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Article

# BEHIND CLOSED DOORS: CLOSING THE COURTROOM IN TRADE SECRETS CASES

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## I. Introduction

A trade secrets case can present the trade secret's owner with a daunting paradox. The objective of trade secrets litigation is to protect the owner's trade secrets, but the litigation process itself can threaten the secrecy that is the essence of the property right at issue. In Texas, as well as other jurisdictions, there exists a strong presumption in favor of public access to judicial proceedings. Yet, unfettered public access in trade secrets cases may result in disclosure of the secrets and possible destruction of the very property rights the lawsuit was brought to protect. This inherent tension, together with the lack of reported precedent in Texas for ***356** excluding the public from at least parts of a civil trial to prevent the disclosure of trade secrets, presents a problem for the practitioner.

This article will explore a litigant's unique need to protect trade secrets from public disclosure at trial, and suggest an appropriate standard in Texas for closing the courtroom to the public. The first part of the article will explain the necessity of preventing the disclosure of trade secrets during the course of litigation. Next, the article will explain why often-used procedures, such as protective orders and sealing court records, may not fully protect trade secrets at trial. The article will then explore federal precedent allowing restrictions on courtroom access to protect trade secrets. Finally, the article will suggest a standard for closing the courtroom in Texas based on federal precedent and Texas Rule of Civil Procedure 76a, which governs the sealing of court records.

## II. Protecting Trade Secrets During Litigation

Federal law, as well as the substantive laws of every state, recognizes that protection of trade secrets is vital to encourage innovation.[1] The need to protect trade secrets is particularly acute in the high technology sectors of the United States economy.[2]

The ability of American business to compete effectively in the global marketplace depends on continued innovation and on meaningful protection for intellectual property and research and development. If incentives to experiment and develop new products, technologies, and services are undermined, American companies will be unable to compete against foreign businesses even in the United States, let alone abroad.[3]

Despite universal acknowledgment of the need to safeguard trade secrets, that need can be easily overlooked in the vagaries and competing pressures of the litigation process. However, because trade secrets are particularly vulnerable during litigation, owners need to take special care not only to prosecute or defend their cases, but also to guard against the disclosure of their trade secrets during the litigation process.

### A. The Nature of Trade Secrets

Trade secrets consist of any formula, pattern, device, or compilation of information used in business that gives the owners an opportunity to obtain an advantage over competitors who do not know or use the trade secrets.[4] The subject ***357** matter of a trade secret must, as its name implies, be kept secret. Persons other than the owner may know of the secret. For example, confidential disclosures to employees or others pledged to secrecy will not destroy the status of the trade secret. Nevertheless, a substantial element of secrecy must exist.[5]

While a precise definition of a trade secret is not possible, courts often consider a non-exclusive list of factors to determine whether information is, in fact, a trade secret. These factors include:

(1) The extent to which the information is known outside the owner's business;

(2) The extent to which the information is known to the owner's employees and others involved in the owner's business;

(3) The extent of measures taken by the owner to guard the secrecy of the information;

(4) The value of the information to the owner and its competitors;

(5) The amount of effort or money the owner expended in developing the information; and

(6) The ease or difficulty with which the information could be properly acquired or duplicated by others.[6] As the list demonstrates, the de facto secrecy of information and the owner's continued efforts to maintain secrecy are the key ingredients of a trade secret.

Although trade secrets may elude precise definition, they are nevertheless valuable property.[7] However, as the United States Supreme Court has recognized, once secrecy is lost, the property interest is forever destroyed:

The right to exclude others is generally "one of the most essential sticks in the bundle of rights that are commonly characterized as property." With respect to a trade secret, the right to exclude others is central to the very definition of the

property interest. Once the data that constitute a trade secret are disclosed to others, ... the holder of the trade secret has lost his property interest in the data.[8] ***358** The Texas Supreme Court has also recognized the primacy of secrecy, as well as the need to protect trade secrets from disclosure during litigation. In Dallas Morning News v. Fifth Court of Appeals,[9] the court considered a challenge by the media to an appellate court order that temporarily sealed trial exhibits containing trade secrets during the pendency of the trial. The court rejected the media's free speech and press claims, and the majority opinion stated that, absent measures such as the appellate court's restrictions on public access to the trial exhibits, "little purpose would be served by suing based on a theft of trade secrets or invasion of privacy because the litigation itself would guarantee that both interests would be destroyed."[10]

In General Tire, Inc. v. Kepple,[11] the Texas Supreme Court again held that public access to documents containing trade secrets should be limited. The court reviewed a trial court's denial of a motion to seal trade secret information produced during discovery and found error in the lower court's decision to allow public interest groups immediate access to the documents.[12] The court reasoned that preliminary disclosure of the information could compromise the effectiveness of a later sealing order and could even render the controversy moot.[13]

Neither Dallas Morning News nor Kepple involved a request to close trial proceedings to the public. The underlying lawsuits in both cases involved products liability claims and did not raise the issue of restricting public access at trials, presumably because it was possible to try the products claims without disclosing any trade secrets to spectators in the courtroom.[14] In other cases, especially those involving trade secret misappropriation claims, it may be impossible to try a case effectively without verbally disclosing trade secrets through the testimony of fact and expert witnesses, or without publicly displaying the trade secrets in exhibits and demonstrative graphics. Thus, while the decisions in Dallas Morning News and Kepple support sealing court records in the interest of protecting trade secrets, neither case had occasion to address the central concern of this article: whether Texas courts can restrict public access to trials in order to prevent the disclosure of trade secrets.

