



## A Premise Too Far

### The Tennessee Supreme Court solves one problem— and creates many more

by: Tom Lee

The Tennessee Supreme Court's newly adopted Rule 1A rests on a straightforward premise: Except in extraordinary cases, court records should be open to the public.

As a former reporter, I accept—indeed, embrace—this premise. More than once in 11 years of reporting, particularly on government misconduct, I found presumably public records to be elusive. That the Supreme Court feels the need to weigh in suggests my experience was not unique.

Had the Court stopped there—establishing a presumption of openness and implementing procedures and standards to govern motions to seal court records—the Court would have accomplished much and upset few, an extraordinary feat worthy of praise.

The Court, however, did not stop there. In so doing, the Court snatched defeat from the jaws of certain victory and set in motion a process that may cause far more problems than it could ever solve.

In Rule 1A.02, the Court has defined “court records” to include records that are not, in fact, records in court. In cases involving the amorphously defined “general public health or safety, or the administration of public office, or the operation of government,” the Court's proposed rule defines “court records” to include *unfiled* discovery documents sitting in our office files and private settlement agreements.

The problems with this leap are far more than textual.

#### **Who loses? Almost everyone.**

I respectfully suggest that the Court's decision to include records *outside* the courthouse in the new rule's definition of “court records” will tamper unnecessarily with the discovery process, the confidential relationship between attorney and client, the operation of law offices, the protection of trade secrets and other confidential intellectual property, and the very resolution of disputes.

**Law offices will become “clerks’ offices.”** Immediate public access to discovery files means that law offices will have to have systems and personnel in place to handle public requests without notice. If one

doubts this, consider this statement by two Texas Supreme Court Justices who *supported* a similar rule in Texas:<sup>1</sup> “A nonparty seeking access to an unfiled document *need only approach an attorney* of a party who has custody of it for an opportunity to inspect and copy the information.”<sup>2</sup>

“Need only approach an attorney”? How’s that going to work in your office?

***Attorney-client confidences will be violated.*** Here’s how it’s going to work. Someone is going to approach your receptionist. You will be out of the office. The person will tell your receptionist he is prepared to file suit to compel you to turn over what he wants unless you produce by the end of the day. Your files will be sloppy, an amalgam of discovery materials, letters from clients, attorney notes, and research thoughts. Someone will hand over the wrong file (or, worse, you’ll be there and *you’ll* hand over the wrong, sloppy file).

It shouldn’t happen. There are ways to guard against it. But it will happen.

***Trade secrets and intellectual property rights will be violated.*** At first blush, the proposed rule appears to protect trade secrets by exempting from the definition of court records “discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.”<sup>3</sup> But read it again. The exemption applies only to cases “*originally initiated* to preserve bona fide trade secrets.” What of the products liability case in which discovery calls for the production of trade secrets or “other intangible property rights?” The exemption does not apply. This information, absent a court order, is subject to public scrutiny once it is exchanged in discovery between lawyers.

***Discovery will become harder, more contentious, and more expensive.*** As every lawyer knows, discovery leads down any number of untraceable, unreliable rabbit trails. The Second Circuit recently wrote: “The temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material.”<sup>4</sup> Documents—even from the same source—contain conflicting and often irresolvable discrepancies (just like eyewitnesses).

The nature of the judicial process acknowledges this, by giving both sides adequate opportunity to cross-examine one another’s evidence in a setting governed by rules and procedures designed to uncover the Truth. This, of course, is the antithesis of an internet-based information culture, where anything is True once enough blogs link to it (hearsay, which we know to be inherently unreliable, is the lifeblood of the net).

Fights over the widespread distribution of out-of-context information will be unending. Cases in Texas, for example, are known to feature two-year-long discovery battles over the release of unfiled discovery materials.

Unfiltered information is not necessarily good information. Filters serve a purpose. Again, the wisdom of the Second Circuit is worth revisiting: “Unlimited access to every item turned up in the course of litigation would be unthinkable.”<sup>5</sup>

***Disputes will be harder to resolve.*** Once, not long ago, lawyers who engaged in the litigation process proudly wore the label “trial lawyer.” Today, that moniker belongs to a handful of lawyers. The rest of us are “litigators.”

The fact is, all of us are dispute resolvers. The number of cases, civil and criminal, that proceeds to trial is a tiny fraction of those that are initiated. Today, discovery is far more likely to lead to private mediation or a negotiated settlement than a public trial. Courts have, thus far, regarded this trend positively, encouraging alternative means of dispute resolution to clear crowded dockets and overburdened chambers.

