ORAL ARGUMENT — 3/3/99
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IN RE DALLAS MORNING NEWS

LAWYER: Three primary factors support the New's request for mandamus relief in this case. First, the plain language of Rule 76a(7); second, the public policies behind the rule; and 3) the history leading up to the passage of the rule by this court in 1990.

I want to talk about each of those 3 factors in turn, but first by way of introduction, I would like to discuss the facts to frame the issue as we see it.

It's not a petition for writ of mandamus with a lot of working fact questions. It doesn't have a voluminous record and it doesn't lend itself to multi-colored visual aids during oral argument. There are really on 4 undisputed facts. First, in this medical negligence case, the parties signed a rule 11 agreement about discovery and exchanged documents. Two,...

GONZALES: Was the agreement in any way in compliance with the requirements under 76a, with respect to sealing?

LAWYER: No. Two, the TC was never asked to sign and never signed a protective order or a sealing order. And I think that also goes to your question, Justice Gonzales. Three, the case settled and judgment was entered. Four, 112 days later, the Morning News intervened seeking access to the discovery documents exchanged between the parties.

ENOCH: Were many of these documents that were under the rule 11 agreement ever a part of the public record?

LAWYER: I don't believe so.

ENOCH: Your argument is that - where you're going is the full breath of 76a, which if you read it it appears to say that people's private documents become a matter of public record merely by the request for the documents?

LAWYER: Yes. We want the opportunity to go back to the TC and have the TC conduct an in camera inspection of the documents, and introduce any other evidence we can so that we can try and meet our burden under *Kappel* and the other cases to show that these discovery documents are court records even though they were unfiled under the definition of the rule.

OWEN: So your position is, that irrespective of a rule 11 agreement, let's just say there was a normal exchange of documents, the case settles, 2 years later you want all the unfiled discovery, and you say that 76a applies to all unfiled discovery?

LAWYER: Yes. I think we should have the opportunity to intervene, and try to establish that that unfiled discovery is court records as defined under the rule.

HECHT: Subsection 7 says, Any person may intervene to seal or unseal?

LAWYER: Yes.

HECHT: And not try to seal?

LAWYER: No.

HECHT: You're trying to unseal?

LAWYER: Yes.

HECHT: But how can a rule 11 agreement seal or in Judge Owen's question, how could just not doing anything have the effect of sealing?

LAWYER: It's our position that the plain language of rule 76a(7) of the first sentence particularly addresses a situation where the court hasn't acted, hasn't entered a sealing order, hasn't entered an unsealing order, and it allows intervention as a matter of right at anytime before or after judgment by any person. And under that language of the first sentence of rule 76a(7), we think the Morning News' intervention was proper and the TC had continuing jurisdiction even though the traditional plenary power period had expired.

HECHT: But you don't ordinarily think of records being sealed just because nobody has given them to the press?

LAWYER: I think it's a distinction without a difference. Kizer's argument are: 1) you ignore the first sentence of the rule, 76a(7), and just focus on the second one that talks about when the TC has entered a sealing order it has continuing jurisdiction to modify, alter, vacate that sealing order; 2) they say, Gotcha; nobody asked the court to seal the records, the court didn't enter a sealing order, we simply did it by way of a rule 11 agreement. And it's our position that that's _____, it's a distinction without a difference. It elevates form over substance. The records are sealed because access to them is limited. No matter whether it's through a sealing order or through a rule 11 agreement.

ABBOTT: If the rule were the way you wanted it to be, why would it not have been written to say: Any person may enter _____ as a matter of right at any time, before or after judgment, to seek or obtain records, as opposed to seal or unseal records? Why doesn't the exact precise language of the rule contradict what you are urging?

LAWYER: I don't think it does because I don't think - I think it really and truly is a distinction without a difference. I think that under the plain language of the rule, I think the records are sealed because the News hasn't been able to have access to them. They have requested access to them. And now under the guides of this rule 11 agreement, they say it's just too late.

HANKINSON: Wouldn't it be different and doesn't the issue change if this litigation were still pending, and the Morning News came forward - the parties are litigating, discovery is being undertaken, documents have not been filed with the court, no one's gone to the court one way or another, and the Morning News goes to the courthouse to try to gain access to this. Doesn't that then create a different circumstance because we do not have an issue about the court's jurisdiction?