In Texas, litigation, especially trials, can result in the destruction of trade secrets because court records and judicial proceedings are presumptively open to the ***359** public.[15] Federal courts also recognize a presumption in favor of public access.[16] But, the inherent tension between the need to preserve secrecy in trade secrets litigation and the presumption of public access to judicial proceedings is not irreconcilable. There is a trade secrets exception to the presumption of openness that is embodied in federal case law, as well as embedded in Texas Rule of Evidence 507 and parts of Texas Rule of Civil Procedure 76a.[17] To minimize the risk of disclosing trade secrets or fueling an argument that the secrets have been waived during litigation, trade secrets owners should invoke the protections afforded by the trade secrets exception.

**B. Potential Loss of Secrecy**

Several reported decisions outside Texas have addressed the claim that trade secrets are destroyed or waived by disclosure during pending or prior litigation. The prevailing view is that trade secrets are not automatically destroyed by such a disclosure as long as the owner took reasonable measures to maintain the secrecy of the information.

Recently, in Hoechst Diafoil Co. v. Nan Ya Plastics Corp.,[18] the defendant filed a motion for summary judgment, arguing that the plaintiff's trade secret misappropriation claim should fail because a twenty-eight page description of the technology at issue had been found in an unsealed court file from a previous litigation.[19] The United States Court of Appeals for the Fourth Circuit rejected the defendant's argument, finding that the plaintiff had taken reasonable measures to preserve the secrecy of its trade secret information in the prior litigation.[20] These measures included obtaining a protective order in the earlier case requiring that all ***360** documents related to the technology be filed under seal.[21] Although the twenty-eight page description was inadvertently filed unsealed, the court held that the mere presence of that document in the open court record did not automatically destroy its secrecy.[22] However, the court did caution that secrecy might have been lost if there was evidence that the trade secret information had been published elsewhere.[23]

Similarly, trade secret status is not necessarily destroyed by disclosure during pending litigation. In Gates Rubber Co. v. Bando Chemical Industries, Ltd.,[24] the defendant claimed on appeal that the secrecy of certain mathematical constants used with the plaintiff's computer program was destroyed because the constants were disclosed during an injunction hearing in the district court.[25] The United States Court of Appeals for the Tenth Circuit held that secrecy was not lost as a result of the disclosure because the plaintiff took reasonable safeguards during the hearing, such as monitoring the presence of observers

in the courtroom.[26] In addition, the plaintiff also filed a post-hearing request to place the injunction hearing record under seal.[27]

The consequence of failing to protect trade secret information during litigation is illustrated by Littlejohn v. Bic Corp.,[28] although the information primarily at issue in that case was confidential business information, not trade secrets.[29] Cynthia Littlejohn filed a products liability claim against Bic Corporation, and the court entered a protective order during discovery designed to protect Bic's trade secrets and other confidential information from public disclosure.[30] Under the protective order, Bic's confidential materials were available only to the court and counsel, and the materials were to be maintained under seal.[31]

***361** At the liability phase of the products trial, Littlejohn introduced exhibits covered by the protective order.[32] Bic did not object to the admission of the exhibits or raise the issue of confidentiality.[33] The parties settled the case before the damages phase of the trial, and Bic made a post-settlement attempt to seal the trial record. However, the district court refused to grant Bic's belated request.[34]

After the lawsuit settled, a newspaper sought access to the exhibits containing Bic's confidential information that were admitted at trial.[35] The United States Court of Appeals for the Third Circuit held that the public gained the right of access to the exhibits once they were admitted in evidence.[36] Bic argued, based on the promise of confidentiality in the court's protective order, that the public should not have access to its confidential materials.[37] However, the court found that Bic had waived its rights under the protective order by failing to raise the issue of confidentiality at trial.[38] Although the information in Littlejohn was not a trade secret, at least one court has invoked Littlejohn's rationale in the context of trade secrets litigation.[39]

Littlejohn and the other cases discussed in this section teach that a trade secret owner will significantly reduce the chance of destroying its intangible property rights by requesting that the courts protect its trade secrets throughout the course of litigation.

### C. The Texas and Federal Constitutions

Trade secrets owners may be entitled to court orders protecting their trade secrets under the Texas and Federal Constitutions. The Texas Constitution guarantees trade secret owners, like other litigants, a forum in which to seek redress for injuries to their property. The constitutional guarantee for this redress is called the Open Courts provision, which, in contrast to what the name suggests, should result in a "closed" courtroom during some parts of a trade secrets trial. The Open Courts provision is found in section 13 of the Texas Bill of Rights, and provides in ***362** part: "All 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."[40]

The Open Courts provision is a facet of due process and prohibits unreasonable denials of the right to redress.[41] The provision is founded on the belief that the legislature lacks the power "to make a remedy by due course of law contingent upon an impossible condition."[42] To establish an Open Courts violation, a party must show that a common law cause of action is being restricted and that the restriction is unreasonable when balanced against the purpose of the statute.[43] To date, the Texas Supreme Court has limited the Open Courts provision to legislative enactments.[44] However, the judiciary should have no more power than the legislature to restrict unreasonably a party's right to seek redress in Texas courts.[45] Conditioning a party's ability to protect trade secrets upon its willingness to disclose and therefore destroy the very property interest the party seeks to protect should be beyond judicial power; such an impossible condition could eliminate an entire class of claims.[46]

An example of the Open Courts analysis can be found in State ex rel. Ampco Metal, Inc. v. O'Neill.[47] In O'Neill, the plaintiff sought an injunction to prevent the defendant from using the plaintiff's trade secrets.[48] The Wisconsin Supreme Court ordered the trial judge to take testimony concerning the trade secrets in camera and to seal the record of the hearing.[49] The court recognized that if the plaintiff had to give evidence in public regarding the nature of its trade secrets, the public disclosure would destroy the value of the very trade secrets the plaintiff sought to protect.[50] Relying in part on a Wisconsin constitutional provision similar to the Texas Open ***363** Courts provision,[51] the court held that "unless the testimony as to plaintiff's claimed trade secrets be taken in camera, [plaintiff] will be denied any effective remedy for the wrong it has sustained, assuming the truth of the allegations of its complaint."[52] A similar analysis under the Texas Open Courts provision should lead Texas courts to restrict public attendance and close the courtroom when trade secrets must be revealed at trial.[53]

