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BEFORE THE
SUPREME COURT ADVISORY COMMITTEE
AUSTIN, TEXAS

(EXCERPT)

FEBRUARY 9, 1990

1 CHAIRMAN SOULES: We are in session, and I
2 call on Lefty Morris to make his report on sealing court
3 records. Lefty, you have the floor.

4
5
6 SEALING COURT RECORDS

7
8 MR. MORRIS: This is a pleasure I yield to
9 Chuck Herring.

10 CHAIRMAN SOULES: Chuck Herring, you have the
11 floor. It is an important report.

12 MR. HERRING: If everybody will come in and
13 sit down, we will get underway. We have enjoyed working on
14 this. Lefty and I, who is the co-chair, have enjoyed working
15 on this. He made a mistake, though. When we got appointed
16 as co-chairs, he said this would be an interesting little
17 project. And it has been very interesting, but it hasn't
18 been little at all.

19 The issue is the sealing of the court records, and
20 the materials that you have before you, I think we sent out a
21 report to each member of the Committee which I hope some of
22 you at least brought with you. But in the packet you have
23 today, if you will look at Page 792 and following, you will
24 find a little memo from me and Lefty, and then there is a
25 draft rule just to talk about on Page 797. So 792 and then

1 797.

2 I want to explain a little bit about the process
3 and why we are here on this particular rule and then explain
4 the draft a little bit. And then we have Tom Leatherbury
5 here from Locke Purnell who has done a lot of the preliminary
6 work, and we are going to let him make a few remarks as well
7 and talk about some of the drafts.

8 The reason we are here is that the Legislature
9 passed a statute which is now Section 22.010 of the
10 Government Code which appears in the materials there, I
11 think, on Page 792 and is one sentence long. And that is why
12 we are dealing with this rule. The Section 22.010 says,

13 "The Supreme Court shall adopt rules
14 establishing guidelines for the courts of this
15 state to use in determining whether in the interest
16 of justice the records in a civil case, including
17 settlements, should be sealed -- whether in the
18 interest of justice the records in a civil case,
19 including settlements, should be sealed."

20 Luke appointed a subcommittee with Lefty and me as
21 co-chairs and four other members, Justice Peeples and a
22 couple of others. And when we had two public hearings, we
23 had about forty people show up total at those two public
24 hearings on November 15th and December 18th, and then the
25 Supreme Court had its public hearing on November 30th, and we

1 had a couple of hours testimony. And we have received
2 hundreds of pages of drafts and letters and law review
3 articles and cases on this. And it has been an interesting
4 project. It has been an evolutionary project, the draft rule
5 that we have got, and the draft rule is the product of
6 consensus. And probably neither evolution nor concensus
7 leads to either literary elegance or intellectual precision,
8 and you will see that in the rule. The rule that you have
9 before you, the draft, it is long and it is difficult, but we
10 will try to take you through it. It is something to talk
11 about. Neither Lefty nor I like parts of it, but it is
12 something to consider, and we want to key you in on some of
13 the big issues, and I think Tom can do that as well.

14 The basic structure of the rule, the notion is that
15 there is certainly a presumption that the public should have
16 access to court records. And the rule is designed to allow
17 procedure to put that into effect. The basic procedure is
18 that if someone wanted to seal a court record, a motion must
19 be filed, a written motion, notice must be given -- public
20 notice given. There is a procedure outlining that. The
21 public is allowed to participate to intervene for the limited
22 purpose of participating on that motion to seal.

23 There is a standard set out for compelling need
24 that must be shown if records are to be sealed. There are
25 requirements for the order, for the duration of the order,

1 the contents of the order and the findings that the trial
2 court needs to make. There is also a provision dealing with
3 temporary emergency orders more or less tracking Rule 680,
4 the TRO procedure. And then there are provisions dealing
5 with continuing jurisdiction and appeal because one of the
6 problems -- and Tom can speak to this -- one of the problems
7 that the press has had in the past, they have not found out
8 about sealings until after plenary jurisdiction of the trial
9 court has expired. And that has been a major problem because
10 we don't yet have a ruling on the merits out of Texas
11 appellate court dealing with exactly the standard that should
12 be applied because it has been hard to have reviewed.

