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March 13, 2019

Hon. John D. Dailey
Colorado Court of Appeals
Ralph L. Carr Judicial Center
2 E. 14th Ave.
Denver, CO 80203

Hon. Carlos A. Samour, Jr.
Colorado Supreme Court
Ralph R. Carr Judicial Center
2 E. 14th Ave.
Denver, CO 80203

Re: Colorado Rules of Criminal Procedure Committee Request from Chief Justice Coats

Dear Judge Dailey and Justice Samour:

I write in my capacity as the President of the Colorado Freedom of Information Coalition to formally request the opportunity to meet with members of the Criminal Rules Committee as it considers the request sent by Chief Justice Nathan B. Coats dates March 1, 2019, which asks the Committee to consider whether Colorado should adopt a criminal rule establishing a statewide standard governing the suppression of criminal case files.

I would note that in the attached e-mail from the Judicial Branch legislative liaison Terry Scanlon (to the Colorado Broadcasters Association), Mr. Scanlon indicated that the Judicial Branch welcomed the opportunity to discuss this initiative with representatives of the Press and Broadcasters Associations "throughout this the process."

I believe it would be beneficial to the Committee, and to all stakeholders in this process, to engage in a dialogue so that the Committee's decision can be fully informed from a multiplicity of viewpoints. In addition to hearing from representatives of the criminal law bar, on both the prosecution and defense sides, the Committee might benefit from hearing from former Chief Justice Michael Bender, who served on the American Bar Association's Criminal Justice Standards Committee that promulgated the 1992 edition of Standard 8-3.2 (which was applied by the Colorado Supreme Court not only in *Star Journal Publ'g v. District Court*, but also in *P.R. v. District Court*, 637 P.2d 346, 352-53 (Colo. App. 1981).

To assist the Committee in its initial discussion scheduled for this coming Friday, March 15, 2019, I am enclosing herewith: (1) a copy of the current version of ABA Standard 8-5.32, (2) a copy of the 1992 version of that rule along with the comments explaining why it was promulgated, (3) a copy of the Maricopa County, Arizona court's rule that largely adopts the ABA Standard, and (4) D.C.COLO.LCrR 47.1, our federal district court's rule regarding suppression of criminal case records.

Thank you very much for your consideration of this request. I look forward to hearing from you.

Sincerely,

Steven D. Zansberg

SDZ/cdh
Enclosures

cc: Jeff Roberts, Executive Director, Colorado Freedom of Information Coalition
Jill Farschman, Executive Director, Colorado Press Association
Justin Sasso, Executive Director, Colorado Broadcasters Association

Thanks for giving us time to discuss the concerns of the Colorado Press Association and the other stakeholders. Sorry for the delay in responding.

As promised, Andy Rottman and I met with the senior leaders of the [Judicial] Branch. We conveyed the concerns about a lack of process for suppressing records, a lack of standards for suppressing records, and a lack of confidence in the timeliness of the Branch's rule-making process.

In response to those concerns, we, the Courts, are committing to three steps that _we hope you'll agree demonstrate a good-faith effort to address the issues:

1. The Chief Justice will issue **a Chief Justice Directive in the coming weeks that will define a process for how records can be suppressed**. When the CJD is finalized, we will share that with stakeholders.
2. The Chief Justice will send a charge to the Criminal Rules Committee asking them to consider specific issues regarding suppressing records. When the charge is drafted, we will share that with the stakeholders.
3. The Criminal Rules Committee will call a special meeting in March to begin deliberating the issue at the Chief Justice's request.

The committee meets again in April. We can't make any promises about the outcome of the committee process. April is probably the earliest the committee might reach a recommendation. If and when the Criminal Rules Committee makes a recommendation, that recommendation would go to the Colorado Supreme Court for a final decision. The Rules of Criminal Procedure are ultimately decided by the Court and apply to all state courts in Colorado.

We are, of course, open to ongoing dialogue throughout this process.

Thank you,
Terry

Terry Scanlon
Legislative Liaison
Colorado Courts and Probation
1300 Broadway, Suite 1200
Denver, Colorado 80203
Office: 720-625-5967
Cell: 303-957-8137 (call or text)

Standard 8-5.2. Public Access to Judicial Proceedings and Related Documents and Exhibits

(a) Subject to the limitations set forth below, in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access.