In addition to the Texas Open Courts provision, trade secrets owners seeking to protect their secrets during litigation may look to the Federal Takings Clause, which prohibits the taking of private property for public use without just compensation.[54] In Ruckelshaus v. Monsanto Co.,[55] the United States Supreme Court held that trade secrets are property deserving protection under the Takings Clause.[56] Ruckelshaus involved a complaint that certain environmental statutes were unconstitutional because they required owners to divulge trade secrets on applications filed with the Environmental Protection Agency, which could disclose portions of the data to the public.[57] While Ruckelshaus did not involve a court's refusal to order appropriate protective measures during litigation, commentators have argued that the Supreme ***364** Court's recognition of trade secrets as property under the Takings Clause lays the foundation for litigants to urge takings claims in response to such judicial refusal.[58]

Unfortunately, the Texas Supreme Court has not interpreted Ruckelshaus as favorably to trade secrets owners. In Garcia v. Peeples,[59] the court rejected a claim that ordering shared discovery, which contained trade secrets, amounted to an unconstitutional deprivation of property.[60] In this products liability case, the court stated in a footnote that sharing discovery with other plaintiffs asserting similar claims against the same manufacturer would not give the competitors of the trade secrets owner a "free ride."[61] Nevertheless, the court advised that the trial judge could require those who wished to share the discovery "to certify that they will not release it to competitors or others who would exploit it for their own economic gain."[62] More than ten years later, in General Tire, Inc. v. Kepple,[63] the Texas Supreme Court seized upon this footnote in Peeples and without elaboration held that, although trade secrets are property under Texas law, they do not qualify as property under the Takings Clause.[64]

Regardless of the holding in Peeples, litigants undoubtedly are entitled to preserve their trade secrets property rights throughout the course of litigation.[65] Indeed, a business entity's only hope of preventing the misuse of its trade secrets through the often last-ditch effort of litigation may be a "court's willingness to exert its full authority to prevent further dissemination of the information."[66] Constitutional guarantees, such as the Texas Open Courts provision, should strengthen the judiciary's resolve to afford trade secrets owners adequate protection of their property rights.

## *365 III. Exploring the Current Safeguards

Texas courts may soon find themselves at a crossroads. In the 1990's, high technology companies streamed into Texas.[67] When these businesses look to Texas courts to enforce their intellectual property rights, including trade secrets, the judicial system must be prepared to provide a forum that appropriately balances the presumption in favor of public access to judicial proceedings against the countervailing need of litigants to protect their intangible property. Some safeguards are already in place, such as protective orders entered by courts during the discovery phase of litigation. In addition, Texas Rule of Civil Procedure 76a sets forth the substantive and procedural requirements for sealing court records from the public eye. Yet, these safeguards may not be sufficient, particularly when a lawsuit requires that trade secrets be discussed in open court. In this situation, Texas courts should allow litigants to conduct some proceedings behind closed doors.

### A. Protective Orders

Texas Rule of Civil Procedure 192.6 and Texas Rule of Evidence 507 authorize Texas trial courts to issue protective orders specifically designed to protect trade secrets.[68] Texas Rule of Evidence 507, which sets forth this Texas trade secrets privilege, provides:

> A person has a privilege ... to refuse to disclose and to prevent other persons from disclosing a trade secret owned by a person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.[69] The trade secrets privilege seeks to accommodate two competing interests.[70] First, the privilege recognizes that trade secrets are an important property interest worthy of protection.[71] Second, the privilege recognizes the importance of fair adjudication of lawsuits involving trade secrets by providing a means to elicit facts necessary for the full presentation of a case.[72]

***366** If trade secrets must be disclosed to adjudicate a dispute fairly, the trial court should require disclosure subject to an

appropriate protective order.[73] A protective order may limit those who can review material containing the trade secrets at issue, as well as restrict the use of such information to purposes solely related to the underlying lawsuit. For example, a protective order can provide that only counsel, the parties, and their respective experts may review the trade secrets information during discovery.[74] Protective orders may also condition access to trade secrets upon a person's written agreement to keep the information confidential.[75] In addition, a protective order can govern how documents containing trade secrets are maintained during litigation and disposed of at the conclusion of the litigation.[76]

While protective orders may sufficiently preserve secrecy during the entire litigation process in some cases that involve trade secrets, in other cases in which trade secrets are central to the controversy, protective orders may not provide enough protection. The critical factor in every case is whether a discovery product constitutes a court record under Texas Rule of Civil Procedure 76a. If so, then the trial court must follow the stricter standards of Rule 76a to shield the information from the public.[77] Consequently, any time a discovery product qualifies as a court record, a traditional protective order is merely a starting point for protecting trade secrets from public disclosure.

**B. Sealing Orders**

The next step in protecting trade secrets is to obtain appropriate sealing orders under Texas Rule of Civil Procedure 76a. Rule 76a provides that court records are presumptively open to the public and defines "court records" as:

> ***367** (a) all documents of any nature filed in connection with any matter before any civil court, except:
>
> (1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;
>
> (2) documents in court files to which access is otherwise restricted by law;
>
> (3) documents filed in an action originally arising under the Family Code.
>
> ....
>
> (c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery in cases originally brought to preserve bona fide trade secrets or other intangible property rights.[78]

Under the terms of Rule 76a, court records constitute documents filed in the record of a civil case, even if the documents contain trade secrets, including documents filed in connection with substantive motions and exhibits admitted into evidence, or even proffered, at trial.[79] Some unfiled discovery could also constitute court records, namely discovery "concerning matters that have a probable adverse effect upon the [public's] general health or safety."[80] While Rule 76a(2)(c) contains a trade secrets exception for unfiled discovery in cases "originally initiated to preserve bona fide trade secrets or other intangible property rights," the Texas Supreme Court has yet to define the parameters of this exception.[81]