13 We have had input from, certainly, plaintiffs
14 lawyers, defense bar, the intellectual property bar, the
15 family lawyers, public interest groups. All kinds of people
16 have come before us and some of them even come out of the
17 woodwork before us. But it has been a real interesting,
18 interesting process.

19 The three cases I would like you to keep in mind as
20 you think about the rule, the mechanics, the three kind of
21 tough cases or paradigm cases. One of them is the trade
22 secrets case. What do you do in a case where somebody files
23 suit to protect a trade secret or to enforce a Tort remedy
24 for misappropriation of a trade secret? How do you handle
25 that under this rule? Intellectual property lawyers are very

1 interested in this rule because of that question.

2 Another case is the family lawyer -- family bar has
3 repeatedly emphasized the case of small children who perhaps
4 have been sexually abused and who are below the age where
5 they are aware of that, and those records, they contend,
6 should certainly be sealed and that child should not be
7 inflicted to perpetual exposure of public records of that in
8 their background.

9 The third case is a products liability case. What
10 do you do if you have a products liability case and a public
11 hazard surfaces in the course of discovery in that case? How
12 do you deal with that?

13 Keep these three examples in mind as you think
14 about the mechanics of this rule and how we deal with it.

15 The issues we will get into, I want you to think
16 about whether discovery materials should be included within
17 the definition of court records and go into detail whether
18 the rules should apply to settlements that are not filed, the
19 definition of compelling need, and then trade secrets.

20 Let me just run through very quickly the rule
21 itself and the burden of proof also. Let me run through the
22 rule. If you have got it, if you will turn to Page 797, I
23 will take you through it very quickly.

24 The first section has definitions, and it has three
25 subsections. Compelling need is the first one. Protectible

1 interests is the second one. Court records is the third one.

2 The compelling need, that is the standard that is
3 going to have to be shown if you want to seal court records,
4 and compelling need, as you see there, the first sentence
5 says it is "the existence of a specific protectible interest
6 overriding the presumption that all court records are open to
7 the general public," and then the four things that must
8 be shown to establish that compelling need.

9 The first one is a specific interest that clearly
10 outweighs the interest in open court records and that the
11 specific interest would suffer immediate and irreparable harm
12 if the court records are not sealed. That is the first
13 requirement under that. Specific interest clearly
14 outweighs the interest in the open records.

15 The second one is basically that there is no less
16 restrictive alternative. Sealing is necessary because there
17 is no less restrictive alternative to protect that interest.

18 The third one, Item (c) there is the sealing will
19 effectively protect the specific interest without being over
20 broad.

21 And the fourth one is the sealing will not restrict
22 public access to information that is detrimental to public
23 health or safety, or if the information concerning the
24 administration of justice, basically, that information that
25 would show a violation of any law or involved the misuse of

1 public funds.

2 So those are the four requirements under compelling
3 need. Now, compelling need references protectible interests
4 in that next Section No. 2, itemizes some protectible
5 interests. And what this is is an attempt to deal with some
6 of the hard cases, some of the interests the people have
7 said, well, in these circumstances, some form of sealing
8 should be justifiable. And here are four of the categories.
9 Many were suggested, and these aren't perfect, and as I say,
10 neither Lefty or I vouch for or probably will defend hardly
11 any part of this rule. But in any event, the four interests,
12 the first one is basically a right of privacy or privilege
13 under the rules -- under the rules of evidence. The second
14 one is a constitutional right. The third one is trade
15 secrets. And, again, we will come back to that because the
16 trade secret lawyers and the intellectual property bar have a
17 problem with the way we have done that or the way it appears
18 in this draft. And the fourth one is the sexual assault-type
19 of situation, the protection of the identity or privacy of an
20 individual who has been the subject of a sexually-related
21 assault or injury. Those are the four. These are not
22 exhaustive, but the four protective interests of the rule or
23 this draft at least sets out.

