court record and presumed to be open.¹⁰⁷ It can then only be sealed once the court follows the procedure set forth in Rule 76a(1).¹⁰⁸ If the unfiled discovery does not have an adverse effect, it can be subject to a protective order or confidentiality order with no problem.¹⁰⁹ In several cases following the rule’s enactment, Texas courts applied Rule 76a inconsistently, further confusing the rule’s applicability.¹¹⁰

96. TEX. R. CIV. P. 76a(2)(c).

97. See Sickler & Heim, *supra* note 3, at 101.

98. See *id.*

99. See Goldstein, *supra* note 73, at 375, 377–78; Sickler & Heim, *supra* note 3, at 102.

100. See Goldstein, *supra* note 73, at 377–78.

101. See *id.* at 417–18.

102. See TEX. R. CIV. P. 76a.

103. See TEX. R. CIV. P. 76a(2).

104. See TEX. R. CIV. P. 76a(1).

105. See TEX. R. CIV. P. 76a(2)(c); Goldstein, *supra* note 73, at 417–18.

106. See TEX. R. CIV. P. 76a(2)(c); Goldstein, *supra* note 73, at 418.

107. See TEX. R. CIV. P. 76a(1); Goldstein, *supra* note 73, at 418.

108. See TEX. R. CIV. P. 76a(1).

109. See Goldstein, *supra* note 73, at 421.

110. See *infra* Part III.C.

A case that spurred the movement for the Supreme Court of Texas to visit Rule 76a's applicability to unfiled discovery was a 1992 General Motors (GM) settlement in Fort Worth.¹¹¹ GM settled a lawsuit with the family of Frank Zelenuk, a GM employee, who died when his GM pickup collided with another vehicle and caught fire.¹¹² The claim alleged that "the placement of the fuel tanks outside the frame railings of the truck made the tanks more vulnerable to explosion in a collision."¹¹³ Pursuant to the settlement agreement (that presumably included a confidentiality provision), the Zelenuk family returned all documents that had been exchanged during discovery to GM.¹¹⁴

Soon after the settlement, Public Citizen, a national consumer rights advocacy group, "intervened pursuant to Rule 76a and asked the court to disclose the discovery documents to the public."¹¹⁵ The court held that Public Citizen first had to prove that the materials produced during discovery constituted "court records."¹¹⁶ The materials produced included approximately 80,000 documents detailing crash test results and other data concerning the fuel system.¹¹⁷ Although Public Citizen still had not seen the materials, it introduced a deposition of a former GM engineer from a separate case in which the engineer said that GM had withheld negative crash test results from him and forced him to testify for GM favorably, but incorrectly, at trial.¹¹⁸ He stated: "If I'd had the benefit of the testing General Motors hid from me . . . I think my opinion would have changed right then and there."¹¹⁹ Based on this testimony, the court ruled in Public Citizen's favor, deeming the documents to be court records because they had a probable adverse effect upon the general public health and safety, and scheduled a Rule 76a sealing hearing.¹²⁰ On the morning of the hearing, GM voluntarily removed the protective order and released the documents to the public.¹²¹ The documents revealed that GM knew, at least since 1974, that its fuel tank design created a greater fire-hazard risk than other fuel tank designs, but chose not to change the design until 1988.¹²² One of the documents was a "performance review [that] stated concerns about 'rapidly growing products liability litigation involving [the] fuel system' and 'escalating jury awards.'"¹²³

111. See Laird, *supra* note 27, at 12.

112. See *id.* At the time, GM was a defendant in more than 100 lawsuits relating to the fuel tank design. *Id.* The settlement amount was never disclosed. *Id.*

113. Goldstein, *supra* note 73, at 419 (citing Laird, *supra* note 27, at 12).

114. See *id.*

115. *Id.*

116. See Goldstein, *supra* note 73, at 419.

117. See Laird, *supra* note 27, at 12–13.

118. See Laird, *supra* note 27, at 13; Mary Hull, *76a Intervention Allowed in Settled Case: GM Claims Protective Order Shrouds Pickup Crash Data*, TEX. LAW., June 15, 1992, at 5.

119. Hull, *supra* note 118, at 5.

120. See Goldstein, *supra* note 73, at 419.

121. See Laird, *supra* note 27, at 13.

122. Goldstein, *supra* note 73, at 420 (citing Laird, *supra* note 27, at 13).

123. Laird, *supra* note 27, at 13.

This case is one of the very few occasions in which a party successfully used Rule 76a to unveil unfiled discovery materials that expose harms and wrongdoing associated with GM vehicles.¹²⁴

Comparatively, in *Dunshie v. General Motors*, another products liability case, the Beaumont Court of Appeals affirmed the trial court's ruling that certain unfiled discovery documents did not constitute court records.¹²⁵ The disputed documents related to the manufacturer's development and testing of the restraint system of an automobile.¹²⁶ The trial court held that the documents "did not concern matters that [would] have a probable adverse effect upon the general public health or safety."¹²⁷ The court based its decision solely upon the testimony of GM's expert witness who testified that "the documents [did] not reveal a threat to public safety" and therefore, did not involve a probable adverse effect upon the public.¹²⁸ The particular documents at issue were not presented to the appellate court, which gave extreme deference to the trial court's finding.¹²⁹

Another case involving Rule 76a's applicability to unfiled discovery was *Ford Motor Co. v. Benson*, where the plaintiffs alleged tire defects on the Ford Bronco II.¹³⁰ The focus of the appellate court's decision surrounded a procedural issue—whether a party may seek a protective order under Rule 166b without seeking a court record determination under Rule 76a.¹³¹ Prior to exchanging discovery documents, Ford moved for a protective order.¹³² Before granting the protective order, the trial judge, sua sponte, decided that she first needed to hold a Rule 76a determination as to whether the documents met the definition of court records, i.e., whether the documents concerned matters that might have a probable adverse effect on the public.¹³³ After in camera review of thousands of documents, the trial judge found that the documents met the definition of a court record under Rule 76a and denied Ford's request for a protective order.¹³⁴

The Houston Court of Appeals reversed, however, holding that when a party moves for a protective order, the trial court's sole task is to determine whether "good cause" exists to enter the order.¹³⁵ The court went on to conclude that Rule 76a only comes into play after documents have been exchanged and one of the parties alleges that the documents consti-

124. See Goldstein, *supra* note 73, at 420.

125. *Dunshie v. General Motors*, 822 S.W.2d 345, 347–48 (Tex. App.—Beaumont 1992, no writ).

126. *Id.* at 346.

127. *Id.* at 347.

128. *Id.*

129. *Id.* at 347–48.

130. *Ford Motor Co. v. Benson*, 846 S.W.2d 487, 488 (Tex. App.—Houston [14th Dist.] 1993, pet. denied). Notably, the tire defects in this case led to a deadly rollover.

131. *Id.* at 490–91; see TEX. R. CIV. P. 192.6 (replacing Rule 166b).

132. *Benson*, 846 S.W.2d at 488.

133. *Id.* at 491.

134. *Id.* at 490.

135. *Id.* at 491.

tute court records.¹³⁶ Additionally, the court held that the party opposing a Rule 166b(5)(c) protective order carries the burden of showing that the party seeking the protective order must first comply with Rule 76a's court record determination.¹³⁷ Since the judge denied the request for a protective order, the documents were never exchanged, which left the opposing party with no basis to assert that the specific documents contained information concerning matters that had a probable adverse effect upon the general public's health and safety.¹³⁸ Because there was "no allegation or proof that any of the documents were 'court records,'" the trial court had no basis to determine compliance with 76a.¹³⁹ The appellate court reversed the trial court's order holding that without a challenge that the protective order involved court records, Rule 76a does not come into play.¹⁴⁰

Essentially, *Benson* initially provided parties with an avenue to contract around Rule 76a's application to unfiled discovery.¹⁴¹ In other words, a party could seek a protective order before any documents were exchanged. This would then prevent the applicability of Rule 76a because the court would not have any documents to review for purposes of determining whether they were court records. Rule 166b was subsequently repealed. After much procedural inconsistency, the Supreme Court of Texas attempted to provide clarity to Rule 76a's applicability with regard to unfiled discovery in *General Tire v. Kepple*.¹⁴²

IV. THE CURRENT STATE OF 76A'S APPLICABILITY TO UNFILED DISCOVERY

A. GENERAL TIRE V. KEPPLER

Although the Houston Court of Appeals reversed the trial court in *Benson*, the initial trial court's decision that the documents constituted court records resulted in leaks of various internal documents available to the public.¹⁴³ These documents became known as the "*Benson* documents" and were utilized by lawyers in other suits against Ford.¹⁴⁴ The *Benson* documents played a prominent role in another Ford rollover case—*General Tire, Inc. v. Kepple*.¹⁴⁵ *General Tire* was the first and last

136. *Benson*, 846 S.W.2d at 491.