(b) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or to a related document or exhibit only after:

(i) conducting a hearing after reasonable notice and an opportunity to be heard on the proposed order has been provided to the parties and the public; and

(ii) setting forth specific written findings on the record that:

(A) public access would create a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's or the public's interest in public access;

(B) the proposed closure order will effectively prevent or substantially lessen the potential harm; and

(C) there is no less restrictive alternative reasonably available to prevent that harm, including any of the measures listed in Standard 8- 5.3 or permitting access to one or more representatives of the public.

(c) In determining whether a closure order should issue, the court may accept the items for which a seal is being requested under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of that matter. The motion seeking to close access to those items must itself, however, be filed in open court unless the requirements of subsection (b) are met.

(d) If the court issues a closure or sealing order, the court should consider imposing a time limit on the duration of that order and requiring the party that sought the order to report back to the court within a specified time period as to whether continued closure or sealing is justified pursuant to the requirements set forth in subsection (b). If those requirements are no longer met, the documents or transcripts of any sealed proceeding should be unsealed.

ABA Standards for Criminal Justice
Fair Trial and Free Press
Third Edition

ABA Standards for Criminal Justice
Fair Trial And Free Press
Third Edition

James G. Exum, Jr., Chairperson
ABA Criminal Justice Standards Committee

Alexander H. Williams III
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Chairperson, Section of Criminal Justice 1991–1992

Michael L. Bender
Chairperson, Section of Criminal Justice 1990–1991

Eugene Cerruti, Reporter

Approved by ABA House of Delegates
February 11, 1991

Standard 8-3.2 Public access to judicial proceedings and related documents and exhibits

(a) In any criminal case, all judicial proceedings and related documents and exhibits, and any record made thereof, not otherwise required to remain confidential, should be accessible to the public, except as provided in section (b).

(b) (1) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit only after reasonable notice of and an opportunity to be heard on such proposed order has been provided to the parties and the public and the court thereafter enters findings that:

(A) unrestricted access would pose a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's right to a public trial;

(B) the proposed order will effectively prevent the aforesaid harm; and

(C) there is no less restrictive alternative reasonably available to prevent the aforesaid harm.

(2) A proceeding to determine whether a closure order should issue may itself be closed only upon a prima facie showing of the findings required by Section b(1). In making the determination as to whether such a prima facie showing exists, the court should not

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One judicial measure held to be an unconstitutional prior restraint was a trial court's order requiring a newspaper to have counsel attend pretrial proceedings "in order to advise his client . . . so that the publication of the proceedings in these hearings shall not require change of venue . . . or alternative actions by the court." Keene Publishing Corp. v. Cheshire County Super. Ct., 119 N.H. 710, 406 A.2d 137 (1979) (citing standard 8-3.1 with approval). In Sherman Publishing Co. v. Goldberg, 443 A.2d 1252 (R.I. 1982), the trial court employed the measure of "conditional access" to the press. Because the press had previously published the names of juveniles in Family Court proceedings to which the press had been admitted, the court barred the press from future juvenile proceedings unless they agreed not to publish the juveniles' names. Held, an unconstitutional prior restraint. In KUTV, Inc. v. Conder, 668 P.2d 513 (Utah 1983), the trial court employed a "limited" gag order to bar the press from referring to the rape defendant as the "Sugarhouse rapist," a reference to a notorious ten-year-old set of rape convictions of the defendant. Held, an unconstitutional prior restraint. And in News American Div. Hearst Corp. v. State, 447 A.2d 1264 (Md. 1982), the trial court issued an "indirect" gag order that applied directly only to court personnel and trial participants. Held, press had sufficient standing to intervene to challenge gag order. But see KUTV, Inc. v. Wilkinson, 686 P.2d 456 (Utah 1984), upholding a prior restraint on any publication of the defendant's alleged connections with organized crime.

require public disclosure of or access to the matter which is the subject of the closure proceeding itself and the court should accept submissions under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of said matter.

(c) While a court may impose reasonable time, place and manner limitations on public access, such limitations should not operate as the functional equivalent of a closure order.

(d) For purposes of this Standard, the following definitions shall apply:

(1) "criminal case" shall include the period beginning with the filing of an accusatory instrument against an accused and all appellate and collateral proceedings;

(2) "judicial proceeding" shall include all legal events that involve the exercise of judicial authority and materially affect the substantive or procedural interests of the parties, including courtroom proceedings, applications, motions, plea-acceptances, correspondence, arguments, hearings, trials and similar matters, but shall not include bench conferences or conferences on matters customarily conducted in chambers;

(3) "related documents and exhibits" shall include all writings, reports and objects, to which both sides have access, relevant to any judicial proceeding in the case which are made a matter of record in the proceeding;

(4) "public" shall include private individuals as well as representatives of the news media;

(5) "access" shall mean the most direct and immediate opportunity as is reasonably available to observe and examine for purposes of gathering and disseminating information;

(6) "closure order" shall mean any judicial order which denies public access.