24 Next, Item 3 under Paragraph A on the next page is
25 court records. And this particular draft, you will notice,

1 basically defines court records as to what is filed in court
2 and specifically excludes discovery materials. And that has
3 been a big point of discussion. We will discuss that with
4 you in a moment, the pros and cons of discovery materials as
5 being a part of the court records.

6 Then we go into Paragraph B, and that sets out
7 basically the procedures for the notice and the hearings and
8 the orders. Subpart A there, Subparagraph A under B talks
9 about the hearing and basically provides for an open court
10 hearing would allow this draft -- would allow an in camera
11 hearing if, otherwise, the matters that are sought to be
12 protected would be revealed or disclosed if you had a public
13 hearing in that limited circumstance. But basically, an open
14 court hearing.

15 At the hearing, the court can consider affidavit
16 evidence if the affiant is present and available for
17 cross-examination, and then any person not a party can
18 intervene in the proceeding at the hearing stage -- or really
19 at other stages, as well, the way the rule is written -- for
20 the limited purpose of participating on that issue, the
21 sealing issue. And that is where the press, at times, after
22 the fact, has been excluded. They said you didn't intervene
23 timely, you didn't have an opportunity, you didn't
24 participate in a timely fashion. So the goal is to let the
25 press or public participate on that limited issue of sealing.

1 Now, the second part deals with notice. There must
2 be a written notice filed. The moving party is to post a
3 public notice at the place where you post public records
4 dealing with county government, notices for meetings of
5 county government. That notice is to be posted 14 days
6 before the hearing. Now, if we get into the rule later and
7 we have an emergency ex parte exception to that, but in
8 general, 14 days public notice. That notice, the rule --
9 provision there sets out the contents of the notice, provides
10 that the parties shall file a copy with the clerk and forward
11 a copy to the clerk of the Texas Supreme Court so that there
12 will be a central location where the press can check to find
13 out what sealing is going on around the state. That was a
14 big issue that the press was very, very interested in, and we
15 discussed a lot of procedures, but that is the one in this
16 draft.

17 The third provision there is the temporary sealing
18 order. And as I said before, that basically tracks Rule 680,
19 the TRO procedure. And the idea is that in a case where
20 sealing is necessary immediately and there is not time for
21 the public notice and the public hearing that there can be an
22 an application with affidavits and that the immediate need
23 can be established. A 14-day order time period is allowed
24 with up to one extension unless there is agreement for
25 subsequent extensions, just as we do under Rule 680 for TROs,

1 and then a motion to dissolve that kind of temporary
2 emergency order can be filed in two days notice on a motion
3 to dissolve, again, just as we have under Rule 680. So that
4 is the emergency temporary order procedure.

5 A Subpart 4 there that Paragraph B sets out or just
6 makes reference to is the findings and specifically requires
7 the trial court to make a finding demonstrating the
8 compelling need as that term was defined in the first section
9 of the rule.

10 Subparagraph 5 deals with the sealing order and the
11 contents of the sealing order. It provides what shall be in
12 there, the cause number, the style, et cetera, the time
13 period for which the order shall continue for which those
14 records shall be sealed, and identifying those parts of the
15 file that will be sealed and those parts that will remain
16 open. And it provides that the order, while it needs to be
17 specific, shall not reveal the information sought to be
18 protected.

19 And then Paragraph C deals with continuing
20 jurisdiction, and this is, again, the attempt to make sure
21 that the press, if they find out after the fact after
22 judgment has been entered, where otherwise plenary
23 jurisdiction has expired in several cases in Texas, they have
24 an opportunity to come in. The court has continuing
25 jurisdiction over the sealing order. And then the appeal

1 right, it provides for an appeal, except as to those
2 temporary emergency orders, except as to the 14-day orders,
3 it would allow an appeal.

4 That, in very brief fashion, is the outline of that
5 particular draft. There are, as I say, several issues. One
6 of them is discovery. I don't think Tom really wants to
7 speak to the discovery issue. We can come back to that in a
8 minute. Settlement agreements, we want to talk about that,
9 but I don't think you are interested in that either. And
10 trade secrets, I don't think you are involved with that one.