137. *Id.*

138. *Id.* The plaintiffs, however, did have an opportunity to view the documents during the in camera review. *Id.*

139. *Id.*

140. *Id.* at 491–92.

141. See Goldstein, *supra* note 73, at 421; Sickler & Heim, *supra* note 3, at 102; see also Tollack v. Allianz of Am. Corp., No. 05-91-01943-CV, 1993 WL 321458, at *6 (Tex. App.—Dallas Aug. 16, 1993, writ denied) (finding that stipulated agreements, such as protective orders and settlements, did not violate Rule 76a).

142. See *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998); *General Tire, Inc. v. Kepple*, 917 S.W.2d 444, 446 (Tex. App.—Houston [14th Dist.] 1996).

143. See *General Tire*, 917 S.W.2d at 447.

144. See *General Tire*, 970 S.W.2d at 526; *General Tire*, 917 S.W.2d at 447.

145. See generally *General Tire*, 970 S.W.2d at 526.

time the Supreme Court of Texas reviewed Rule 76a's applicability with regard to unfiled discovery.¹⁴⁶ Since *General Tire*, the authors are aware of no reported cases that have applied Rule 76a's court record determination to unfiled discovery, despite the confusion related to the rule and the ambiguities that need clarification.¹⁴⁷

1. Case Summary of *General Tire*

In *General Tire, Inc. v. Kepple*, Kyle Kepple brought a product liability action against General Tire and Ford Motor Company, alleging that a tire defect—caused by tread separation—led to a rollover accident, paralyzing Kepple.¹⁴⁸ General Tire obtained a protective order covering seven general categories of documents, all alleged to contain trade secrets.¹⁴⁹

After the case settled, Kepple's counsel moved to nullify the parties' protective order pursuant to Rule 76a, asserting that unfiled discovery documents in the case concerned matters adverse to public health and safety and therefore constituted court records and should be open to the public.¹⁵⁰ Kepple's attorneys claimed that the documents contained reports proving that General Tire had an inordinately high defect rate, which caused tread separation.¹⁵¹ General Tire claimed the documents contained confidential commercial information and trade secrets.¹⁵² General Tire argued that the disclosure of the documents would give competitors an unfair advantage and, therefore, should not be available for public access.¹⁵³

The trial court conducted a Rule 76a hearing, at which both parties presented documents and expert testimony for an in camera court review.¹⁵⁴ General Tire produced documents that it originally provided during discovery.¹⁵⁵ The plaintiffs obtained and produced the *Bensen* documents that were originally exchanged in the *Bensen* case discussed above.¹⁵⁶ Additionally, several parties intervened and were present for

146. See generally *id.* at 520.

147. See Goldstein, *supra* note 73, at 423.

148. *General Tire*, 917 S.W.2d at 446.

149. *Id.* at 449. The seven categories included in the protective order were: "(1) cured tire standards; (2) specification revisions; (3) product change proposals; (4) testing; (5) mold drawings; (6) adjustment data; and (7) miscellaneous documents including customer inquiries, record retention schedules and Ford tire release." *Id.*

150. *Id.* at 447. Kepple's attorneys were aware of a similar case involving General Tire and Ford, in which the companies filed a grievance action against an attorney in Georgia for failure to comply with a similar protective order. *Id.* Kepple's attorneys moved for relief to avoid similar problems. *Id.*

151. *Id.* at 450–51.

152. *Id.* at 452.

153. *General Tire*, 917 S.W.2d at 449.

154. *Id.* at 447.

155. *Id.*

156. *Id.* The attorney-plaintiffs represented the plaintiffs in *Ford Motor, Co. v. Benson*, and retained information and data relating to General's tire defects. *Id.* at 447, 455 n.1. See *Ford Motor Co. v. Benson*, 846 S.W.2d 487, 488 (Tex. App.—Houston [14th Dist.] 1993, pet. denied).

the in camera review.¹⁵⁷ After the hearing, the trial court determined that the information contained in the documents would “have a probable adverse effect on the general public health or safety,” and thus, were court records.¹⁵⁸ Accordingly, these documents were presumed to be open and subject to Rule 76a’s sealing analysis.¹⁵⁹ During the sealing hearing, the trial court found that General Tire failed to demonstrate that the documents should be closed to the public and vacated the parties’ protective order, thereby unsealing the discovery materials.¹⁶⁰ The appellate court affirmed the trial court’s decision and held that the trial court did not abuse its discretion in determining that the unfiled discovery constituted court records and was, therefore, presumed to be open.¹⁶¹

During its review of the trial court’s order, the Houston Court of Appeals set out a two-part test under Rule 76a for sealing confidential records with regard to unfiled discovery.¹⁶² First, the proponent of access has the burden of proving that the unfiled discovery meets Rule 76a’s definition of court records.¹⁶³ Second, if the proponent of access succeeds, the burden then shifts to the party seeking to preserve confidentiality to rebut the presumption that those court records should be open.¹⁶⁴ After the Houston Court of Appeals affirmed the trial court’s order, General Tire petitioned to the Supreme Court of Texas for a writ of mandamus.¹⁶⁵

2. *The Supreme Court of Texas Reviews General Tire*

The Supreme Court of Texas overturned the lower courts’ decision that the discovery materials constituted court records under Rule 76a, thereby allowing the discovery materials to remain protected and confidential.¹⁶⁶ First, the court held that the trial court erred by applying Rule 76a’s notice and hearing provisions to the threshold determination of whether unfiled discovery constituted court records.¹⁶⁷ In addition, the court held that persons other than the parties may intervene before the court record determination, but they may not have immediate access to the documents (i.e., be present during the in camera review).¹⁶⁸ The court reasoned that applying Rule 76a’s notice and hearing provisions to the court record determination would be overly burdensome on the trial court at such a preliminary stage.¹⁶⁹ The court also noted that “Rule 76a could easily

157. *General Tire*, 917 S.W.2d at 447.

158. *Id.*

159. *Id.* at 447–48.

160. *Id.* at 447.

161. *Id.* at 451–52.

162. *General Tire*, 917 S.W.2d at 449–52.

163. *Id.* at 449–451.

164. *Id.* at 451–52.

165. *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 523 (Tex. 1998).

166. *Id.* at 529.

167. *Id.* at 524.

168. *Id.* at 524–25.

169. *Id.* at 524.

become a tool for delay and gamesmanship” or “parties might view the rule as so cumbersome that they would make elaborate arrangements to avoid its requirements.”¹⁷⁰ The court also expressed concern with the possibility of intervenors gaining access to confidential documents before the court determines whether they are court records.¹⁷¹

Second, the court held that a trial court could not broadly rely on evidence that the manufacturer’s product contains a defect in determining whether unfiled discovery constitutes court records.¹⁷² In other words, the trial court could not rely on evidence of a defect to determine whether the unfiled discovery had had a probable adverse effect on the general public health or safety. Rather, the party seeking access must “demonstrate some nexus between the alleged defect and the documents at issue.”¹⁷³ With regard to the documents—categorized as “cured tire standards; specification revisions; product change proposals; developmental testing documents; tire mold drawings; . . . and miscellaneous [documents]”—the court held that the plaintiffs’ evidence “did not link the alleged defect to any of these documents.”¹⁷⁴ The plaintiff’s evidence relied on two expert witnesses.¹⁷⁵ One expert was a consultant who specialized in tire failure analysis and had previously viewed the very documents as an expert witness in other cases against General Tire.¹⁷⁶ He testified that tread separations in tires of this design were responsible for several serious traffic accidents.¹⁷⁷ He considered the root cause of the problem to be the defect in the “skim stock.”¹⁷⁸ Another expert for the plaintiff testified that “General changed its skim stock compound in 1987, and that any documents relating to that change would be important to the public safety.”¹⁷⁹ According to the court, neither expert was “able to correlate any defect in [the] tires with a specific document or set of documents.”¹⁸⁰

The remaining category of documents was the “tire adjustment data.”¹⁸¹ These documents charted the frequency with which General Tire’s customers returned certain tires under warranty and the reasons behind those returns.¹⁸² One of General Tire’s experts testified that the tire adjustment data was primarily used as a “marketing tool” for customer feedback.¹⁸³ The plaintiff’s expert witness, however, characterized the data as a “report card” for the tire industry and testified that General

170. *General Tire*, 970 S.W.2d at 524.

171. *Id.* at 524–25.

172. *Id.* at 527.

173. *Id.*

174. *Id.* at 526–27.

175. *Id.* at 527.

176. *General Tire*, 970 S.W.2d at 527.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *General Tire*, 970 S.W.2d at 527.