The effect of converting this inherently private process into a public show by opening private settlement agreements and discovery files will be profound. Take away the value of privacy and confidentiality and parties will choose trials again. This is great for court reporters, copying services, courthouse architects, and lawyers who like to try lawsuits. It is terrible for just about everyone else.

### So, does anyone win?

Advocates make arguments for three potential winners: the plaintiffs' bar, the "public," and the press. Each, however, stands to lose far more than they will gain.

**The plaintiffs' bar.** Plaintiffs' attorneys will find the cost of litigation will grow, as discovery fights take on a more central role in dispute resolution. This will strain lines of credit as lawyers put more money into the front end of cases that may, or may not, pay off. All but the most well-heeled plaintiffs' firms will find this frustrating and, potentially, disabling. Granted, there may be a boomlet for a few plaintiffs' lawyers if Tennessee attracts suits for discovery purposes the way Barber County, Alabama, and Holmes County, Mississippi, have attracted lawsuits for income redistribution purposes. But, lawyers' income aside, that substantive result surely suggests its own demerit.

**The public.** The public may be divided into two groups: participants and spectators. For the reasons outlined above, participants in litigation will derive little benefit from Rule 1A they do not otherwise enjoy by their engagement in a cause of action; indeed, the rule will run contrary to their interests in cost-effective resolution.

It is unavailing to say that the participants "chose" a public forum. Roughly half of all litigants—those on the right side of the v—are not in a forum of their choosing. No more persuasive is the argument that defendants' conduct rightly subjected them to a risk of being sued, and the scrutiny that attends to such a public process. It takes only a filing fee and a signed complaint to start a lawsuit. Even with a beefed-up Rule 11, it does not take much more to keep a lawsuit from plunging into discovery. Further, defendants—and this is a shocker to some—occasionally deserve to win.

It is, therefore, a long, long way from being targeted by a plaintiff to owing the public a duty to open up one's business records. Rule 1A, however, ignores this distance: You get sued, you have an obligation to answer, you have an obligation to participate in discovery, you have an obligation to open up your files, and your lawyer has an obligation to hand them over when someone stops by the receptionist's desk.

### Merits? What merits?

For spectators, the proposed benefit is said to be a brighter light on unsafe or unhealthy practices. That light, advocates argue, will lead to less litigation and safer practices, as companies fear exposure and respond rationally.

As a matter of separation of powers, this is a dangerous view, for it converts the judicial process into a regulatory process, a process for which the courts are ill-suited. If unsafe drugs and products are reaching the market, isn't the more effective answer reform of the Food, Drug & Cosmetic Act or greater responsiveness by the Consumer Products Safety Commission?<sup>6</sup> It is one thing to advocate policy preferences before our legislatures and executives. When lawyers make the *rules* for dispute resolution, our cause should be common: to make dispute resolution work.

So, will Rule 1A *work* for the public? Apparently no other jurisdiction but Texas thinks so. Tex. R. Civ. P. 76a(1), adopted in 1990, is the model for Tenn. R. Civ. P. 1A; the definitions of "court records" are identical.<sup>7</sup>

The following from the D.C. Court of Appeals is typical of the widespread skepticism for Texas's approach: "*Public access to discovery materials, therefore, would focus attention not at all on the courts, but solely on the presumptively private affairs of the parties. . . . Thus, a public right to view discovery materials has no greater foundation in the first amendment than would the bare claim by any member of the public that another person must answer questions and produce documents independent of a legitimate lawsuit and the legal processes it ensures.*"<sup>8</sup>

Texas is the model for dance halls, high school football, and up-armored possums. It is not the model for civil litigation.<sup>9</sup>

**The press.** Finally, what of my erstwhile brethren in the Fourth Estate and their fellow traveler, the First Amendment?

We live in an information-rich society. As Rule 1A bears witness, the temptation is great to conflate the availability of information with the right to access it. Acceding to this temptation, however, makes privacy a mere captive to technological development.

The Washington Supreme Court recognized the untenable nature of this position in *Seattle Times Co. v. Eberharter*,<sup>10</sup> holding that “the right to speak and publish does not carry with it the unrestrained right to gather information.”<sup>11</sup> Denying a news organization the right to obtain a copy of an affidavit in support of a search warrant in an unfiled criminal case, the *Eberharter* court said: “Minimizing the initial intrusiveness of necessary governmental activity is one means of serving fundamental privacy interests, but controlling broadside disclosure of materials or information obtained by intrusive means is another.”<sup>12</sup>

Discovery is a necessary government activity. It is necessarily invasive of privacy. The law rightly minimizes that intrusiveness by regulating the scope of discovery through the doctrines of privilege, attorney work product, and relevance. The procedures for sealing court records set forth in Rule 1A also afford an opportunity, albeit constrained, to minimize loss of privacy.