11 The standard of proof is a question, if you will go
12 back and look at -- if you will look at the compelling need,
13 that is the very first sentence, the second sentence, really.
14 It says "The moving party must establish the following:" And
15 then it lists those four factors.

16 Well, one question is whether that should be by a
17 preponderance of the evidence or by clear and convincing
18 evidence. I think that is one of the points probably you
19 wanted to talk on, Tom. So why don't you take it there and
20 then Tom Leatherbury and John McElhaney to represent the
21 Dallas Morning News really drafted the very initial version
22 of this rule that went through many different forms and did
23 just a whole lot of work for the committee, and we were very,
24 very appreciative of that.

25 There is a current version that -- I think his most

1 current version we are going to pass out, and it will also
2 have some of the other current versions, David Perry's
3 version and David Chamberlain's version, in this packet we
4 will pass out now. But why don't you draw some of the
5 differences between this draft and the one -- the most recent
6 version that you have.

7 MR. LEATHERBURY: Sure. In the packet that I
8 got from Chuck earlier in the week, our most recent draft
9 says draft 12/26/89 up at the top and it was Attachment C.
10 Chuck, is that the same as in --

11 MR. HERRING: That is what is going out right
12 now.

13 MR. LEATHERBURY: Okay.

14 MR. MORRIS: Did any of you get this bound
15 book? Okay, well, I thought you had it.

16 JUSTICE DOGGETT: It is under Tab C.

17 MR. HERRING: If you have the bound book that
18 we sent out to everybody, and you may or may not have gotten
19 it, it will be under Tab C. We are going to pass out a copy
20 of Tab C and the other versions right now.

21 MR. LEATHERBURY: I can go ahead and get
22 started because I know time is short. I tried to compare our
23 most recent draft, which is Attachment C, with the draft that
24 Chuck circulated as the co-chairs' draft. And I will just
25 walk through it and show you the points of agreement and

1 disagreement and be happy to answer any questions you have.

2 Under the definition of compelling need, in our
3 draft, Attachment C, one of the first things we get up front
4 is the clear and convincing evidence standard that we think
5 is the appropriate standard given the fundamental nature of
6 this right to access to information that is on file at the
7 courthouse. It is a standard that the courts are familiar
8 with. Clear and convincing evidence is used in civil
9 commitment cases, in termination of parental rights cases, in
10 libel cases to assess certain issues of fact such as the
11 existence of actual malice. And we believe very strongly
12 that that rather than the preponderance of the evidence
13 standard that others have advocated is appropriate to seal
14 court records that are actually on file at the courthouse.

15 Our draft, as well as Chuck's draft, incorporates a
16 balancing test in this definition of compelling need. We
17 believe that the co-chairs' draft dilutes the balancing test
18 a little bit and unacceptably.

19 In the definition of compelling need in the
20 co-chairs' draft, we would enter a line after "specific
21 protectible interests," which we would add "is substantial
22 enough to override the presumption that all court records are
23 open to the general public." So we would suggest that
24 innerlineation in the co-chairs' draft to jive more closely
25 to what we have in our draft, which is Attachment C.

1 Our fear there is that with the enumeration of
2 certain protectible interests, the definition of certain
3 protectible interests, that the definition of compelling need
4 in the co-chairs' draft is not explicit enough about the
5 balancing test, and courts may forget that all -- that there
6 are other parts of the balancing test in addition to the
7 establishment of a protectible interest.

8 There is some language in our draft C which drew a
9 lot of heat and not much light about mere sensitivity,
10 embarrassment or desire to conceal the details of litigation
11 is not in and of itself a compelling need. That has been
12 deleted from the co-chairs' draft. And while we think that
13 is still an accurate statement of the law, I think it draws
14 more controversy than it deserves and so are not really
15 insisting and advocating that, although it is a correct
16 statement of the law.

17 B and C are identical between the co-chairs' drafts
18 and our draft talking about less restrictive alternative and
19 a finding that sealing will actually protect the interest of
20 the person that sought to be protected without being over
21 broad.