LAWYER: That's correct.

HANKINSON: And the heart of the issue in this case is whether or not at this point in time, 112 days after judgment, after the TC's plenary power has expired, whether or not the TC has jurisdiction to do anything with respect to these documents?

LAWYER: We totally agree.

HANKINSON: And that's why the specific language of §7, of rule 76a, becomes important because we are asked to determine in this case whether or not under 76a(7), the TC, in fact, has jurisdiction to undertake rule 76a proceedings?

LAWYER: Yes.

HANKINSON: So why doesn't the specific language as Judge Abbott said in 76a(7) become very important?

LAWYER: I think it is very important. But I think under our construction of the first sentence of rule 76a(7), these records are sealed.

HANKINSON: Are they sealed because of the rule 11 agreement or are they sealed just because they are discovery?

LAWYER: They are sealed by way of the rule 11 agreement.

HANKINSON: So if you didn't have the rule 11 agreement, you wouldn't be here today?

LAWYER: No, I think if there was an unfiled rule 11 agreement, if there was no agreement at all, we might be here. I can't say as a matter of certainty that we wouldn't be here.

HANKINSON: How would you given the specific language of 76a(7), our view, that in fact

the TC has jurisdiction?

LAWYER: If access to the documents is restricted by informal agreement with the parties, by rule 11 agreement, certainly by sealing order _____, our argument is the same.

HANKINSON: The parties haven't even by informal agreement restriction. They just said the lawsuit is over. I don't have to just because you show up at my door and say I would like to have your business records. Give them to me.

LAWYER: Obviously, that's not the situation presented in this case. I think our argument would be the same is my answer to you. I think the error of the CA's opinion becomes even more apparent when you recognize, as Justice Hecht pointed out, that the rule provides evenhandedly for sealing or unsealing, for intervention to seal or unseal records after judgment at anytime after judgment intervention as a matter of right.

If you take the hypothetical where the parties enter into an agreement that places no restrictions on discovery. They enter into a rule 11 agreement and they say there are no limits on this discovery. They go file that agreement. They get documents. Judgment is entered, the case settles, plenary power expires. And then a nonparty finds out that it's sensitive, it's private information, it's business information has been filed or exchanged as part of that lawsuit. In order to be consistent with its interpretation of the rule that you need a sealed order and we are 112 days after judgment, Kizer would have to say that the TC has no jurisdiction to seal in that case. I think that exemplifies the fallacy in the Dallas CA's elevation...

OWEN: In that situation, in the situation where there is no agreement, the lawsuit is over, we are looking at continuing jurisdiction?

LAWYER: Yes.

OWEN: And, but for this rule, I think everyone agrees, the TC's plenary jurisdiction is gone. This is the only thing that gives the TC plenary jurisdiction. And the second sentence says, A court that issues a sealing order retains continuing jurisdiction.

LAWYER: Yes.

OWEN: Assuming there is nothing, no agreement at all, how do we get around the words "issues a sealing order retains jurisdiction"?

LAWYER: You get it from the first sentence of rule 76a(7). The language that you just read is the second sentence of rule 76a(7). And we submit to the court that our construction of the first two sentences of rule 76a(7) gives effect to both sentences; whereas, Kizer's interpretation and the interpretation accepted by the Dallas CA reads the first sentence out of the rule and you're only

left with the second sentence.

PHILLIPS: In your view, how long might parties who have voluntarily exchanged documents and made up a rule 11 agreement and nobody has mentioned sealing or protection or anything else, how long might they be liable for the impossibility of a third-party coming in and in essence reopening a review of the dispute?

LAWYER: I understand from being involved in the discussion of that rule 76a, that that obviously was a key concern to courts. And I think the court has _____ the rule making process to place potentially some practical limits on rule 191, which establishes a retention period for unfiled discovery. As I say, that's a practical limitation that the lawyers are bound to retain for that period.

I do want to talk a little about the plain language of rule 11, too, because I think that what you see of the Dallas CA's opinion, is an elevation of rule 11 to some sacrosanct status above rule 76a. And I think it's important to note...