To the extent that documents constitute court records under Rule 76a, they cannot be sealed by a protective order unless the requirements of Rule 76a are satisfied. Thus, in order to have a court record sealed, a trade secrets owner must show all of the following:

> (a) a specific, serious and substantial interest which clearly outweighs:
>
> (1) [the] 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.[82] ***368**

Fortunately for trade secrets owners, a trade secret can constitute "a specific, serious and substantial interest" justifying restrictions on public access.[83] The Texas Supreme Court has held that:

> even if a trade secret produced under a protective order is later determined to be a court record, this does not necessarily mean that the information must be made public. Rule 76a allows the information to remain sealed upon a showing that it meets the criteria specified in Rule 76a(1). That a document contains trade secret information is a factor to be considered in applying this sealing standard.[84]

This concept of a trade secrets exception to the presumption of public access is not novel or unique to Texas. Decades ago, the United States Supreme Court stated that the public does not have an absolute right of access to judicial records. In Nixon v. Warner Communications, Inc.,[85] the Court held that the public was not absolutely entitled to copy certain tape recordings central to the Watergate scandal for commercial purposes.[86] The Court observed:

> It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify private spite or promote public scandal through the publication of the painful and sometimes disgusting details of a divorce case. Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.[87] In Texas, Rule 76a is a means to restrict public access to court records. Thus, trade secrets owners who rely on protective orders that do not meet the requirements of Rule 76a could find themselves lacking full protection from public disclosure.

### C. The "Gap"

Even if protective orders and Rule 76a sealing orders are entered in a particular case, those protections still may not go far enough in preventing public disclosure of trade secrets. The protections afforded by these types of orders potentially leave--for lack of a better term--a "gap." The gap occurs when oral testimony concerning the trade secrets takes place during a trial or hearing and when trade secrets are ***369** publicly revealed in demonstratives and graphics in open court. Traditional protective orders do not cover the disclosure of trade secrets during a hearing or trial; Rule 76a, by its terms, does not apply to live testimony or visual presentations in open court. Only court orders that restrict public access to the courtroom in these scenarios will fill this gap.

Although there is not a single reported decision in Texas on point, neither the practitioner nor Texas courts should be deterred from considering restrictions on public access to civil trials. Litigants should request that courts close courtrooms to the public when appropriate, and courts should grant such requests when circumstances would involve the revelation of trade secrets in otherwise presumptively open courtrooms.

## IV. Closing the Courtroom at Trial

Just as the United States Supreme Court has recognized that the public right of access to judicial records can be restricted to protect a litigant's competitive posture, the Court also has recognized that the public's right to attend trials can be restricted to preserve trade secrets.[88] In fact, lower federal courts have closed courtrooms to prevent the disclosure of trade secrets, while other courts have posited closure as a viable option.[89] While only a few courts have enunciated guidelines for considering closure requests, these courts have established guidelines with a framework that may be easily adapted in Texas courts.

### A. Federal Precedent

Two decisions, In re Iowa Freedom of Information Council[90] and Publicker Industries, Inc. v. Cohen,[91] merit special attention by Texas courts faced with requests to close courtrooms during trials involving trade secrets. Both of these federal appellate opinions attempt to flesh out standards to guide lower courts in situations involving trade secrets, although both cases recognize the need to decide such ***370** requests on the specific facts of the case. In Iowa Freedom of Information Council, an attorney represented a plaintiff in a wrongful death lawsuit against Procter & Gamble (P&G).[92] During discovery, the attorney

signed a non-disclosure agreement covering the confidential information P&G would produce in the case, and the district court entered a protective order based on the parties' agreement.[93] Despite the non-disclosure agreement and protective order, the attorney sold several confidential documents to other attorneys prosecuting similar cases against P&G.[94] In response, P&G filed a contempt action against the attorney.[95]

During the contempt hearing, P&G requested that the judge close the courtroom to the public because part of the testimony would reveal P&G's trade secrets.[96] An attorney representing the media protested and asked the district court to make an initial determination of the existence of trade secrets in the case.[97] The judge denied the media's request, closed the courtroom, and ordered that the transcript be sealed.[98] Representatives of the Iowa press filed a petition for mandamus seeking to compel the district court to unseal the hearing transcript.[99] The Eighth Circuit Court of Appeals denied the petition, finding that the district court did not abuse its discretion.[100] The court also provided guidance on how courts should rule on future motions to close the courtroom.[101]

First, the petitioners argued that the district court erred by refusing to consider the media's objections prior to closing the courtroom.[102] While the Eighth Circuit agreed that the judge was "too precipitate" in closing the hearing without permitting the press to air its grievances, the court held that the error was harmless on the facts of the case.[103] According to the court, "trade secrets were in fact involved, and ... substantial damage to P&G's property rights in these secrets would have occurred ***371** had the hearing not been closed."[104] Moreover, the court found that "no reasonable alternative existed to closure, sufficient to protect these property rights."[105]

Second, the petitioners argued that the district court erred in closing the courtroom without first determining whether trade secrets were actually present in the case.[106] The Court of Appeals reasoned that the normal requirement of prior findings justifying closure cannot be applied literally in the context of trade secrets:

> Trade secrets are a peculiar kind of property. Their only value consists in their being kept private. If they are disclosed or revealed, they are destroyed. Therefore, it makes no sense to say that a determination whether trade secrets are involved should be made in open court, with the hearing to be later closed only if the determination is that they are involved. For in order to make this very determination, the Court must consider the information that one of the parties claims constitutes a trade secret, and the damage to that party that may occur if the claimed secrets are revealed. We do not see, as a practical matter, how this kind of decision can be made without at least some limited initial in camera consideration.[107]

Therefore, under Iowa Freedom of Information Council, once a court determines that trade secrets are involved in a case, two findings are paramount to justify closing the courtroom. First, the court must determine if a trade secrets owner's property rights would be damaged if the courtroom remains open.[108] Second, the court must determine if there are any reasonable alternatives to closure that are sufficient to protect the owner's property rights.[109] If not, then the courtroom should be closed.