183. *Id.*

Tire's report card revealed an "extraordinary amount of tread separations."¹⁸⁴ He also testified that tread separations can make a vehicle lose control and listed specific instances in which people had been severely injured in accidents caused by tread separation.¹⁸⁵ General Tire's expert claimed that computer errors incorrectly combined tread separations with other reasons for tire adjustments.¹⁸⁶ He claimed the adjustment chart greatly overstated the number of adjustments due to tread separations.¹⁸⁷ The corrected figures indicated adjustments of only 0.8% due to tread separation, compared to the previous 1.5%.¹⁸⁸ The court held that the adjustment data did not constitute a court record since "[n]o one challenged that the data had been properly corrected, and there [was] no evidence that the corrected adjustment data could adversely affect public health or safety."¹⁸⁹

Thus, the court held that the plaintiff failed to "demonstrate some nexus between the alleged defect and the documents at issue," and thus, failed to prove that the disputed documents revealed any public hazard.¹⁹⁰ The court noted that, although physical inspections revealed purported defects in defendant's tires, there was no proof that any of the disputed documents exposed those defects.¹⁹¹ It concluded that the trial court abused its discretion in classifying the documents as court records.¹⁹² The Texas Supreme Court reversed the court of appeals and remanded the case to the trial court "for the sole purpose of reinstating the protective order."¹⁹³

B. GENERAL TIRE'S ISSUES AND UNANSWERED QUESTIONS

The court's analysis and holding in *General Tire v. Kepple* "essentially overturned the unfiled discovery provision of Rule 76a."¹⁹⁴ Without the ability to view the documents, the burden on third party intervenors (those seeking for the documents to be open and unsealed) to prevail on a court record determination is completely impractical.¹⁹⁵ Most importantly, the holding confuses the application of Rule 76a, leaving trial judges with a precedent that is confusing, inconsistent, and lacking in appropriate guidelines for determining whether specific unfiled discovery constitutes a court record.¹⁹⁶ As stated earlier, the authors are aware of no reported cases since *General Tire* that have applied Rule 76a to un-

184. *Id.*

185. *Id.*

186. *Id.* at 528.

187. *Id.*

188. *Id.* Plaintiff's expert believed 1.5% to be the maximum acceptable amount. *Id.*

189. *General Tire*, 970 S.W.2d at 528.

190. *Id.* at 527–28.

191. *Id.*

192. *Id.* at 528.

193. *Id.* at 529.

194. See Goldstein, *supra* note 73, at 422; see generally *General Tire*, 970 S.W.2d at 527.

195. See Goldstein, *supra* note 73, at 423; see generally *General Tire*, 970 S.W.2d at 527.

196. See generally *General Tire*, 970 S.W.2d at 524–27.

filed discovery.¹⁹⁷

1. *Impractical Intervention*

The court's holding that Rule 76a's notice and hearing provisions should apply only after conducting the threshold court record determination creates great difficulty and inconvenience for third party intervenors and other proponents of access.¹⁹⁸ This holding requires the presiding court to first determine whether the unfiled discovery constitutes "court records" before notifying the public and other parties that may have an interest in the outcome.¹⁹⁹

Furthermore, the actual litigants will rarely, on their own, file a motion for a court record determination, especially if a lucrative settlement agreement incentivizes the parties to comply with an "agreed upon" confidentiality provision.²⁰⁰ Thus, the practicality of this limitation results in a single avenue—"to hope that the trial judge is willing" to move sua sponte for a Rule 76a court record determination and "inspect the documents in camera and make an independent ruling on the matter."²⁰¹

Additionally, the burden on the party seeking dissemination of unfiled discovery appears unduly burdensome.²⁰² The proponent, advocating for the openness of the document and that the document constitutes a court record (by demonstrating that it has a probable adverse effect on the public health and safety), must "demonstrate some nexus between the alleged defect and the documents at issue."²⁰³ The court's holding supports the position that the party seeking dissemination holds the burden to demonstrate the exact nature and likelihood of adverse effects that are evidenced in certain data or a particular document.²⁰⁴

How can a party or a public advocate (intervenor), generally with no expertise in an industry, know what documents they may need from a manufacturer to prove their claim?²⁰⁵ In the situation where only the parties to the litigation receive the opportunity to review the discovery materials, third-party intervenors have little or no knowledge of the documents needed to make a formal request to the court to review the discovery.²⁰⁶ Contrast this with the plaintiff's expert in *General Tire* who had an opportunity to view the documents and still could not satisfy the "nexus between the alleged defect and the documents at issue."²⁰⁷ This burden is

197. See Goldstein, *supra* note 73, at 423; see generally *General Tire*, 970 S.W.2d at 524.

198. See Goldstein, *supra* note 73, at 399–400; see generally *General Tire*, 970 S.W.2d at 527.

199. See generally *General Tire*, 970 S.W.2d at 527.

200. See Laird, *supra* note 27, at 12; but see *Ford Motor Co. v. Benson*, 846 S.W.2d 487, 491 (Tex. App.—Houston [14th Dist.] 1993, pet. denied) (trial judge motioned sua sponte).

201. See Goldstein, *supra* note 73, at 423.

202. See *General Tire*, 970 S.W.2d at 524; *id.*

203. See *General Tire*, 970 S.W.2d at 527.

204. See *id.*

205. See Goldstein, *supra* note 73, at 423.

206. See *id.*

207. See *General Tire*, 970 S.W.2d at 527–28.

ill-defined and too harsh for those parties who are likely unfamiliar with the information contained in the specific documents claimed to be confidential.²⁰⁸

There must be a balance between protecting the public's interest and protecting a client's confidential information. The authors of this Article are fully aware of the importance of protecting confidential business documents. The authors also understand and fully support the importance of ensuring that unaffiliated intervenors do not gain access to these types of documents as a product of a Rule 76a challenge. In fact, the authors only advocate for a system where a client's confidential documents are fully protected. We do believe, however, that possible intervenors should receive notice and should have an opportunity at a hearing to articulate the documents they believe to be within the unfiled discovery that could adversely affect the public health and safety. These intervenors should not be able to view the documents. Instead, they should have an opportunity to make an initial argument, and the trial court should then review the documents in camera and consider the arguments set forth by the intervenors. The authors also believe there needs to be greater clarification as to the meaning of "nexus" and "probable adverse effect" previously discussed above.

2. *Confusing Judicial Guidelines and Application—Specifically in Light of Trade Secret Law*

There are many unanswered questions that remain in regard to a trial judge's discretion in applying Rule 76a.²⁰⁹ For example, the lack of precise guidelines has led to the possibility that Rule 76a may undermine important trade secret protection provided by Texas Rule of Evidence 507 (TRE 507).²¹⁰ Furthermore, the legislature enacted recent statutory changes regarding trade secrets that have an influence on a trial judge's discretion with regard to granting or denying of protective orders.²¹¹

In the context of trade secrets, Rule 76a and TRE 507 both address distinct disclosure issues with regard to discovery.²¹² Rule 76a addresses this issue of *dissemination* of discovery documents from private litigation to the public.²¹³ TRE 507 addresses *disclosure* of discovery documents between the private litigants.²¹⁴ But if a court applies Rule 76a's analysis

208. See generally *id.* at 524.

209. See generally *General Tire*, 970 S.W.2d at 526; Goldstein, *supra* note 73, at 399. Are judges qualified to inspect records in camera? Can judges be held accountable for granting a sealing motion when there is no record of what documents were sealed or why they were sealed? Should there be a public representative to inspect the records? Does this nullify any attempt of even having a public representative to protect the public about unforeseen harms within unfiled discovery? See Goldstein, *supra* note 73, at 399.

210. See TEX. R. EVID. 507; see generally *In re Continental General Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998).

211. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.006 (West 2015).