HANKINSON: Why isn't this just a question of whether or not the Morning News waited too long? If the position is that, and apparently there was some publicity over this case, and when the jury trial was held and so on, there was a lot of activity associated with that, if in fact at that point in time under the paragraph we didn't have a jurisdictional question and paragraph 1 of the rule would have allowed the Morning News to go in and having a 76a(7) proceeding to access the discovery in this case why isn't this just a question of the Morning News having rested on its rights and waited too long beyond the time that the court's jurisdiction expired, as happens all the time in connection with litigation when parties wait too long? We are not depriving the Morning News of a right. We are just saying, Morning News be on top of things and go get the documents while the TC still has jurisdiction.

LAWYER: In fact Kizer has raised waiver in their motion to strike. In this case, because we are dealing with the continuing jurisdiction language of 76a(7), it's not a question of waiver. I think waiver in this case is a fact issue really in search of a record. Because Kizer certainly had the opportunity to press its way for argument and enter his testimony in the TC; they chose not to; it was not found by the TC and it was not found by the CA, and there is no basis for this court to find of these facts.

HANKINSON: Under your interpretation in 76a(7) there are no limits to the TC's continuing jurisdiction?

LAWYER: That's correct.

O'NEILL: If you look at the third sentence of 76a(7), my understanding is you are equating the rule 11 agreement to a sealing order? You are saying it's the same thing?

LAWYER: The same thing.

O'NEILL: So if you read that third sentence and say, an order sealing or unsealing court records - so let's just say the rule 11 agreement, shall not be reconsidered on motion of any party or intervenor who had actual notice of a hearing proceeding _____. If we are going to substitute a rule 11 agreement for _____ sealing, then why can't we say, actual notice was given by the filing of the rule 11 agreement? Doesn't the third sentence of that rule show exactly what Justice Hankinson has said, that the Dallas Morning News sat on its rights and can't now come in?

LAWYER: I think Kizer can't have it both ways. If you look at the proceedings, there was no sealing here. There was no hearing at all before the court. Certainly the rule 11 agreement was filed in the _____, and that is not in dispute, but there was no hearing as required by the rule.

O'NEILL: Again, my question is, if we are going to bend this language a little bit this says, Order sealing or unsealing. And you are trying to equate that with rule 11. Isn't the filing of the rule 11 agreement the same as a hearing if we are going to equate them in that way?

LAWYER: No, because the other procedures under 76a would have to be followed. The posting of that is the opportunity to be heard, the hearing.

OWEN: We've held otherwise in *Kepple*, that you can have a 166b order entered presumably by brining in the parties without a hearing. And if no one says 76a, the court doesn't have to do a 76a proceeding?

LAWYER: But in *Kepple* you didn't foreclose the possibility that somebody, even somebody who was a party to that protective order could come back and say 76a, and then have the court record determination and the posting.

OWEN: But if you had notice of all that, that there was a 166b order entered by the court why would you be foreclosed as Justice O'Neill was asking under the 3rd sentence of subsection 7?

LAWYER: Fist of all, I don't think there's a record of any of that, because nobody introduced any testimony in the TC at the hearing in June of last year. So that is not in the record in this case.

O'NEILL: What's not in the record?

LAWYER: There's no evidence in the record about the actual testimony about: I knew about the order and so forth...

O'NEILL: Well but a rule 11 agreement is on file and it says what the agreement is, that these documents will be confidential.

LAWYER: There is no evidence in the record of actual notice in the filing of that agreement.

O'NEILL: But isn't the filing itself actual notice?

LAWYER: No.

O'NEILL: Why not?

LAWYER: First of all, there was a huge debate when rule 76a was passed about constructive notice and actual notice. And I would think that the filing is at best constructive notice, and not the actual notice required by the 3rd sentence of the rule.

BAKER: Your viewpoint is that the continuing jurisdiction is _____ under the rule. Doesn't that create contention that just a matter of course destruction of records like that by either or both sides, and if you choose to come in 2 years later and ask for a 76a hearing on those records, where does the court find itself under those kind of circumstances?

LAWYER: I think you're absolutely right. And I think that that's one of the problems that the court acted to address in setting that retention period under rule 191(4)(d), in the rules that went into effect on Jan 1 by specifying the time period for which the attorneys had _____ on to unfile discovery so that there wouldn't be later accusations of spoliation of court records.