The appellate court's opinion in Publicker Industries, Inc. v. Cohen[110] envisions similar findings prior to closing the courtroom to the public. Publicker Industries involved a proxy fight among corporate shareholders, and one issue before the district court was whether to close the courtroom during a preliminary injunction hearing. The motion for preliminary injunction required the court to determine whether certain confidential business information had to be disclosed to the corporate shareholders.[111] The judge closed the entire preliminary injunction hearing because the judge found that allowing the press to attend the hearing would usurp the judicial function of determining whether or not the information should be revealed to the shareholders.[112]

***372** The press appealed, claiming that the closure by the district court "deprived them of their common law and First Amendment rights of access to a civil trial without due process of law."[113] On review, the United States Court of Appeals for the Third Circuit held that public access to civil court proceedings could be limited when an important countervailing interest is shown. Specifically, the record must demonstrate "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[114] Thus, the Court of Appeals found that a litigant's interest in safeguarding trade secrets may be sufficient to satisfy the first part of the test.[115]

On the facts of the case, the Court of Appeals held that the district judge acted properly in excluding the public from the part of the hearing that concerned whether certain "sensitive" information should be kept confidential.[116] However, the court found that the judge erred in excluding the public from the remainder of the hearing because no findings supported the continued closure of the hearing. Thus, the closure order was not narrowly tailored to advance the interests articulated.[117] Although the

court in Publicker Industries found that the judge improperly excluded the public from the entire injunction hearing, the case squarely supports restrictions on public access to the trade secrets portions of civil trials.

**B. Rule 76a by Analogy**

The standards for closing a courtroom set forth in Iowa Freedom of Information Council and Publicker Industries hinge on, first, the existence of an important property interest in information and, second, an order narrowly tailored to protect that interest. These two elements should be familiar to practitioners who have had occasion to deal with a request to seal court records under Texas Rule of Civil Procedure 76a. In Texas, court records can be sealed only when there is a showing of a specific, serious, and substantial interest that clearly outweighs the presumption of openness and any probable adverse effect on the public's health or safety, e.g., an important property right.[118] In addition, there must be a showing that no means less ***373** restrictive than sealing will adequately protect that interest, i.e., narrow tailoring.[119] Therefore, the showing required by Rule 76a as a prerequisite to sealing court records readily lends itself to requests to close courtrooms.

Applying Rule 76a by analogy in this circumstance makes sense. Assuming that the Rule 76a showing must be made before a trial transcript can be sealed, it would be a strange law that required a different showing to restrict contemporaneous public access to the very trial for which the transcript is the verbatim record.[120] In other words, there is little logic in having one standard for sealing records and an entirely different standard for closing a courtroom. The same words must be protected from public dissemination, whether they are printed on paper or spoken in court.

The Honorable David W. Evans of the 193rd Judicial District Court for Dallas County recently visited this issue in Alcatel USA, Inc. v. Samsung Electronics Co., Cause No. 96-08262-L.[121] Judge Evans granted the plaintiffs' request to close the courtroom during portions of a trade secrets misappropriation trial.[122] Among the numerous orders Judge Evans entered during the pre-trial hearings was an order that closely parallels Rule 76a. The order provided, in relevant part, that:

> prior to sealing an exhibit or transcript, or exclusion of anyone from the courtroom during any proceeding, the party moving to seal must establish a specific, serious and substantial interest in the exhibit, transcript or presentation that outweighs the presumption of openness that generally attaches to court records and court proceedings by either (1) demonstrating the probable existence of a trade secret in, or embodied in whole or in part in, the exhibit, transcript or presentation which has not been publicly disclosed or by (2) demonstrating other privileged interest in, or embodied in whole or in part in, the exhibit, transcript or presentation which has not been publicly disclosed which must be protected by closure in order to preserve the value of such privilege.[123]

The Dallas Morning News ("The News") intervened in the case. Both The News and the defendants in the underlying misappropriation lawsuit filed mandamus petitions in the Dallas Court of Appeals challenging, inter alia, the various restrictions placed by Judge Evans on public access to the trade secrets portions of the trial. In unpublished decisions, the Dallas Court of Appeals denied the petitions, ***374** finding that the lower court had not abused its discretion.[124] The defendants in the underlying lawsuit also sought mandamus relief in the Texas Supreme Court, but the petition was denied.[125] While denials of mandamus petitions have no precedential value, the fact that a Texas court has restricted public access to a trial in the interest of preserving trade secrets should be welcome news for trade secrets owners.

The decision by Judge Evans to close the courtroom with reference to Rule 76a, while certainly a legal bellwether, is not a departure from Texas law. Texas Rule of Evidence 507 requires that when trade secrets must be disclosed during litigation, the trial judge "shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require."[126] Examples of protective measures contemplated by Rule 507 include sealing testimony, taking trade secret testimony in camera, and placing those present during the taking of such testimony under oath not to disclose the trade secrets.[127] Therefore, closing the courtroom during trade secret testimony is a necessary adjunct of the trade secrets privilege in Texas.

## V. Conclusion

Trade secrets owners should be aware that a potential by-product of trade secrets litigation is the destruction of valuable, intangible property rights. While several other protections exist to protect these property rights, closing the courtroom may be

necessary when traditional protective orders and Rule 76a sealing orders will not prevent the public disclosure of trade secrets in open court. Federal law clearly allows courts to close judicial proceedings in the interest of preserving trade secrets, and, despite the lack of reported precedent in the State, Texas courts are also well equipped to handle closure requests by reference to federal precedent, Texas Rule of Evidence 507, and Texas Rule of Civil Procedure 76a. Litigants should request that courtrooms be closed to the public when necessary to protect their trade secrets because Texas courts are ready to forge this new, but certainly not uncharted, legal ground.