History of Standard

This standard has been entirely redrafted in light of the new access doctrine of *Richmond Newspapers v. Virginia*.[1] It provides a right of access to all judicial proceedings. The previous standard applied only to pretrial

1. 448 U.S. 555 (1980).

proceedings and emphasized voluntary cooperation by the bench and press to resolve issues of access.

Related Standards

ABA Standards for Criminal Justice 6-3.10, 8-3.8, 14-3.1 (2d ed. 1980).

Institute of Judicial Administration—American Bar Association, Standards Relating to Juvenile Records and Information Systems, Parts XV and XX (1980).

Commentary

This comprehensive standard sets out a right of public and press access to criminal proceedings. The standard and the constitutional law from which it is derived are both new. The Supreme Court revolutionized the law of access with its decision in *Richmond Newspapers v. Virginia*.[2] It announced a First Amendment right of public access that was premised on the "structural" design of the Constitution to guarantee a self-informed citizenry. Although the Supreme Court has decided only three access cases since *Richmond*[3], the case law developments at the lower court level, both federal and state, have been extraordinary.[4] This case law is still in its formative stages and therefore is something less than concise and coherent. But the structural premises of the new law can be identified. This standard has employed them to construct a comprehensive set of guidelines that is designed both to track and to anticipate these legal developments.

The second edition recognized a right of access in two separate standards. Standard 3.2 provided for access to pretrial proceedings and Standard 3.6 covered trials. The standards applied only to courtroom proceedings and each required the consent of the defendant to close a proceeding. The theory behind these access standards was the public

2. 448 U.S. 555 (1980).

3. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Court (I), 464 U.S. 501 (1984); Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1 (1986). Related cases decided on other grounds are: Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Gannett Co., Inc. v. De Pasquale, 443 U.S. 368 (1979); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984); Waller v. Georgia, 467 U.S. 39 (1984).

4. *See generally*, Note, *Whatever Happened to the Right to Know? Access to Government-Controlled Information since* Richmond Newspapers, 73 VA. L. REV. 1111 (1987), Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813 (1984).

trial provision of the Sixth Amendment.[5] The public and press were argued to have a right of access derived from the defendant's right to an open trial. Shortly after publication of the second edition, the Supreme Court rejected this Sixth Amendment theory of access in *Gannett Co., Inc. v. De Pasquale*.[6] Nonetheless, the second edition's formative recognition of a public right of access did make a remarkable contribution in anticipating the groundswell of access law that would begin in the court's following term.

The "structural" theory of access adopted by the high court in *Richmond* was certainly a product of its time. Over the preceding two decades there had been growing promotion and recognition of a "right to know" government-controlled information. The right-to-know movement had begun slowly in the late 1940s in response to the secret and somewhat inquisitorial practices of the legislative committee investigations of domestic communism.[7] The argument advanced was essentially political. It held that the Constitution had established a form of representative self-government which in turn required that the citizen, as sovereign, be possessed of whatever information was either in the control of his/her representative or pertinent to a critical review of the representative's performance. The movement was directed primarily at governmental secrecy in the legislative and, to a lesser extent, the executive branch.[8] It was not at all concerned with the nonrepresentative judiciary.

The critical achievement of the right-to-know advocates was the passage of two ground-breaking pieces of "open government" legislation. The Freedom of Information Act[9] was passed in 1966 followed by the Government in the Sunshine Act[10] ten years later. The public demand for more open government was fueled throughout the 1970s by repeated exposures of governmental secrecy and scandal.[11] This

5. ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 34 (2d ed. 1980).

6. 443 U.S. 368 (1979).

7. A. MEIKLEJOHN, POLITICAL FREEDOM (1948), is commonly cited as the seminal work on the structural right to know.

8. *See generally* D. M. Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L. Q. 109 (1977).

9. 5 U.S.C. § 552.

10. 5 U.S.C. § 552b.