212. See generally TEX. R. CIV. P. 76a; TEX. R. EVID. 507.

213. See generally TEX. R. CIV. P. 76a.

214. See generally TEX. R. EVID. 507.

to protective orders that were issued during a TRE 507 ruling, are we thwarting the policy of TRE 507?²¹⁵ When the party resisting discovery establishes that the requested information is a trade secret during a TRE 507 hearing, the only reason these documents should be disclosed is because they are “necessary for a fair adjudication” of the requesting party’s claim.²¹⁶ If the court deems trade secret information necessary for the requesting party to prove its case, the court is required to issue a protective order.²¹⁷ Can a party ask the court to invoke Rule 76a’s analysis to undermine a protective order that the court previously thought necessary to protect the trade secret information, because of some public interest?²¹⁸ It seems plausible that a Rule 76a motion can undermine a TRE 507 proceeding by requesting the court to invalidate a protective order that was necessary for disclosure in the first place to protect third parties who were not present in the court during the trade secret determination.²¹⁹ Although the authors are not aware of a TRE 507 protective order that has been challenged by a Rule 76a motion, the outcome is possible and needs to be addressed by the court.²²⁰

Additionally, recent statutory changes have also affected a trial judge’s discretion with regard to trade secrets.²²¹ In 2013, the Texas Legislature enacted the Texas Uniform Trade Secrets Act (TUTSA) to codify and modernize Texas law on misappropriation of trade secrets.²²² Under TUTSA, a trade secret means information that “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”²²³ This standard mandates that the court consider the nature of the trade secret and the facts and circumstances surrounding the efforts to maintain its secrecy to determine whether these efforts were reasonable under the circumstances.²²⁴ TUTSA “creates a presumption in favor of granting protective orders to preserve . . . trade secrets,” which can drastically limit a judge’s discretion.²²⁵ This presumption gives courts the power to seal filings and records without following the burdensome requirements

215. See generally TEX. R. CIV. P. 76a; TEX. R. EVID. 507.

216. See TEX. R. EVID. 507; *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998).

217. See TEX. R. EVID. 507; *In re Continental*, 979 S.W.2d at 613.

218. See generally TEX. R. CIV. P. 76a; TEX. R. EVID. 507.

219. See generally TEX. R. CIV. P. 76a; TEX. R. EVID. 507.

220. See generally TEX. R. CIV. P. 76a; TEX. R. EVID. 507.

221. See Joseph F. Cleveland Jr. & J. Heath Coffman, *Protecting Trade Secrets Made Simple: How the Recently Enacted Texas Uniform Trade Secrets Act Provides a Legislative Framework for Litigating Cases*, 76 TEX. B. J. 751, 755 (2013).

222. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.001–.008 (West 2015); see *id.* at 752.

223. TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6).

224. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002(6); Cleveland & Coffman, *supra* note 221, at 752. See also *Astoria Indus. of Iowa, Inc. v. SNF, Inc.*, 223 S.W.3d 616, 634 (Tex. App.—Fort Worth 2007, pet. denied) (holding under Texas common law (before TUTSA), “[b]efore information can be termed a trade secret, there must be a substantial element of secrecy.”). A substantial element of secrecy exists when, “except by use by improper means, there would be difficulty in acquiring the information.” Cleveland & Coffman, *supra* note 221, at 753.

225. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007(c); David Drez & Meredith Perry, *37th Annual Advanced Civil Trial Course - The Model Protective Order 5* (2014),

of Rule 76a.²²⁶ It provides courts the power to limit disclosure of information to only attorneys and experts and also order parties not to disclose alleged trade secrets.²²⁷ Importantly, TUTSA provides that “[t]o the extent that this chapter conflicts with the Texas Rules of Civil Procedure, this chapter controls.”²²⁸ Thus, although the authors are aware of no reported cases that have addressed the issue, it appears nonetheless that a § 134A.006 motion would permit courts to also grant “agreed upon” protective orders without the burdens of complying with 76a.²²⁹ Now that trade secrets are afforded greater protection, there is a drastic need for new guidance relating to the unfiled discovery provisions of Rule 76a.²³⁰

C. RECENT CASES RELATED TO 76A AND UNFILED DISCOVERY

Three cases have involved Rule 76a’s application to unfiled discovery since *General Tire*; however, these cases did not provide any additional clarification as to Rule 76a’s application other than dicta.²³¹ In *BP Products North America, Inc. v. The Houston Chronicle Publishing Co.* and *Cortez v. Johnston*, the unfiled discovery was determined to constitute a court record for reasons other than the public health and safety requirements of Rule 76a.²³² In *BP Products*, the issue was whether the fifteen witness statements detailing an explosion concerned matters that had a probable adverse effect upon the public.²³³ The appellate court, however, found the question to be moot and did not proceed through Rule 76a’s analysis.²³⁴ Unfiled discovery can also constitute a court record if it concerns matters having a “probable adverse effect upon . . . the administration of public office.”²³⁵ In *Cortez v. Johnston*, the issue was whether unfiled discovery pertaining to a judge’s alleged illicit acts concerned matters having a probable adverse effect upon the administration of public office.²³⁶ The last case, *ICON Benefit Administrators II, L.P. v. Mullin*, is an example of how overly broad protective orders can permit parties to avoid the burdens of complying with Rule 76a.²³⁷

http://www.texasbarcle.com/Materials/Events/13099/164275_01.pdf [https://perma.cc/3LWC-4MBN].

226. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.006; Cleveland & Coffman, *supra* note 221, at 752.

227. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.006.

228. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007(c); Drez & Perry, *supra* note 225, at 5.

229. See TEX. CIV. PRAC. & REM. CODE ANN. § 134A.007(c).

230. See *id.*

231. See generally *BP Products N. Am., Inc. v. Houston Chronicle Pub. Co.*, 263 S.W.3d 31, 33 (Tex. App.—Houston [1st Dist] 2006, no pet.); *Cortez v. Johnston*, 378 S.W.3d 468, 475 (Tex. App.—Texarkana 2012, pet. denied).

232. See generally *BP Products*, 263 S.W.3d at 33; *Cortez*, 378 S.W.3d at 475.

233. *BP Products*, 263 S.W.3d at 33.

234. *Id.*

235. TEX. R. CIV. P. 76a(2)(c); see *Cortez*, 378 S.W.3d at 475.

236. See *Cortez*, 378 S.W.3d at 475.

237. See *ICON Benefit Administrators II, L.P. v. Mullin*, 405 S.W.3d 257, 259 (Tex. App.—Dallas, 2013, pet. denied).

1. *BP v. The Houston Chronicle*

In *BP Products*, a civil action was filed in the Galveston County District Court for personal injuries and deaths of those affected by a 2005 explosion that occurred at BP's Texas City facility.²³⁸ During discovery, BP produced many documents, including fifteen witness statements from BP's internal investigation.²³⁹ The plaintiffs agreed to keep the discovery confidential pursuant to a protective order.²⁴⁰ The *Houston Chronicle* and the *Galveston County Daily News* intervened on April 15, 2005, and filed a motion to unseal the discovery.²⁴¹ BP voluntarily produced the fifteen witness statements to the plaintiffs and the *Houston Chronicle*, but redacted the names and identifying information of the witnesses.²⁴² After an in camera review of the witness statements, the trial court held that the fifteen witness statements were court records that concerned matters that had a probable adverse effect upon the general public's health or safety.²⁴³

The Houston Court of Appeals affirmed the trial court's determination that the witness statements were court records, but not because the statements fell under Rule 76a's court record definition.²⁴⁴ Because BP agreed to release the information, although redacted, it effectually made the witness statements available to the public as if they were a court record.²⁴⁵ The court of appeals held that the question of whether the witness statements were court records was moot.²⁴⁶

2. *Cortez v. Johnston*

Unfiled discovery that concerns matters having a probable adverse effect on the administration of office should limit privacy rights in the case of a public figure or judge.²⁴⁷ A recent high-profile case surrounds the former Judge Carlos Cortez's alleged scandals and his defamation case against attorney Randy Johnston.²⁴⁸ In *Cortez*, the Dallas Court of Appeals ruled on whether depositions attached to motions for sanctions submitted within thirty days of the case being non-suited constituted court records as defined by Rule 76a.²⁴⁹ The trial court held that the depositions of Cortez were court records, concerning matters having a "probable adverse effect upon the administration of public office," as defined

238. *BP Products*, 263 S.W.3d at 33.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 34.

243. *BP Products*, 263 S.W.3d at 33.

244. *Id.*

245. *Id.* at 35.

246. *Id.*

247. See TEX. R. CIV. P. 76a(2)(c); *Cortez v. Johnston*, 378 S.W.3d 468, 475 (Tex. App.—Texarkana 2012, pet. denied).

248. *Cortez*, 378 S.W.3d at 475.

249. *Id.* at 473.

under Rule 76a and were presumably available for public disclosure.²⁵⁰ The court of appeals affirmed.²⁵¹

Cortez later appealed, requesting the discovery documents to be sealed.²⁵² The Dallas Court of Appeals stated: “[c]ourt records, as defined by Rule 76a, ‘are presumed to be open to the general public’ [and] [t]he party seeking to seal court records has a heavy burden.”²⁵³ The court’s opinion involved a policy discussion related to the public’s right to know about a “publically elected member of the state judiciary . . . with allegations of criminal activity.”²⁵⁴ While the adverse effects of a judge’s scandal on the administration of public office is clear in this context, there is still much confusion regarding matters having a probable adverse effect upon the public health and safety given the vague language.²⁵⁵

3. *ICON Benefit Administrators v. Mullin*

Even trial judges should remain aware of the consequences of granting an overly broad protective order even when it is agreed.²⁵⁶ For example, in *ICON Benefit Administrators II, L.P. v. Mullin*, after signing an “agreed upon” protective order, the trial judge lost discretion in determining whether future (non-existent at the time) documents fell under protection.²⁵⁷ In that case, the City of Lubbock contracted with ICON to provide administrative services for the City’s self-funded health care plan.²⁵⁸ A few years later, ICON filed suit against certain City employees alleging the City employees made defamatory statements about ICON’s administrative services.²⁵⁹ While the suit was pending, the City hired Sally Reaves to conduct an audit (Reaves Audit) of the services ICON performed for the City’s health care plans.²⁶⁰ Employees of the City sought pretrial discovery of certain information from ICON to aid in Reaves’s audit work.²⁶¹ ICON responded by moving for a protective order that “defined certain categories of ‘Protected Materials’ and restricted the use and disclosure of ‘Protected Materials’ and ‘all information derived therefrom.’”²⁶² The trial judge signed the protective order that had been submitted as an “agreed order.”²⁶³ As noted previously, a judge does not have the obligation to accept or enforce a pro-

250. *Id.* at 475.