22 D in the co-chairs' draft adds that final phrase
23 "that violates any law or involves misuse of public funds or
24 public office." We take a broader approach that any
25 information about the administration of public office or the

1 operation of government should not be sealed and would be
2 more absolute test on that than the co-chairs' draft
3 currently provides for by deleting that language.

4 We did not enumerate protectible interests --
5 specific protectible interests that would be covered by this
6 rule. I guess our preference is for no specific categories
7 and to remain general and just talk about specific
8 protectible interests, although we can see some benefit to
9 spelling out specific categories. Again, the fear is that in
10 the trial court you come in and you say "trade secret," the
11 judge looks at protectible interests and you have trade
12 secret. And that may be the end of the discussion without
13 going through the balancing test that is necessary.

14 In addition, I try to think of some constitutional
15 right that would warrant sealing, and I really couldn't come
16 up with one unless you accept that there is a constitutional
17 right to privacy, and I am not sure that is the case. So I
18 have questions about 2(c), I mean, 2(b), protectible
19 interests, and that would cover 2.

20 As Chuck said, the definition of court records is
21 the same. We did not want to bite off the discovery fight,
22 whether discovery is subject to the same standards of sealing
23 as documents that are actually on file at the courthouse. We
24 think it is very important to get a rule in place about the
25 documents that are actually filed at the courthouse and

1 certainly would encourage any further study about discovery
2 and sealing of discovery and protective orders and so forth,
3 but thought that was a study best left to another day and not
4 for this rule. So our rule, similarly, would not affect
5 discovery.

6 Our rule, as well as Chuck's draft, would affect
7 settlement agreements that are actually filed at the court,
8 but would not reach beyond that, and try to make public
9 settlement agreements which were not required to be filed and
10 which were not filed with the court.

11 There is a very crucial sentence in B of our draft
12 that is omitted, an introductory sentence which states,

13 "All orders of any nature and all opinions
14 made in the adjudication of cases are specifically
15 made public information and shall never be sealed."

16 It is that first sentence in B. That language
17 tracks exactly the Open Records Act language in Section 612.
18 We think, if anything, should be public. It is all orders
19 and opinions that are made by the court which actually
20 explain the reasoning and the rulings of the court. And this
21 language was included in our draft to respond to
22 particular -- at least one particular situation where an
23 order was sealed and the party seeking to unseal the records
24 could not even be told the basis for the order by their
25 lawyer. That was the Tuttle Jones case. So we think that

1 that is a very critical --

2 MR. MORRIS: Do you mind clarifying for me
3 what you just said? I mean why is this particular Open
4 Records Acts phraseology important to you?

5 MR. HERRING: I think the reason we left it
6 out, it is in the Open Records Act.

7 MR. LEATHERBURY: Well, I think it belongs in
8 the rules too, and I will tell you why, because there is a
9 very fundamental debate about whether the Open Records Act
10 applies in any fashion to the judiciary or to court clerk
11 files. And so we thought in an abundance of caution, since
12 we were doing this and there really didn't seem to be much
13 dispute at the committee level, that that language should be
14 left in here to cover any possible loopholes in the
15 application of the Open Records Act.

16 We have one great concern about the co-chairs'
17 draft, and that is the provision for in camera hearing. We
18 certainly are sensitive to the problem of bringing and having
19 to file trade secret information or other types of
20 protectible information with the court and recognize that a
21 potential -- an open hearing always has the potential to
22 reveal the information that is sought to be disclosed. But
23 in camera hearings, in my view and experience, really have a
24 great potential for abuse. I think you would find an almost
25 indiscriminate use of the in camera hearings because of --

1 because in every situation an open hearing might reveal the
2 information sought to be protected. And we would urge that
3 that be handled through instructions from the judge to the
4 lawyers not to reveal it in their questioning as was done in
5 the oral arguments at Tuttle Jones -- in the Tuttle Jones
6 case, which some of you may be familiar with, involving a
7 file that was sealed involving sexual abuse of a patient by a
8 psychologist, and really would urge no in camera hearing
9 provision or certainly not the one that is included with a
10 fairly weak showing in the co-chairs' draft.