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RESPONDENT

LAWYER: The issue in this case is whether or not this rule 11 agreement extended the plenary power of the TC in this case.

ABBOTT: Let's assume it didn't. Why would rule 11 not create a hole in rule 76a, such that it would fairly obliterate it?

LAWYER: Two reasons. First, this court through the new rules that were just passed encourages the parties to resolve as many of the discovery disputes as possible through agreements.

BAKER: Well that doesn't help me if I'm an intervenor.

LAWYER: I understand. But let's say you've got through the whole 76a process all the time. That's can't be the case because this court in *Kepple* recognized that it is an onerous process

to go through the hearing, the notice. It's expensive, consumes time for the court, it consumes time for the litigants.

The public is protected because, first off, there is notice to the public that there is a rule 11 agreement. It is filed of record.

HECHT: Actual notice.

LAWYER: Well it's much actual notice as for example posting them downstairs at the courthouse like is required in the rule 76a with the other notices from the courthouse.

ABBOTT: If we affirm the CA's, here is what is going to happen in cases around the state of Texas. And that is, that in any meaningful case where there are documents that one party does not want the public to know about, when the other side is not strongly adverse to not disclosing those documents, you are going to have a rule 11 agreement entered into that will forever shield those documents and no one will ever be able to gain access to them.

LAWYER: I disagree. Again, there is going to be notice to the public about the filing of the rule 11 agreement in the records. Under *Dallas Times Herald v. Jones* it involved a rule 11 agreement. And it said 3 things: 1) there is a public live access to documents; 2) the agreement of the parties in the rule 11 to keep those documents secret is not binding on the trial judge; and 3) the parties, in this case the Dallas Times Herald has a right to come into the court and seek an order requiring those documents to be turned over.

ABBOTT: When this rule 11 agreement is filed, and the Dallas Morning News goes down there and happens to learn about it and reads the rule 11 agreement, how are they to know that it involves the sealing of documents? Here, an attorney worth his salt is going to be able to figure out a way to word the rule 11 agreement, such that it doesn't disclose to the world what it concerns. As an example: you can have a rule 11 agreement that attorneys on both sides and the parties on both sides agree to be bound by a document A. And document A, of course, will be identified elsewhere and no one in the world will know what document A refers to except for the lawyers and the parties.

LAWYER: I think pursuant to the common law that existed 401.76a, and the common law that exist after rule 76a, a private party such as the Morning News or such as the Dallas Times Herald when they were in business, has a right to come into the court and say, Judge, here's a rule 11 agreement. We think there may be some very _____ documents that are important to public policy and _____ to public health, and we want access to those documents. The court at that point in time would hold a hearing to determine whether or not indeed in this case they fall into the criteria set forth under 76a. If they do, the court would order them to be produced. If not, the court would say, I'm sorry, they are not of public importance or as the Health & Safety, Administration of Justice, or a business or whatever, it would not order them to be produced.

HECHT: A rule 11 agreement need not be filed to be enforceable. It can be filed later and that _____ the mediation process. What's to keep a party from coming in shortly before the expiration of the TC's plenary jurisdiction and file a rule 11 agreement knowing that as a practical matter nobody is going to find about for 2 days?

LAWYER: I think this goes back to one of the earlier questions, and that is, assuming there is no rule 11 agreement, if there is a case of public importance as the Dallas Morning News contends this case was, and we know that the Dallas Morning News _____ notice _____ most of the discovery documents now aren't filed of record. So they don't know either with or without the rule 11 agreement there is going to be a lot of documents that aren't filed with the trial. If they think they are of public importance they can go into the court and say, We are going to see the documents which have been produced in discovery in this case. And so I don't think the filing of the rule 11 agreement necessarily would limit or enlarge their right to come into the court and seek the turnover of those documents.

ABBOTT: Isn't it possible for a rule 11 agreement to be made, not in writing, but you go down in open court - let me read it to you. It says, that a rule 11 agreement can be made in open court and entered of record. Why couldn't the parties go down and dictate it into the record into court reporter transcript, and each initial it, and slip into the record? No one would have a clue what it is, unless someone goes down there and says, Ah, please transcribe this.