251. *Id.*

252. *Cortez v. Johnston*, No. 06-13-00120-CV, 2014 WL 1513306, at *1 (Tex. App.—Dallas Apr. 16, 2014, no pet.) (mem. op.).

253. *Id.*

254. *Id.* at *5.

255. *See generally* TEX. R. CIV. P. 76a(2)(c).

256. *See generally* *ICON Benefit Administrators II, L.P. v. Mullin*, 405 S.W.3d 257, 259 (Tex. App.—Dallas, 2013, pet. denied).

257. *See id.*

258. *Id.* at 260.

259. *Id.*

260. *Id.*

261. *ICON Benefit Administrators*, 405 S.W.3d at 260.

262. *Id.*

263. *Id.*

posed protective order even though it is “agreed.” In fact, judges must be careful not to give protected status to even unfiled discovery when the documents involve public interest and welfare without engaging in the Rule 76a analysis.

The parties eventually settled and the trial court dismissed the case before Reaves completed her audit.²⁶⁴ Soon after, “the City received open record requests for the Reaves Audit pursuant to the Texas Public Information Act.”²⁶⁵ Upon notice of these requests, ICON filed a motion to enforce the protective order to prevent public disclosure of the audit.²⁶⁶ ICON argued that the protective order prohibited disclosure of the audit because the audit “contain[ed] information from, and [was] derived from, ‘Protected Materials.’”²⁶⁷ The City employees, joined by the City, disagreed and submitted a copy of the audit to the trial court for an in camera review to determine whether it was subject to the terms of the protective order.²⁶⁸ A hearing was held on the motion, and afterwards, the trial court denied ICON’s motion to enforce the protective order and signed an order declaring that the protective order did not prohibit disclosure of the audit.²⁶⁹

Under the belief that the judge’s order was directly appealable under Rule 76a(8), ICON appealed to the Dallas Court of Appeals.²⁷⁰ The court of appeals found that the trial court’s order did not relate to the sealing and unsealing of court records.²⁷¹ It held that the trial court’s in camera review and ruling on this issue was only “to determine whether [the audit] was subject to the terms of the protective order.”²⁷² It also held that the proper procedural mechanism for review of an order is to seek a writ of mandamus, not an appeal.²⁷³

Considering judicial resources, however, the court treated the improper appeal as a petition for writ of mandamus.²⁷⁴ The appellate court then determined whether the trial court abused its discretion in determining that the protective order did not prohibit disclosure of the audit.²⁷⁵ The appellate court considered the trial court’s determination “as a legal conclusion to be reviewed with limited deference to the trial court.”²⁷⁶ Construing the order under contract law, the court looked to the plain

264. *Id.*

265. *Id.*

266. *ICON Benefit Administrators*, 405 S.W.3d at 260.

267. *Id.*

268. *Id.* at 260–61.

269. *Id.*

270. *Id.* at 261–62.

271. *ICON Benefit Administrators*, 405 S.W.3d at 262–63.

272. *Id.* at 262.

273. *Id.* at 63. A court order denying a motion to enforce a family code protective order, however, is directly appealable. *See* *Cooke v. Cooke*, 65 S.W.3d 785, 788 (Tex. App.—Dallas 2001, no pet.).

274. *Icon Benefit Administrators*, 405 S.W.3d at 263.

275. *Id.* at 263–65.

276. *Id.* at 263.

language of the protective order.²⁷⁷ The court stated that the protective order “broadly and unambiguously restrict[ed] the use and disclosure not only of information or documents referred to as ‘Protected Materials,’ but also ‘all information derived therefrom.’”²⁷⁸ It was undisputed that Reaves created the audit using protected materials.²⁷⁹ Because the plain language of the protective order prohibited the public disclosure of the audit, the court held that the trial court order was a clear abuse of discretion (in its interpretation of the protective order) and directed the trial court to vacate its order denying ICON’s motion to enforce the protective order.²⁸⁰ According to the appellate court, the trial court essentially released its authority to govern the protective order to the parties. It appears that the appellate court failed to consider the Rule 76a requirements when it applied simple contractual standards to this unfiled discovery.

Even if the language of the protective order contained a broad and unambiguous restriction, the analysis set forth in Rule 76a must still be applied. This case, however, at the very least sets forth a warning for all trial judges of the consequences of routinely signing an agreed protective order without considering in significant detail the requirements set forth in Rule 76a.

V. POTENTIAL SOLUTIONS AND RECOMMENDATIONS FOR THE SECRECY CRISIS

The rules regarding protective order standards, trade secret privileges, and sealing of court records under Rule 76a were all promulgated before the information age developed into what it is today.²⁸¹ New information technologies, specifically electronic discovery, has substantially affected the discovery process. Compared to hard-copy discovery, e-discovery accommodates a larger quantity of information than was subject to production in the past.²⁸² Because of the widespread use of computer-based communication and information storage, there is a vast amount of information available from computerized sources.²⁸³ E-mail, for example, has created important issues with regard to confidentiality.²⁸⁴ This free exchange of information has “expanded [the] potential for intrusions on litigants’ private lives” and created a greater risk for publication of sensitive personal information.²⁸⁵ Additionally, the ease with which these documents are obtained and distributed has encouraged attorneys to cast a

277. *Id.* at 264.

278. *Id.*

279. *Id.*

280. *Id.* at 265.

281. *See generally* Marcus, *supra* note 11, at 1844.

282. *Id.* (quoting Jason Krause, *What a Concept!*, 89-AUG. A.B.A. J. 60 (2003)) (“Some major cases now involve one terabyte of information, which, if printed to paper, would fill the Sears Tower four times.”).

283. *See* Marcus, *supra* note 11, at 1846.

284. *See id.*

285. *See id.* at 1838–39.

wide net in terms of their requests for documents. Not only is there a significant burden on both parties because of these requests, broader requests also create the risk that confidential documents will be distributed. In order to limit the amount of confidential document exposure, attorneys should work toward narrowing document requests.

The economic incentives for secrecy are so great that parties become willing and have been able to circumvent the intention of Rule 76a.²⁸⁶ Specifically, parties can avoid complying with Rule 76a's requirements with relative ease.²⁸⁷ It has been over twenty years since the Supreme Court of Texas opined in *General Tire*, and as repeated above, the authors are aware of no reported cases that have applied Rule 76a to unfiled discovery (at least in the context of public health and safety).²⁸⁸ Therefore, the Texas Supreme Court should revisit *General Tire* and review Rule 76a's applicability in the modern legal system.²⁸⁹ At the very least, the court should clarify with more specificity the evidentiary threshold sufficient to satisfy the burden of proving that unfiled discovery constitutes a court record.²⁹⁰ Part of our recommended solution is to promote greater awareness for trial judges and attorneys about their role in this process.²⁹¹ Included are some proposed tools for conducting discovery as well as a proposed ethical duty for attorneys.²⁹²

A. REVISIT OF GENERAL TIRE

The Supreme Court of Texas could help by revisiting *General Tire v. Kepple* for clarity regarding Rule 76a's applicability to unfiled discovery.²⁹³ As evidenced by the dearth of case law, the current application of Rule 76a with regard to unfiled discovery is ineffective or, at the very least, undeveloped.²⁹⁴ The practical effect of proving the "nexus between the alleged defect and the documents at issue" is nearly impossible.²⁹⁵ There is also a need to provide greater clarification regarding the definition of "general public health or safety" and what actions or information can constitute an "adverse effect" with regard to unfiled discovery.²⁹⁶ Additionally, the court should address whether the harm has to be physical, and if so, whether only the most dangerous effects fall into that category.²⁹⁷

286. See Richard Zitrin, *Why Lawyers Keep Secrets About Public Harm*, 12 NO. 4 PROF. LAW 1, 2 (2001); Moss, *supra* note 14, at 874.