Rule 1A’s expansion of the definition of “court records,” however, undoes much, if not all, of this. The rule enshrines the right to “broadside disclosure of materials or information obtained by intrusive means” in the Rules of Civil Procedure.

The press may well gain a short-term victory if Rule 1A remains unchanged. Unlike attorneys who are subject to sanction for violation of civil rules and rules of professional conduct, the press is sanctionable by no one. That is good, generally, for it ensures robust speech. It is not always good, however, if that unfettered right is not exercised with care and caution. As one who witnessed—and participated in—this sausage-making for more than a decade, I despair more than I hope where this is concerned.

## Conclusion

Rule 1A is scheduled to become effective on July 1, 2005. However, the rule must be ratified by the General Assembly before it becomes effective.

In the absence of a second thought by our Supreme Court, it is my sincere hope the General Assembly will exercise its prerogative, one might say obligation, to subject Rule 1A to vigorous debate and careful consideration. Our legislators should not shy away on the ground that the Rules of Civil Procedure are the domain of courts and lawyers. To the contrary, Rule 1A’s extraordinary intrusion upon privacy is, in my view, “court business” to the same extent that unfiled discovery materials and private settlement agreements are “court records.”

One didn’t have to go to law school to know that to ask that question is to answer it. ■



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**(Endnotes)**

<sup>1</sup> Texas is the only state in the nation that currently defines discovery files and private settlement agreements as “court records.” For more on Texas, see *infra*.

<sup>2</sup> Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Judicial Process*, 69 *Tex. L. Rev.* 643, 668 (1991) (italics added).

<sup>3</sup> Proposed TENN. R. CIV. P. 1A.02(c).

<sup>4</sup> *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1999).

<sup>5</sup> *Id.*

<sup>6</sup> I hear the groans from my Democratic friends. In the face of growing Republican control of the federal regulatory mechanism, we Democrats have newfound enthusiasm for our 50 little laboratories.

<sup>7</sup> Interestingly, our Supreme Courts’ Advisory Commission references the Texas rule in its public comments on Rule 1A. The Advisory Commission note makes no mention, however, of the “court records” re-definition in Rule 1A.02.

<sup>8</sup> *Mokhiber v. Davis*, 537 A.2d 1100, 1110 (D.C. Ct. App. 1988); see also *In re Policy Mgmt. Sys. Corp.*, 1995 WL 541623, at \*4 (4<sup>th</sup> Cir. 1995) (holding that “a document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach”); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 784 (3d Cir. 1994) (holding that whether a document is a court record “turns on the technical question of whether a document is physically on file with the court”); *West Virginia v. Moore*, 902 F. Supp. 715, 717-18 (S.D. W.Va. 1995).

<sup>9</sup> A 2002 survey for the U.S. Chamber of Commerce ranked Texas 46<sup>th</sup> for overall litigation climate. By 2004, a year after a voter referendum placed significant tort reforms into the state constitution, Texas had climbed to 45<sup>th</sup> in the same survey. The 2004 survey results are available at <http://www.instituteforlegalreform.org/study030804.html>.

<sup>10</sup> 105 Wash.2d 144, 713 P.2d 710 (1986), on remand from *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984). In *Memphis Publ’g Co. v. Memphis*, 1992 Tenn. App. LEXIS 727 (Tenn. Ct. App. Aug. 26, 1992), the Court of Appeals wisely followed *Rhinehart* in holding that unfiled discovery materials are not public records under Tennessee’s open records laws:

[A] party to a lawsuit may take a discovery deposition of a person believed to have knowledge which will aid in the prosecution or defense of the litigation and in that deposition ask questions only tangentially related to the litigation in hopes of discovering information to help the party achieve the desired outcome, even though the party never intends to use nor, in fact, uses the information obtained in the deposition in the litigation. Given the purpose of discovery depositions, their broad scope and the fact that they need not be filed with the court, we believe that they are more likened to the work product of an attorney employed by the government in preparation for litigation, than to public documents placed in the possession of an attorney.

*Id.* at \*14. Nothing in the Advisory Commission notes supporting proposed Rule 1A explains why the Court has chosen now to overrule *Memphis Publishing*.

<sup>11</sup> *Id.* at 149, (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1964)).

<sup>12</sup> *Id.*