LAWYER: Sure. Again, I think that it is necessarily a distinction without a meaning because the Dallas Morning News and the Times Herald is going to know that all the discovery documents are going to be on file now under the current rules. If they think the case is important and wanted to see the discovery in the case, they can go in, as the Times Herald did in the *Jones* case and request access to those documents. That is a right they have. It's been recognized as a fundamental right that non-parties have is to see the court records.

HECHT: Do you agree under subsection (7), that if there were a sealing order in the case, if the parties had gone in before the judgment and had a 76a hearing and gotten a sealing order, that an intervenor could come in after the expiration of the court's plenary jurisdiction and challenge that order?

LAWYER: In all honesty there is confusion for this reason. The sealed order is the document that confers jurisdiction to the TC. Clearly in order for a plenary power to be conferred to the TC, there must be a sealing order within the TC's plenary power.

HANKINSON: Not necessarily. Couldn't you not have a sealing order and doesn't the provision allow someone to come in to seal records as well? The court has jurisdiction to seal or unseal records by the fact that you could come in, the rule reads in terms of sealing.

LAWYER: But the second line on paragraph 7 says, a court that issues a sealing order.

Then they go onto paragraph 6, they talk about sealing or unsealing records. And they talk about sealing or unsealing orders. The way I interpret the rule it's only a matter of sealing records that confers continuing jurisdiction to the TC.

ABBOTT: I urge you to reread the first sentence. It says, At anytime a person has a right to seek an order after judgment to seal court records.

HANKINSON: That means the language to seal court records is meaningless in the first sentence?

LAWYER: No. I think you can rule to seal or unseal court records while there is plenary power. However, the only thing that plenary power _____ the second sentence is extended is through a sealing order.

HANKINSON: It says, that anytime before or after judgment?

LAWYER: Correct. I think one of the things we're talking about is under rule 60, the intervention statute. Under the _____ intervention statute, there is no right to intervene after judgment. It doesn't specifically say, the right to intervene can only be done before there is a judgment, and the _____ right to intervene after judgment.

ABBOTT: Why would you seek an order to seal if there is already a sealing order?

LAWYER: I don't think you would. I think if there is already a sealing order issued of wanting to seal further documents or somehow expand the scope or the breath of the sealing order, perhaps, maybe limited to all people, then perhaps as far as the publication of the documents, that it was originally, you may do that. But the other part that you've got to read is paragraph 4, which talks about intervention. It's the second sentence: Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings upon payment of a fee required for the filing of the plea in intervention. Again, they are talking about proceedings to seal the records.

BAKER: And that's the purpose of the notice to give anybody that wants to come in the opportunity to intervene even though they don't have an interest in the litigation per se.

LAWYER: That's correct. And once there's been a determination that they are court records, then they disclose it out and your start the procedure under rule 76a.

HECHT: If there were a sealing order during the court's jurisdiction, isn't your position that an intervenor could then come in at anytime after the plenary jurisdiction expired and modify that order?

LAWYER: I think there is some confusion in the statute. I don't think that's been

interpreted. I think you can certainly read the first sentence of paragraph 7 as holding that, that you can intervene during the continuing jurisdiction time period of the case. However, if you go to 4, it talks about intervening for the purpose of participating in the sealing hearing, which we know the sealing hearing has to occur during the plenary power.

HECHT: If it were true that you can do that, wouldn't it be wiser not to ever get a sealing order and hope the rule 11 agreement or maybe just silence would work out for the best?

LAWYER: Two things: One is, of course, when you have a sealed order, you have the _____ and you have the protection from the court. I mean it cuts both ways. For example, if there is a sealing order, if Mr. Scully and I are on opposite sides and we have a sealing order and he violates that, the court's continuing jurisdiction, I believe, would allow him again perhaps take sanctions against Mr. Scully. On the other hand, if we just have a rule 11 agreement and the plenary jurisdiction of the court expires and there is a violation for example of a confidentiality agreement, the trial judge has no jurisdiction at all. It cuts both ways.

BAKER: But if you have a rule 11 agreement, we know you can enforce it in other ways.

LAWYER: Pursuant to a new lawsuit, an injunction or something like that. But you have to create and establish new jurisdiction with a new court in order to give effect to that. And I think that's the _____ distinction here between a rule 11 agreement and a sealing order or a protective order...