287. See Zitrin, *Why Lawyers Keep Secrets*, *supra* note 286, at 1–2.

288. See Goldstein, *supra* note 73, at 423; see generally *General Tire, Inc. v. Kepple*, 970 S.W.2d 520 (Tex. 1998).

289. See *infra* Part V.A.

290. See generally *General Tire*, 970 S.W.2d at 524; *infra* Part V.A.

291. See *supra* Part IV.B–C.

292. See *supra* Part IV.B–C.

293. See generally *General Tire*, 970 S.W.2d at 524.

294. See Zitrin, *The Judicial Function*, *supra* note 61, at 1587; see generally *General Tire*, 970 S.W.2d at 524.

295. See generally *General Tire*, 970 S.W.2d at 524, 527.

296. See generally *id.* at 523–24.

297. See generally *id.*

1. *Specific Proof of Burden to Prove Nexus*

The burden for the proponent of access when seeking determination of a court record is vaguely described by the court as follows:

A party cannot demonstrate that a manufacture's proprietary design, research, and testing records have a *probable* adverse effect on the public health or safety . . . 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.²⁹⁸

Given the lack of case law on this topic, this burden as described by the court is inadequate. Consequently, it is difficult to predict how the Texas courts should rule when determining whether this nexus exists. There are a number of possible unanswered questions as to whether a nexus exists between a defect and the documents, for example: (1) testing records clearly stating that a defect in the steering wheel prevented the car from turning completely, thereby causing a number of accidents; (2) internal research demonstrating a company's concerns about a particular antibiotic's side effects; or (3) a series of e-mails from a company's top officials admitting to the severity of defects. Would any of the information contained in these documents be sufficient to warrant the disclosure of these documents? How harmful does the defect need to be? How clear does the nexus between the information and the potential harm need to be? These are all questions that are still seemingly unanswered given the lack of case law. Additionally, the current case law creates a nearly impossible burden for the party seeking to disclose these important documents. This is particularly interesting given that Rule 76a set forth a *presumption* of openness for court records. When it comes to unfiled discovery, it seems as if this presumption is reversed.

The court seemed to indicate where it might lean when it analyzed Texas Rule of Evidence 507, stating that parties should disclose trade secrets "only where the information is 'material and necessary to the litigation and unavailable from any other source.'"²⁹⁹ In *Continental*, the plaintiffs failed to meet the burden because "[t]he only evidence that [the] plaintiffs presented was deposition testimony from Continental's expert . . . [who testified] that a compound that 'doesn't have the right ingredients in it' could cause a belt separation."³⁰⁰ We could therefore speculate that this type of evidence would not suffice under Rule 76a either. The court has essentially set a very high test for the mandatory disclosure of trade secret information during discovery.³⁰¹ Can we assume from the holding that if the court is resistant towards disclosing trade secret information within private litigation, it will be equally or more re-

298. *Id.* at 527.

299. *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998); *see also* TEX. R. EVID. 507.

300. *In re Continental*, 979 S.W.2d at 615.

301. *See id.*

sistant towards disseminating that information to the public?³⁰² The vast majority of information subject to protective orders, however, contains less sensitive non-trade secret information, and the court might be willing to protect the public at a higher rate.³⁰³

The bottom line is that the court should provide litigants and third party intervenors with greater guidance as to the nexus that would give rise to the disclosure of important documents that adversely affect the public health and safety. If this guidance is not provided, these parties will not know what is needed to prove up whether the unfiled discovery should be considered a court record, and the ultimate goal of Rule 76a will fail.

2. Define “Public Health and Safety”

As explained above, Rule 76a states that unfiled discovery concerning matters that have a “probable adverse effect upon the general public health or safety” should be presumed open to the general public.³⁰⁴ This language, however, is vague and difficult to apply practically. The court needs to articulate the definition of “general public health and safety” and what Rule 76a should strive to protect.³⁰⁵ *Black’s Law Dictionary* defines “public health” as “the health of the community at large” and “the healthful or sanitary condition of the general body of people or the community en masse, especially, the methods of maintaining the health of the community, as by preventive medicine and organized care for the sick.”³⁰⁶ An open question to consider is whether the harm has to affect a certain number of individuals.³⁰⁷ The court has provided a limited example in stating that “[a] ‘nuisance in fact’ is a condition that ‘endangers the public health [and] public safety.’”³⁰⁸ However, this example is not likely intended to encompass the only instance of endangerment to the public.³⁰⁹

Our recommendation is that public health and safety should not be defined so narrowly as to only relate to personal injury claims. The definition under Rule 76a should also include environmental issues and business practices that violate the public’s interest.³¹⁰ The focus of this requirement should be geared toward those parties who affirmatively introduce products to the public that contain certain risks that they would

302. *See generally id.*

303. *See Doggett & Mucchetti, supra* note 6, at 647–55.

304. TEX. R. CIV. P. 76a(2)(c).

305. *See id.*

306. BLACK’S LAW DICTIONARY 737 (10th ed. 2014). *See Whitman v. American Trucking Ass’ns, Inc.*, 531 U.S. 457, 465–66 (2001) (holding that the ordinary meaning of the term “public health” is “health of the community” or “health of the public”).

307. *See generally* TEX. R. CIV. P. 76a(2)(c).

308. *City of Dallas v. Stewart*, 361 S.W.3d 562, 591 (Tex. 2012) (quoting *State v. Spartan’s Indus., Inc.*, 447 S.W.2d 407, 413 (Tex. 1969)).

309. *See id.*

310. *See Doggett & Mucchetti, supra* note 6, at 645.

not be exposed to otherwise.³¹¹ This would put promoters of dangerous products in the crosshairs of Rule 76a, which aligns with the purposes behind the creation of the rule.³¹² Examples would include documents that relate to (1) side effects of drugs and other medications, (2) overarching product liability, (3) research addressing illnesses or viruses, (4) natural disasters, and (5) crime. That list is certainly not exhaustive. Additionally, to “adversely affect the public health and safety” does not mean that the effect must be widespread. There should be no specific number of affected individuals that necessarily gives rise to the sealing or openness. Rather, the courts should fully weigh the factors outlined in Rule 76a. While this is a determination that may require significant advocacy, the trial courts have the ability to efficiently make this determination through the proceedings outlined in Rule 76a(3).

3. Utilize the Notice and Hearing Provisions of Rule 76a

As discussed above, the court in *General Tire* held that Rule 76a’s notice and hearing provisions should not be applied to the threshold determination of whether unfiled discovery constitutes court records.³¹³ The court stated that applying the notice and hearing provisions to the court record determination would be overly burdensome at such a preliminary stage. The court noted that “[i]f this were allowed, a party, merely by claiming that unfiled discovery met the standard for a court record under Rule 76a(2)(c), could trigger an elaborate, expensive process in any case where unfiled discovery has been exchanged.”³¹⁴ The court noted that parties may find the rule so overly cumbersome that they may seek arrangements to avoid the requirements. The court also noted concerns with allowing intervenors to see confidential documents before the courts had even determined whether they are court records. The authors of this Article fully acknowledge the court’s concerns; however, we believe that a notice and hearing can assist the courts in determining whether unfiled discovery is a court record while still avoiding the concerns outlined by the court in *General Tire*.

As noted above, the application of Rule 76a to unfiled discovery is slightly more challenging than the application of Rule 76a to documents that are being filed with the court.³¹⁵ When handling a court record that is going to be filed with the court, Rule 76a applies when a party wants that court record to be sealed.³¹⁶ The presumption is that the court record will remain open; however, the party can ask the court to follow the Rule 76a procedure and seal the court record if the determination is proper.

Unfiled discovery presents a different challenge. Unfiled discovery is not presumed open *unless* it concerns matters that have a probable ad-

311. *See id.*

312. *See id.*

313. *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 524 (Tex. 1998).

314. *Id.*

315. *See supra* Part III.B.

316. *See* TEX. R. CIV. P. 76a(1).

verse effect upon the general public health or safety. In other words, the unfiled discovery will not be presumed open until the party seeking it to be open has demonstrated that the documents have a probable adverse effect upon the general public health or safety. Once that is demonstrated, the unfiled discovery will be classified as court records and the party then seeking to *protect* those documents may ask the court to follow the Rule 76a procedure in making that determination.

Based on this explanation, it seems clear that the courts will, at some point, need to make an educated decision as to whether the unfiled discovery documents present the adverse effect (and nexus) discussed above. The court is implying that the notice and hearing processes are not needed until the second stage (after the unfiled discovery is determined to be a court record and where the court then has to decide whether that “court record” should be sealed). We believe that the notice and hearing process would be equally as valuable if applied to the earlier stage as well.