Footnotes


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1 Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 472 (1991).

2 See id. at 472-73.

3 Id. at 473.

4 Restatement of Torts § 757 cmt. b (1939); Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1994). See also Restatement (Third) of Unfair Competition § 39 (1993) (defining a trade secret as any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others).

5 Restatement of Torts § 757 cmt. b (1939). See also Restatement (Third) of Unfair Competition § 39 cmt. f (1993) (stating that the secrecy requirement is satisfied if it would be difficult or costly for another to exploit the information without unlawfully misappropriating it).

6 Restatement of Torts § 757 cmt. b (1939); American Derringer Corp. v. Bond, 924 S.W.2d 773, 777 n.2 (Tex. App.--Waco 1996, no writ).

7 See In re Continental Gen. Tire, Inc., 979 S.W.2d 609, 612 (Tex. 1998) ("[T]rade secrets are an important property interest, worthy of protection.").

8 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (internal citation omitted) (emphasis added).

9 842 S.W.2d 655 (Tex. 1992).

10 Id. at 660.

11 970 S.W.2d 520 (Tex. 1998).

12 See id. at 524-25.

13 See id.

[14] The underlying suit in Kepple was settled before trial. See id. at 522.

[15] See Dallas Morning News, 842 S.W.2d at 657 ("The press and the public have a right to be present at all proceedings in the trial of the underlying case, and to report all that they observe."); Tex. R. Civ. P. 76a (1) ("court records, as defined in this rule, are presumed to be open to the general public"). For commentary on the impact of Rule 76a on trade secrets in Texas, see Jennifer S. Sickler & Michael F. Heim, The Impact of Rule 76a: Trade Secrets Crash and Burn in Texas, 1 Tex. Intell. Prop. L.J. 95 (1995).

[16] See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) ("we note that historically both civil and criminal trials have been presumptively open"); Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (stating that the courts in this country recognize a general right to inspect judicial records); In re Continental Ill. Secs. Litig., 732 F.2d 1302, 1308-09 (7th Cir. 1984) (discussing the presumption of public access to court records and the correlative right of the public to attend judicial proceedings); Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F. 2d 1165, 1177-79 (6th Cir. 1983) (same); Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981) ("[T]here remains a clear and strong First Amendment interest in ensuring that '[w]hat transpires in the courtroom is public property.' ') (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

[17] The trade secrets exception in federal case law is discussed in Section IV, infra. Texas Rule of Evidence 507 and Texas Rule of Civil Procedure 76a are discussed in Section III, infra.

[18] 174 F.3d 411, 50 U.S.P.Q.2d (BNA) 1332 (4th Cir. 1999).

[19] See id. at 415, 50 U.S.P.Q.2d at 1334.

[20] See id. at 417, 50 U.S.P.Q.2d at 1337.

[21] See id. at 415, 50 U.S.P.Q.2d at 1334.

[22] See id.

[23] See id. at 418-19, 50 U.S.P.Q.2d at 1337 (citing Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1362, 1368, 37 U.S.P.Q.2d (BNA) 1258, 1262-63 (E.D. Va. 1995) (holding that trade secret status is lost by the combination of the presence of the document in an open court record and, more importantly, the posting of the information on the Internet)). See also Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 923 F. Supp. 1231, 1255 (N.D. Cal. 1995) (finding that, absent evidence of publication, plaintiff did not forfeit trade secret status of works that were temporarily left unsealed in a court record in other litigation).

[24] 9 F.3d 823, 28 U.S.P.Q.2d (BNA) 1503 (10th Cir. 1993).

[25] See id. at 848-49, 28 U.S.P.Q.2d at 1521.

[26] See id. at 849, 28 U.S.P.Q.2d at 1521.

[27] See id.

[28] 851 F.2d 673 (3d Cir. 1988).

[29] Id. at 685 ("[D]ocuments do not contain trade secrets merely because they are confidential.").

[30] See id. at 676.

[31] See id.

[32] See id.

[33] See id.

[34] See id.

[35] See id. at 676-77.

[36] See id. at 679.

[37] See id. at 680.

[38] See id. ("But, in any event, we hold that Bic's failure to object to the admission into evidence of the documents, absent a sealing of the record, constituted a waiver of whatever confidentiality interests might have been preserved under the [protective order].").

[39] See Gates Rubber Co. v. Bando Chem. Indus., Inc., 9 F.3d 823, 849, 28 U.S.P.Q.2d (BNA) 1503, 1521. But see Northwest Airlines, Inc. v. American Airlines, Inc., 870 F. Supp. 1504, 1511 (D. Minn. 1994) (distinguishing Littlejohn on the basis that the relevant documents did not contain trade secrets).

[40] Tex. Const. art. I, § 13.

[41] See Glyn-Jones v. Bridgestone/Firestone, Inc., 857 S.W.2d 640, 643 (Tex. App.--Dallas 1993) ("The open courts provision ensures that citizens bringing a common-law cause of action will not unreasonably be denied the right of redress for their injuries."), aff'd, 878 S.W.2d 132 (Tex. 1994).

[42] Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 355 (Tex. 1990).

[43] See id.

[44] See, e.g., Federal Sign v. Texas S. Univ., 951 S.W.2d 401, 410 (Tex. 1997); Peeler v. Hughes & Luce, 909 S.W.2d 494, 499 (Tex. 1995).

[45] At least one Texas court has upheld an Open Courts challenge to judicial action. See Decker v. Lindsay, 824 S.W.2d 247 (Tex. App.--Houston [[1st Dist.] 1992) (orig. proceeding) (finding that an order requiring the parties to negotiate in good faith and attempt to reach a settlement violated the Open Courts provision).