BAKER: In what respect is there a distinction?

LAWYER: The good distinction is when we are talking about jurisdiction it's got be from statute and rules or the constitution.

BAKER: But this is a rule, do you agree with that?

LAWYER: When we're talking about continuing jurisdiction of the TC in those limited situations where statutes or rules do give continuing jurisdiction if it is to enforce an order of the TC, a judgment.

BAKER: Is it a fair statement to say under your theory as Judge Abbott asked, that by using a rule 11 agreement, that you could emaculate(?) the rule?

LAWYER: I disagree with that. When a party whether or not there is a rule 11 agreement, or there is no rule 11 agreement, we just chose documents and we're sitting in my office and my documents are sitting in the other party's office, any non-party I believe under the common law has a right to come in and seek access to those documents whether or not there's a rule 11 agreement or

not. If I don't want to turn them over or if they are subject to a rule 11 agreement, then the court will have the 76a hearing and decide whether or not they are of public importance.

BAKER: So then it's the bottom line of your argument that the reason why they don't get them in this case is because they asked for them outside the jurisdiction of the court. Is that the bottom line of your argument?

LAWYER: Yes, that is all we are saying is they waited too long.

BAKER: Do you agree there's a difference between waiver and jurisdiction?

LAWYER: There is a difference between waiver and jurisdiction.

BAKER: And that's exactly what we are talking about here. Did you ever plead waiver in this case?

LAWYER: We have never gotten to that point.

BAKER: Well it's a little late to try to get to it here.

LAWYER: We contend there was no jurisdiction in the TC.

ENOCH: Can the actions of parties create jurisdiction in the DC?

LAWYER: It cannot. The parties through their own affirmative acts, for example, through a rule 11 agreement, we can't create jurisdiction. Likewise, I don't think the parties through the actions of a waiver or estoppel can confer jurisdiction. Either the court has jurisdiction or the court doesn't have jurisdiction based upon the face of the documents that are there in the record. And so I don't think waiver or estoppel is an issue in this case because no matter what we did, no matter what the Dallas Morning News did, Judge Marshall signed that judgment on Jan. 14, and 30 days later his plenary power expired. Whether or not they had notice, they didn't have notice, whether or not we did something or didn't do something, the plenary power has expired.

O'NEILL: So you say the rule 11 agreement is sort of a red herring, that with or without the rule 11 agreement would have the same result?

LAWYER: Right. It's our position there are only two vehicles to extend the court's jurisdiction. One is the 76a sealing order, which is what the statute says, or the rule says. The other is, a protective order, which under *Kebble* this court held is also subject to 76a. And again one of the things that counsel said was that 76a applies to all documents. Well, if it applied to all documents, then why was it necessary under rule 166b(5)(c) for this court to say we're going to apply protective orders to the same rules as sealing orders. Otherwise, it would apply to everything.

BAKER: Your argument was is because that's what rule 166(c)(5) says, that it's subject to a rule?

LAWYER: It does.

BAKER: Do you remember that argument?

LAWYER: I remember that argument. And for sealing orders as well as protective orders, we have specific rules that extend the jurisdiction of the court. We do not have that rule with respect to rule 11 agreements.

BAKER: So your argument really is then, that rule 11 agreements are outside the scope of the 76a hearing situation if they are after 30 days?

LAWYER: They are outside scope of the continuing jurisdiction. That is correct.

GONZALES: Suppose there is a disagreement regarding whether or not you have a 76a sealing order, and now it's 2 years. Where do we go to get that question resolved?

LAWYER: As far as whether or not there was a valid 76a?

GONZALES: The sealing order is covered under 76a.

LAWYER: The TC has jurisdiction to determine jurisdiction always. And so, if indeed, the TC determined that he or she had entered a valid 76a sealing order, then by that act he or she would continue to have jurisdiction. On the other hand, if the trial judge said, this was not a valid 76a sealing order, therefore, I don't have jurisdiction, then he or she would have that limited power to determine their own jurisdiction.

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REBUTTAL

OWEN: Let's assume that we disagree with you, and we say that there has to be some sort of sealing order of some nature in effect in order to confer continuing jurisdiction of the TC. Can parties take away that jurisdiction by agreeing to revoke their rule 11 agreement?