11 There is a real minor differentiation in the notice
12 provision. Our notice provision would require the party
13 giving notice to describe the type of records which are
14 sought to be sealed in the notice. So actually just list
15 them, whether it is plaintiff's original petition or answers
16 to interrogatories or exhibits to summary judgment motion,
17 some brief description like that. And I think that is a very
18 good and useful thing to have in the notice to allow the
19 public to decide whether or not they want to come and spend
20 the time and the effort to attend the hearing on the motion
21 to seal.

22 The notice provision in Chuck's draft, I am sure it
23 is implicit, but it omits the specific reference that the
24 notice itself can never be sealed. And we think that is an
25 important addition that may be implicit, but we think we need

1 to be explicit about it.

2 Our temporary sealing order provision is quite
3 different from Chuck's in that -- or from the co-chairs' --
4 in that it does not provide for any extensions of the
5 temporary sealing order, and certainly doesn't provide for
6 any extensions by agreement. And there is a good reason, I
7 think, why there should be no extension to the temporary
8 sealing orders in this case and why TRO practice is not
9 directly applicable in this point. And that is once you get
10 your temporary sealing order, you have to go ahead and post
11 your notice, your public notice. You have to mail notice to
12 the clerk of the Supreme Court so that it can be posted down
13 here as well.

14 In the notice, you have to specify the time for the
15 hearing, and presumably, people will look at these notices
16 and either come to the hearings at the scheduled time or
17 decide not to come to the hearings at the scheduled time.

18 If you get into a situation where there can be
19 extensions and extensions by agreement and so forth, I think
20 it is going to -- it is not going to allow the public to
21 appear and contest sealing orders. I think there will be
22 confusion about settings. There is a real question in my
23 mind in the co-chairs' draft about whether you have to go
24 back and post a new notice if you obtain an extension. Do
25 you have have to wait again 15 days after that notice is

1 posted or 15 days before you have the hearings. So I think
2 that it is not complete. And because the public's rights on
3 sealed records are involved, as well as the private
4 litigant's rights, I would urge the Committee not to include
5 any extensions and to adopt our temporary sealing order
6 provision as it is written in our draft, which is
7 Attachment C.

8 There is a minor discrepancy in the section on
9 findings, which is No. 4. We included that the Court must
10 explain the reason for the findings, and we believe that is
11 important or else you are going to get laundry list findings
12 and no explanation, no reasoning, no rationale. And we think
13 that is very important that the court set forth its reasons
14 for sealing the records as well as just making the findings
15 that are required by the rule. Chuck had included a
16 provision that the findings should not reveal the information
17 sought to be protected. I think that, of course, is
18 understood, and we don't have any problem with that. I think
19 good lawyers can draft around that and good judges can draft
20 around that and that won't be a problem. But if that
21 language helps out, that is fine.

22 The sealing order provision, we made explicit for
23 the clerk's benefit that in cases where sealing orders are
24 granted, there would be two files, an open one and a closed
25 one. This may be more of a semantic difference than a

1 substantive difference because, in substance, Chuck's, or the
2 co-chairs' draft, is substantially identical to ours. But
3 there is that one minor wording change about two files being
4 kept by the clerk's office.

5 The continuing jurisdiction provision of ours is
6 virtually identical to Chuck's, and that is very important
7 from our past lawsuits where the press or other parties have
8 been held to intervene too late to challenge a sealing order
9 because the trial court's jurisdiction over the sealing order
10 has expired. So that is very important.

11 The appeal provisions -- I want to direct your
12 attention to the last two sentences of our draft
13 Attachment C, the sentences which begin "Upon any such
14 appeal, the trial court's failure to make the specific
15 findings required in Paragraph (B)(4) shall never be harmless
16 error and shall be reversible error." And then the second
17 sentence says, "The trial court's failure to comply with the
18 notice of hearing requirements in Paragraphs (B)(1) through
19 (B)(3) shall render any sealing order void and of no force
20 and effect."

21 That is an accurate statement of the law. We think
22 the importance of it is such that it deserves a place in the
23 rule. I can anticipate that there would be a lot of harmless
24 error cases if we did not have that, and you are never going
25 to have adequate appellate review unless you require the