[46] See, e.g., Glyn-Jones, 857 S.W.2d at 643-44 (statute prohibiting the introduction of seat belt evidence violated the Open Courts provision because it effectively eliminated an entire class of products liability claims).

[47] 78 N.W.2d 921 (Wis. 1956).

[48] See id. at 922.

[49] See id. at 927.

[50] See id. at 923.

[51] The Wisconsin provision stated: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs, which he may receive in his person, property, or character." Id. at 927 (quoting Wis. Const. art. I, § 9).

[52] Id. at 927. See also Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 540 n.11, 183 U.S.P.Q. (BNA) 321, 326 n.11 (2d Cir. 1974) ("Unyielding preservation of the public trial right would in such cases present trade secret owners with the Hobson's choice of suffering an unprosecuted theft of their secrets, or allowing a prosecuted thief to broadcast the same secrets at trial.").

[53] Recently, the Honorable David W. Evans of the 193rd Judicial District Court in Dallas County employed an Open Courts analysis in a series of temporary sealing orders and a final sealing order in Alcatel USA, Inc. v. Samsung Electronics Co. In this trade secrets misappropriation lawsuit, the authors represented the trade secrets owners who requested restrictions on public access to the trade secrets portions of the trial. Judge Evans found that:
the State's interest in its open courts provision of its Constitution to provide alleged trade secrets owners a forum in which to enforce their rights, and the imminent and irreparable harm to the property right in the alleged trade secrets by the disclosure of the secrets in an open courtroom which would destroy the secrecy of the trade secret ... outweigh the public's interest in an open courtroom during the limited duration of testimony about the exhibits that reveal the trade secrets or the explicit subject matter of the trade secrets[.]
Alcatel USA, Inc. v. Samsung Elecs. Co., No. 96-08262-L (193rd Jud. Dist. Ct., Dallas County, Texas) Agreed Order Sealing Court Records Pursuant to Rule 76a, at P 10(h) (Jan. 21, 2000).

[54] U.S. Const. amend. V.

[55] 467 U.S. 986 (1984).

[56] Id. at 1003-04 ("[T]o the extent that Monsanto has an interest in its health, safety, and environmental data cognizable as a trade-secret property right under [state] law, that property right is protected by the Takings Clause of the Fifth Amendment.").

[57] See id. at 986.

[58] See, e.g., James R. McKown, Taking Property: Constitutional Ramifications of Litigation Involving Trade Secrets, 13 Rev. Litig. 253, 254-55 (1994) ("If a court ruling results in the public disclosure, and therefore the destruction, of a trade secret, a compensable taking of property may have occurred."); Note, Trade Secrets in Discovery: From First Amendment Disclosure to Fifth Amendment Protection, 104 Harv. L. Rev. 1330 (1991). See also Sickler & Heim, supra note 15, at 98 (stating that Rule 76a may lead to unconstitutional takings of property).

[59] 734 S.W.2d 343 (Tex. 1987).

[60] Id. at 348 n.4.

[61] Id.

[62] Id. at 348.

[63] 970 S.W.2d 520 (Tex. 1998).

[64] See id. at 454.

[65] The protections to which trade secrets owners are entitled during litigation are discussed in Section III, infra.

[66] Miller, supra note 1, at 470.

[67] See generally D'Ann Petersen and Michelle Burchfiel, Silicon Prairie: How High Tech Is Redefining Texas' Economy, Federal Reserve Bank of Dallas Southwest Economy, Issue 3 May/June 1997 (discussing the influx of "high tech" businesses to Texas).

[68] See, e.g., Kepple, 970 S.W.2d at 523 (stating that Rule 166b(5), the precursor to Rule 192.6, allowed courts "to issue protective orders to protect trade secrets contained in discovery"). See also Garcia v. Peeples, 734 S.W.2d 343, 346 (Tex. 1987) ("For the last thirty years, the Rules of Civil Procedure have included provisions specifically tailored to prevent dissemination of trade secrets."); Automatic Drilling Machs., Inc. v. Miller, 515 S.W.2d 256, 259-60 (Tex. 1974) (criticizing a trial court for failing to properly consider a litigant's motion for a protective order against discovery by a competitor seeking the litigant's trade secrets).

[69] Tex. R. Evid. 507 (emphasis added).

[70] In re Continental Gen. Tire, Inc., 979 S.W.2d 609, 612 (Tex. 1998).

[71] See id.

[72] See id.

[73] See id. at 613.

[74] See, e.g., id. at 613 n.3 (stating with approval that the trial court issued a protective order that limited access to the trade secret data to "the parties in this lawsuit, their lawyers, consultants, investigators, experts and other necessary persons employed by counsel to assist in the preparation and trial of this case"). See also E.I. DuPont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102-03 (1917) (recognizing the need to protect trade secrets during discovery through the use of case-specific protective orders); Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1471, 22 U.S.P.Q.2d (BNA) 1429, 1433-34 (9th Cir. 1992) (approving a protective order that denied a litigant's in-house counsel access to a competitor's trade secrets); Quotron Sys., Inc. v. Automatic Data Processing, Inc., 141 F.R.D. 37, 40 (S.D.N.Y. 1992) ("Protective orders that limit access to certain documents to counsel and experts only are commonly entered in litigation involving trade secrets and other confidential research, development, or commercial information.").

[75] See, e.g., Continental Gen. Tire, 979 S.W.2d at 613 n.3.

[76] See, e.g., id.

[77] General Tire, Inc. v. Kepple, 970 S.W.2d 520, 524 (Tex. 1998) ("To the extent that discovery ... is a 'court record' under Rule 76a, the court must follow the stricter standards of that rule to limit its dissemination.") (citing Eli Lilly & Co. v. Marshall, 829 S.W.2d 157, 158 (Tex. 1992)). See also Tex. R. Civ. P. 192.6(b)(5) (providing that the court may order that "the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.").