LAWYER: That's an interesting question. I would think that the court's answer would be the same: either there is jurisdiction to reconsider the rule 11 agreement as a sealing order or as a rule 11 agreement, or there is not jurisdiction. I'm not sure that parties could come back in and do something else to reconfer jurisdiction on the TC. Our argument is, is that the effect of the rule 11 agreement is the same as a sealing order, these records are sealed, the plain language of the first sentence.

OWEN: What if the parties come back and say, Well, we've returned each other's documents and we've agreed that we've released more one another from any further obligations under that rule 11 agreement. Do we still have a sealing order in place under those circumstances?

LAWYER: I'm not sure. I think that if the Morning News - really this case isn't about the Mornings News, it's about the public and the Morning News is the representative of the public. If the public is still being denied access to records that are defined as court records under the rule, then I would think an intervenor could still come in subject to the time limitations that we were talking about earlier.

ENOCH: The jurisprudence in Texas seems to be pretty strong that the parties by their actions can't confer jurisdiction on a court. And the argument here it seems the parties can have an agreement outside of the court that we are going to agree among ourselves to seal these records. And we are going to file it in terms of a rule 11 agreement and thereby force that court to take continuing jurisdiction. The court doesn't enter an order sealing it. It's just we agree to seal it and we are going to file it with the court, and therefore, by our actions, we confer jurisdiction on the court. Can they do that?

LAWYER: That's not really our argument. Our argument is under the rule.

ENOCH: Well your argument is just the opposite of that. They have agreed to not seal it. And you're saying because they agreed to not seal it they've conferred continued jurisdiction on the court. Your argument is, that they by their rule 11 have agreed to seal it. And I've asked you the question, well you say that confers continuing jurisdiction on the court because that's tantamount to sealing. But can parties by simply their agreement confer jurisdiction on a court in Texas?

LAWYER: I wouldn't phrase it exactly that way. But I think under these facts, the answer is, yes, that there is continuing jurisdiction. It happens to relate to the Rule 11 agreement, because that is the document that seals the records.

ENOCH: So the parties by agreement can confer jurisdiction on a court?

LAWYER: As I said, I wouldn't phrase it that way, but I see your point, yes. One thing, picking up on Justice Baker's questions, I wanted to talk a little bit about the rule 11 agreement, the relationship between the rule 11 and rule 76a. Because I think a key point is that rule 11 is sort out of your phrase, unless, otherwise, provided in these rules. And the comment to that section which was added in 1988, says, if that makes it clear that rule 11 is subject to modification by all of the other rules of civil procedure. In effect, Justice Abbot is right, because what this allows the parties to do is to contract around rule 76a. And it does create a large gap in the rule. What party or _____ would go seek a protective order or follow the requirements of 76a if they can sign a rule 11 agreement, particularly a vague one, sit back, cross their fingers, settle their case, and hope that the 30 day traditional plenary power period expires.

The court is so familiar with the policies behind rule 76a, that they don't even bear repeating. But I would point out to the court that Kizer's construction of their rule 11 agreement is unenforceable because it would violate the rules first of all, the first sentence of rule 76a. It would also violate public policy. Justice Doggett and Mike McKetta argued at page 682 of their Texas Law Review article, that agreements of counsel contrary to the rules were unenforceable as against public policy. They cited *Missouri Pacific v. Cross*, 501 S.W.2d 868, 872, which is not in the briefs.

O'NEILL: If there were no rule 11 agreement in this case, could you still be here?

LAWYER: Yes.

O'NEILL: How?

LAWYER: If there was denial of access to records that we as an intervenor or any other intervenor contended were court records as defined under the rule...

O'NEILL: Where would be the denial if there were no rule 11 agreement?

LAWYER: We go to the parties in the lawsuit and they say, Oh, we're not going to give them to you. It's as simple as that. A reporter sees a case that's settled, he goes in, he looks at the file, he says, Gosh, I would like to go see those financial projections or whatever, discover he thinks might be in the party's files, the parties say, no, we're not going to give it to you. I think we could come in at that point under the first sentence of 76a(7), and seek to prove that those are court records within the rule.