It will be difficult for the court to determine whether unfiled discovery adversely affects the public health and safety without context. Without any testimony, the court may not understand why a particular document could arguably have a significant effect on the public health and safety. For example, before a court signs a protective order, the court needs to ensure that none of the unfiled discovery documents have a probable adverse effect upon the general public health or safety—because if they do have that effect, they should be presumed *open* and the court should follow the procedure set forth in Rule 76a before signing the protective order. Accordingly, we recommend that the court take a second look at whether the notice and hearing provisions should apply at the court record determination stage when reviewing unfiled discovery. In fact, in order to avoid the gamesmanship that the court worried about or the concern of parties seeking alternative arrangements, the courts can first require briefs (with page limits) outlining why a particular set of documents does or does not adversely affect public health or safety. Then, if necessary, the court can hold a very short hearing—but only if the court needs additional information. The authors simply want the courts to have the *option* of holding a hearing so that they can make an informed decision. Further, to avoid the court’s concern of intervenors viewing confidential documents, the documents should be reviewed *in camera*. In fact, the court even acknowledges this by noting that “Rule 76a anticipates this problem by allowing the trial court to ‘inspect records *in camera* when necessary.’”³¹⁷ Therefore, the courts can still have access to a hearing to ensure access to all information while still being conscious of the concerns expressed by the court in *General Tire*.

317. *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 525 (Tex. 1998).

B. GREATER JUDICIAL AWARENESS AND ACCOUNTABILITY

Trial judges should be vigilant of the possibility of inadvertently aiding in a party's improper concealment.³¹⁸ New technologies and e-discovery have not only promoted greater access to information but have also created a greater incentive to preserve secrecy.³¹⁹ Thus, new information technology has created an incentive for overly broad protective orders in a number of ways.³²⁰ It is often a temptation for trial judges to sign any agreed order, including protective orders, since the main objective for each judge is to resolve conflict. Accepting protective orders without considering Rule 76a, however, is problematic. As explained above, if the court signed the protective order without considering the types of documents the order is protecting, there is a chance the court could be protecting unfiled discovery documents that have a probable adverse effect on public health and safety. If the court is protecting these types of documents without presuming they are open and following the steps outlined in Rule 76a, that is simply counterproductive and misaligned with Rule 76a's purpose.

While the technologies mentioned above promote greater access to information, they can also provide judges with efficient tools to use in determining whether certain discovery falls within the scope of a protective order.³²¹ Judges should also consider implementing a standard protective order so that many of these problems can be avoided in most cases.

1. *Losing Control*

As stated above, judges should remain aware of the consequences of granting an overly broad protective order.³²² *ICON Benefit Administrators II, L.P. v. Mullin* exemplifies the risk of signing an "agreed upon" protective order that can result in a trial judge losing discretion and authority in determining what documents fall under the protection of a protective order.³²³ Most of the time, parties agree to protective orders and confidentiality agreements but fail to comply with disclosure procedures under Texas law.³²⁴ Some judges may not be inclined to sit through a full day of reviewing disclosure requests during a motion to compel.³²⁵ Judges should refuse to sign overly broad protective orders and require parties to craft more narrow protective orders that only protect the sensitive information worthy of protection.³²⁶ Although a judge may be nominally present in a public proceeding, these protective order proceedings have

318. See Doggett & Mucchetti, *supra* note 6, at 650–51.

319. See Marcus, *supra* note 11, at 1839.

320. See generally *id.* at 1837–39.

321. See Benham, *supra* note 2, at 1827–28.

322. See generally *ICON Benefit Administrators II, L.P. v. Mullin*, 405 S.W.3d 257, 259 (Tex. App.—Dallas, 2013, pet. denied).

323. See generally *id.* at 264–65.

324. See Doggett & Mucchetti, *supra* note 6, at 650–51.

325. See *id.* at 679.

326. See generally *ICON Benefit Administrators*, 405 S.W.3d at 259.

recently resembled an arbitration proceeding, where much of the proceeding and aftermath is hidden from public view.³²⁷

2. *Alternative Tools to Aid in Protection – Specifically a Standardized Protective Order*

Can technology be used as an effective way to determine which documents are confidential and militate the need for overly broad protective orders?³²⁸ Could the technology also be used to determine whether particular documents are ones that would probably adversely affect the general public health and safety? Some courts and law firms are currently using “predictive coding” and algorithm-based search technology to aid with the exchange of discovery.³²⁹ Based on limited user input, this technology can predict, identify and classify categories of documents that are relevant to the scope of discovery, or within a privileged category.³³⁰ The use of this technology could be effective in determining whether a certain document falls within the scope of a proposed protective order or whether the documents fall under a category that would then lead them to be presumed open.³³¹

This algorithm-based search technology could also be used by the court system as a tool for public awareness.³³² The predictive coding could be used to search through the petitions filed. Cases that affect the public’s interest in health and safety could likely involve similar allegations and similar wording that could be identified by the search engine.³³³ The creation of a committee or agency to monitor and review this petition database could be an efficient enforcement mechanism.³³⁴ Even though this technology could potentially streamline the process, there is no substitute for the court’s independent judgment, evaluation, and determination as to whether unfiled discovery could have the adverse effect discussed above.

More importantly, the creation of a standardized protective order is another approach to prevent overly broad protective orders.³³⁵ A standardized protective order can require the party seeking to expand the protection of the protective order to show that dissemination would harm the proprietary value of the confidential information.³³⁶ Going further,

327. See Laird, *supra* note 27, at 12.

328. See Benham, *supra* note 2, at 1827–28.

329. See Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633, 637–38 (2013).

330. See *id.* at 659; Benham, *supra* note 2, at 1827–28.

331. See Benham, *supra* note 2, at 1827.

332. See Yablon & Landsman-Roos, *supra* note 329, at 634.

333. See *id.*

334. See Mark Lisher, *Judicial Panel May Keep Records Secret, Texas AG Says*, TEXAS WATCHDOG (Dec. 11, 2012, 3:28 PM), <http://www.texaswatchdog.org/taxonomy/term/1103> [<https://perma.cc/XK6N-L6MN>].

335. See Timothy Lendino, C. King, Evan Sauda, *Confidentiality and Protective Orders, DRI’S FOR THE DEFENSE* (July 2013), <http://www.smithmoorelaw.com/Confidentiality-and-Protective-Orders-08-05-2013> [<https://perma.cc/EMS5-QXDK>].

336. See *id.*

the protective order could include a provision giving the judge authority to sign a protective order only after acknowledging that none of the discovery materials, with limited exceptions, concern matters that have a probable adverse effect upon the general public.³³⁷ Judge Craig Smith, one of the authors of this Article, has a standard protective order available on the Dallas County website that he encourages litigants in his courtroom to use.³³⁸ This standardized protective order is only four pages (a stark contrast to the twenty-plus page proposed protective orders that Judge Smith's court often receives). Additionally, this standard protective order has a specific provision addressing public health and safety: "Nothing in this Order is intended to prevent any party from raising with the court any concern that the non-disclosure of certain Confidential Material may have a possible adverse effect upon the general public health or safety, or the administration or operation of government or public office."³³⁹

The standardized protective order also states that "[t]his Order does not seal Court Records in this case and is only intended to facilitate the prompt production of discovery materials."³⁴⁰ The order explains that any motion to seal must adhere to Rule 76a and also states that any determination regarding protection will be ruled upon pursuant to any applicable notice and hearing provisions.³⁴¹ Finally, the order explains: "This Order merely provides a framework for the parties to claim such materials as confidential to preserve their right to seek protection for these documents as confidential proprietary information, and to preserve such issues for ruling until each party may prepare their appropriate arguments on these issues."³⁴² This language allows courts to avoid the problem stated earlier: blindly protecting documents before determining whether they should in fact be protected.

There is always a chance that if protective orders are made more onerous and harder to obtain, parties will likely go "underground" and circumvent the courtroom.³⁴³ There are certainly problems that arise from that type of side dealing, as discussed below.

C. THE ATTORNEY PROBLEM

Lawyers on both sides of the docket lead the "secrecy parade."³⁴⁴ They sign agreements, actively participating in the cover-up of information—information which, if disclosed, could potentially save lives.³⁴⁵ They often

337. *See id.*

338. *See* Standard Protective Order for the 192nd Judicial District (Dallas County, Texas) http://www.dallascounty.org/department/courts/civildistrictcourts/192nd/documents/ProtectiveOrder_Exhibit_030216.pdf [<https://perma.cc/3H9T-88FT>].

339. *Id.* at 4.

340. *Id.*

341. *Id.*

342. *Id.*

343. *See* Zitrin, *Why Lawyers Keep Secrets*, *supra* note 286, at 6.

344. *See id.* at 4.