[78] Tex. R. Civ. P. 76a(2).

[79] See Tex. R. Civ. P. 75a ("The court reporter ... shall file with the clerk of court all exhibits which were admitted in evidence or tendered on bill of exception during the course of any hearing, proceeding, or trial."). See also Dallas Morning News v. Fifth Court of Appeals, 842 S.W.2d 655, 659 (Tex. 1992) ("exhibits introduced into evidence are ... court records").

[80] Tex. R. Civ. P. 76a(2)(c).

[81] See Sickler & Heim, supra note 15, at 96-97 (criticizing the trade secrets exception in Rule 76a(2)(c) for its lack of clarity).

[82] Tex. R. Civ. P. 76a(1). In addition to the substantive requirements, there are numerous procedural requirements for Rule 76a motions, hearings, and orders. See Tex. R. Civ. P. 76a. See also David E. Keltner, Texas Practice Guide Discovery §§ 11:54-11:103 (West 1999); Sickler & Heim, supra note 15, at 103-04.

[83] See Eli Lilly & Co. v. Marshall, 829 S.W.2d 157, 158 (Tex. 1992) ("Regardless of the cause of action, a properly proven trade secret is an interest that should be considered in making the determination required by Rule 76a.").

[84] In re Continental Gen. Tire, Inc., 979 S.W.2d 609, 614 (Tex. 1998) (internal footnote omitted).

[85] 435 U.S. 589 (1978).

[86] Id. at 597-99.

[87] Id. at 598 (1978) (internal quotations and citations omitted) (emphasis added).

[88] See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 600 n.5 (1980) ("The preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil trial.") (Stewart, J., concurring).

[89] See, e.g., Encyclopedia Brown Prods., Ltd. v. Home Box Office, Inc., 26 F. Supp. 2d 606, 612 (S.D.N.Y. 1998) ("Potential damage from release of trade secrets is a legitimate basis for sealing documents and restricting public access during trial."); Uniroyal Goodrich Tire Co. v. Hudson, 873 F. Supp. 1037, 1040 (E.D. Mich. 1994) (granting plaintiff's request to close the courtroom during a trade secret misappropriation trial), aff'd, 97 F.3d 1452 (6th Cir. 1996) (table); Standard & Poor's Corp., Inc. v. Commodity Exch., Inc., 541 F. Supp. 1273, 1278, 220 U.S.P.Q. (BNA) 522, 526 (S.D.N.Y. 1982) ("To have refused to close the proceedings during the testimony concerning the trade secrets would have ... put S&P to the Hobson's choice of not suing Comex ... or suing and losing forever all the proprietary value ..."); Sperry Rand Corp. v. Rothlein, 241 F. Supp. 549, 566, 143 U.S.P.Q. (BNA) 172, 186 (D. Conn. 1964) (stating that the courtroom was closed so as "not to disclose to the general public the trade secrets concerning which testimony was given in the course of the trial").

[90] 724 F.2d 658 (8th Cir. 1983).

[91] 733 F.2d 1059 (3d Cir. 1984).

[92] Iowa Freedom of Info. Council, 724 F.2d at 660.

[93] See id.

[94] See id.

[95] See id.

[96] See id.

[97] See id.

[98] See id.

[99] See id.

[100] See id. at 661.

[101] See id.

[102] See id. at 660-61.

[103] See id. at 661.

[104] Id.

[105] Id.

[106] See id. at 662.

[107] Id.

[108] See id. at 661.

[109] See id.

[110] 733 F.2d 1059 (3d Cir. 1984).

[111] See id. at 1062-63.

[112] See id. at 1063.

[113] Id. at 1064.

[114] Id. at 1073 (quoting United States v. Criden, 648 F.2d 814, 824 (3d Cir. 1981)).

[115] See id. at 1073. The information sought to be protected in Publicker Industries, though confidential and sensitive, was not a trade secret. Id. at 1074 ("we will point out that the 'sensitive' information at issue here is not the kind of confidential commercial information that courts have traditionally protected, e.g., trade secrets").

[116] See id. at 1072.

[117] See id. at 1074.

[118] Tex. R. Civ. P. 76a(1). In trade secret misappropriation cases between business competitors, the effect on the general public health or safety should rarely form an obstacle to sealing court records. In Iowa Freedom of Information Council, the Eighth Circuit stressed that when only private commercial interests are involved, the law justifies maintaining judicial records under seal, if necessary to protect property rights. In re Iowa Freedom of Info. Council, 724 F.2d 658, 664 (8th Cir. 1983).

[119] Tex. R. Civ. P. 76a(1).

[120] While there appears to be no Texas case on point, a trial or hearing transcript is probably a "court record" under Rule 76a, because a transcript is likely to fall within the ambit of "all documents of any nature filed in connection with any matter before any civil court." See Tex. R. Civ. P. 76a(2)(a) (defining court records for purposes of Rule 76a).

[121] See supra note 53.

[122] See id.

[123] Alcatel USA, Inc. v. Bunch, Cause No. 96-08262-L (193rd Jud. Dist. Ct., Dallas County, Texas) Order on Procedure for Temporary Sealing of Portions of Trial Related to Trade Secrets at P 3 (Oct. 28, 1999).

[124] In re Dallas Morning News, Inc., No. 05-99-01959-CV, 1999 WL 1081071 (Tex. App.--Dallas Dec. 2, 1999, no pet.) (not designated for publication).

[125] In re Samsung Telecomms. of Am., Inc., Nos. 05-99-01949-CV and 05-99-01969-CV, 1999 WL 1081387 (Tex. App.--Dallas Dec. 2, 1999, pet. denied) (not designated for publication).

[126] Tex. R. Evid. 507.

[127] Texas Rules of Evidence Handbook at 442 (3d ed. 1998).