345. *See supra* Part V.C.1.

pursue arbitration and avoid the courts altogether. We strongly advocate for the addition of a new Model Rule of Professionalism and Ethics that provides attorneys with an incentive to protect the public due to the fear of reprimand (and thus avoid Rule 11 agreements on the side).³⁴⁶ Additionally, attorneys should be encouraged to collaborate their discovery efforts into resource databases to promote efficient quality representation.³⁴⁷

1. Abuse of Rule 11 Agreements

As an alternative to seeking a protective order from the court, attorneys can enter into an agreement under Rule 11 of the Texas Rules of Civil Procedure.³⁴⁸ Rule 11 provides that an agreement between lawyers in a case is enforceable as long as the agreement is “in writing, signed, and filed with the papers as part of the record.”³⁴⁹ In practice, an attorney seeking to preserve confidentiality for his or her client may only be willing to exchange discovery if opposing counsel enters into a Rule 11 agreement, promising to remain silent.³⁵⁰ A judge does not have to sign a Rule 11 agreement in order for it to be enforceable.³⁵¹ Additionally, the agreement between parties is not a motion, pleading, or plea.³⁵² If an attorney does choose to file the Rule 11 agreement, the filing does not constitute a “request for enforcement or any other affirmative action by the trial court.”³⁵³ Thus, the trial judge will likely remain unaware of the agreement’s existence.³⁵⁴ The agreement becomes a contract upon execution, rather than when the trial court attempts to enforce it.³⁵⁵ Trial courts have a ministerial duty to enforce valid Rule 11 agreements.³⁵⁶

In many instances, some attorneys believe that the benefits of settling with a confidentiality agreement outweigh the costs of dissemination of certain information.³⁵⁷ Consider the situation where after the exchange of discovery, an attorney for the plaintiff uncovers sensitive company information that depicts a causal link between an alleged defect and the resulting harm (to the individual plaintiff and/or public health and safety).³⁵⁸ The party seeking to preserve confidentiality will probably present the opposing party with a settlement agreement, which will likely contain a confidentiality provision.³⁵⁹

346. See *supra* Part V.C.2.

347. See *supra* Part V.B.2.

348. See TEX. R. CIV. P. 11; *In re The Dallas Morning News, Inc.*, 10 S.W.3d 298 (Tex. 1999).

349. See TEX. R. CIV. P. 11.

350. See *In re The Dallas Morning News*, 10 S.W.3d at 298.

351. See TEX. R. CIV. P. 11.

352. See *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 305 (Tex. 2004).

353. See *id.* at 306.

354. See generally TEX. R. CIV. P. 11.

355. See *Coale v. Scott*, 331 S.W.3d 829, 831–32 (Tex. App.—Amarillo 2011, no pet.).

356. See TEX. R. CIV. P. 11.

357. See *In re The Dallas Morning News, Inc.*, 10 S.W.3d 298 (Tex. 1999).

358. See *id.*

359. See *Zitrin, Why Lawyers Keep Secrets*, *supra* note 286, at 5.

If a party is unwilling to remain silent, however, that party could revoke its consent to Rule 11 agreements at any time until judgment is rendered.³⁶⁰ However, if a party revokes its consent to a Rule 11 agreement, the agreement can be enforced through a separate action for breach of contract.³⁶¹ Essentially, Rule 11 agreements have been used as a way to contract around judicial review.³⁶² Where there is no protection from state laws, attorneys who believe entering into a secrecy agreement is in their client's best economic interests "will simply do so."³⁶³ Even under the belief that the Model Rules of Professional Conduct permit disclosure, an attorney's perceived duty of advocacy will outweigh any possibility of dissemination.³⁶⁴

While a Rule 11 agreement will seem like an "easy way out" of the Rule 76a presumption of openness, attorneys should keep in mind that that the Rule 11 agreements do not have the weight of a court order. Rather, the parties will have to pursue a *completely separate breach of contract cause of action* to enforce the Rule 11 agreement if there is a potential breach.

Parties will also avoid Rule 76a and the courts altogether by bringing their claims to arbitration, an alternative to litigation. As the American Arbitration Association explains, "[a]rbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an 'award.'"³⁶⁵ Procedurally, arbitration can be much more flexible than litigation. If the courts fine tune and articulate the Rule 76a procedures as discussed in this article, parties may not avoid the courts through arbitration as often as they do now.

2. Ethical Duty to the Public

Current and future practicing attorneys should advise their clients about the potential harm to the public in requesting secret settlements, protective orders, and the sealing of court files.³⁶⁶ Similar to the ethical rules that limit client confidentiality, ethics rule-makers should implement and enforce a rule that "ensures that lawyers [cannot] contract away their ability to disclose known, discovered dangers to the public" for the benefit of their client.³⁶⁷ In 2001, Richard Zitrin, one of the nation's leading authorities on legal ethics and attorney conduct, presented Proposed Rule 3.2(B) to the Ethics Commission.³⁶⁸ Proposed Rule 3.2(B) states:

360. *See id.*

361. *See* Woody v. Woody, 429 S.W.3d 792, 796 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

362. *See* Zitrin, *Why Lawyers Keep Secrets*, *supra* note 286, at 5.

363. *See id.* at 6.

364. *See id.*

365. *Arbitration*, AM. ARB. ASS'N, <https://www.adr.org> [<https://perma.cc/Z53A-VJDY>].

366. *See* Doggett & Mucchetti, *supra* note 6, at 650–51.

367. *See* Zitrin, *Why Lawyers Keep Secrets*, *supra* note 286, at 5.

368. *See id.*

A lawyer shall not participate in offering or making an agreement among parties to a dispute, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that [the lawyer reasonably believes] [a reasonable lawyer would believe] directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual(s).³⁶⁹

The commission rejected the idea and concluded that such a rule had specific policy implications and should be dealt with by legislation or court rules.³⁷⁰ The new rule would be similar to the current Model Rule of Professional Conduct 1.6(b), which allows attorneys discretion to disclose attorney-client privileged information in limited discretionary circumstances.³⁷¹ An attorney or judge could submit a complaint to an advisory committee, similar to the State Commission on Judicial Conduct and other local Judicial Ethics Committees throughout the state.³⁷² This attorney would essentially serve as a whistleblower. The attorney and committee would then be under a duty to keep the complaint confidential until it has been properly reviewed.³⁷³

A major concern is that these discretionary rules regarding professional conduct carry the potential risk of violating a professional duty to the client and the potential for a malpractice claim.³⁷⁴ In the situation where a lawyer does have a duty to disclose information that concerns substantial harm to the public health and safety, this new duty could include a stringent burden on the client alleging breach of attorney client privilege, since they are likely the ones wanting to avoid disclosure.³⁷⁵ The authors of this Article do not advocate for this proposed ethics rule to supersede any rule related to the attorney client privilege or work product privilege. Additionally, the authors emphasize and support the protection of confidential documents. The authors advocate, however, for the responsibility of attorneys to disclose documents adversely affecting public health and safety that would otherwise be available in discovery, but for the protective order. The authors advocate for the implementation of Mr. Zitrin's proposed rule outlined above, which would give attorneys more guidance and create better balance.

VI. CONCLUSION

Despite a specific rule in Texas aimed at establishing a presumption of open courts, there is often a difficulty within the judicial system in balanc-

369. *See id.* at 8.

370. *See id.* at 5.

371. *See id.*; *see generally* MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 1994).

372. *See generally* Zitrin, *Why Lawyers Keep Secrets*, *supra* note 286.

373. *See generally id.*

374. *See id.* at 6.

375. *See generally id.*

ing transparency and confidential private interests.³⁷⁶ First, this difficulty can arise when a judge signs an agreed protective order or confidentiality agreements without adequate assessment of Rule 76a's considerations.³⁷⁷ Second, this difficulty arises in the professional capacity of an attorney—where attorneys advocate for broad, all-encompassing protective orders or share confidential documents through informal exchanges outside the courtroom.³⁷⁸ Each of the proposed solutions presented in Part IV carries its own benefits and consequences.³⁷⁹

As noted throughout this Article, the authors of this Article fully embrace and support the importance of protecting confidential documents. The authors do, however, want to ensure that the courts remain open when matters involve an adverse effect on the public's health and safety. We want to work towards ensuring that our society does not endure multiple scenarios where (1) a plaintiff brings a lawsuit, (2) the plaintiff determines a severe defect in a particular product or process, and then (3) that defect is hidden or masked until the next plaintiff fights its way through the system in order to disclose the same defect. This jeopardizes the health and productivity of our society, this wastes valuable judicial resources, and this often lets companies or entities off the hook when they should instead be held accountable.

In the end, the debate as to whether unfiled discovery should be disclosed to the public will continue until the Supreme Court of Texas or legislature takes action. This Article has outlined several key areas where the courts, the legislature, and litigants can focus to ensure better clarity and understanding of Rule 76a so that all parties' interests are protected and a well-developed procedure is followed.

376. See *supra* Part V.

377. See *supra* Part V.B.

378. See Zitrin, *Why Lawyers Keep Secrets*, *supra* note 286, at 6; see also *supra* Part V.C.

379. See *supra* Part V.