11. "Recent controversies involving the Pentagon Papers, Watergate, executive privilege, congressional scandals, and secret government operations have aroused considerable public concern that the people are not being told that which they have a right to know." D.M. Ivester, *supra* note 8, at 109.

legislative success was accompanied by a turn to the courts to gain constitutional recognition of the right. A series of cases was brought by journalists to extend the right to know to matters of executive control not covered by statute.[12] The theory put forward in these cases was that the right to know government information was subsumed within either or both the free speech and free press clauses of the First Amendment.[13] Since political speech was at the core of the First Amendment and such speech, to be adequately informed, required government-controlled information, it followed that the First Amendment guaranteed a public/press right of access.

The high court rejected this argument at every opportunity during the 1970s,[14] although there did develop a line of dicta which purported to give some constitutional recognition to a right to gather information.[15] Yet so complete did the Court's rejection of a First Amendment right of access appear by the late 1970s that a new, Sixth Amendment-based theory of access was constructed by those challenging the growing tide of courtroom closure orders.[16] This was the access theory rejected by the Court in *Gannett*.[17]

Richmond Newspapers was therefore quite a turnaround for the Court. Not only did it recognize a First Amendment-based right of access to the judicial branch but it did so by embracing the broadly political implications of a structural right to know.[18] The Court followed quickly with three cases that extended the right of access to criminal trials closed by state statute,[19] the voir dire portion of the trial[20] and the preliminary hearing.[21] While the high court has never applied the right to judicial

12. The principal cases to reach the Supreme Court were Houchins v. KQED, 438 U.S. 1 (1978), Saxbe v. Washington Post, 417 U.S. 843 (1974), and Pell v. Procunier, 417 U.S. 817 (1974).

13. *See generally* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1; Lange, *The Speech and Press Clause*, 23 UCLA L. REV. 77 (1975).

14. *See* cases cited at note 12, *supra*.

15. *E.g.*, "... news gathering is not without its First Amendment protections ...," Branzburg v. Hayes, 408 U.S. 165, 707 (1972).

16. Courts apparently understood the Court in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) to suggest that closure orders were a preferable alternative to prior restraints as a means to prevent pretrial publicity.

17. Gannett Co., Inc. v. De Pasquale, 443 U.S. 368 (1979).

18. 448 U.S. at 575 (Burger, opinion for the court) and at 587 (Brennan, concurring).

19. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

20. Press Enterprise Co. v. Superior Court (I), 464 U.S. 501 (1984).

21. Press Enterprise Co. v. Superior Court II, 478 U.S. 1 (1986).

documents[22] as opposed to proceedings, the lower courts have been quick to do so.[23] Therefore the *Richmond* right of access now accomplishes with respect to the judiciary much of what the Sunshine Act and the Freedom of Information Act together provide for the legislative and executive branches.

Against the background of these rapidly shifting and evolving legal developments, this standard has constructed a right of access that is premised on the core theory of the *Richmond* doctrine. It is both broad and comprehensive. It is broad because the underlying theory cannot be, and has not been by the case law, narrowly cabined.[24] It is comprehensive because the constitutional force of the theory has increasingly prevailed over contrary bodies of law which had previously regulated access in disparate areas.[25] However, the standard also recognizes that the structural theory of access is "theoretically endless"[26] and must at some point be grounded in the world of real judges if it is to succeed at all. The standard therefore limits the right to those matters "that

22. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984), upholding a protective order which prohibited a party from publishing the contents of a discovery document, was decided on other grounds.

23. *E.g.*, Associated Press v. U.S. (DeLorean), 705 F.2d 1143 (9th Cir. 1983). *See generally* Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813 (1984).

24. *See generally* Note, *Whatever Happened to the Right to Know? Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111 (1987).

25. The new First Amendment right of access has been held to supersede countervailing bodies of law in a broad variety of circumstances, *e.g.*: U.S. v. Peters, 754 F.2d 753 (7th Cir. 1985) (trial exhibits); Seattle Times Co. v. District Court, 845 F.2d 1513 (9th Cir. 1988) (pretrial motion papers); *In re* Washington Post Co., 807 F.2d 383 (4th Cir. 1986) (plea hearings and related documents); *In re* Baltimore Sun, 841 F.2d 74 (4th Cir. 1988) ("venire list" of prospective jurors); U.S. v. Haller, 837 F.2d 84 (2d Cir. 1988) (sealed plea agreements and related documents); Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (sealed records of acquittal); Valley Broadcasting v. District Court, 798 F.2d 1289 (9th Cir. 1986) (copying of tape exhibits); Sarasota Herald Tribune v. Holtendorf, 507 So. 2d 667 (Fla. D.C. App. 1987) (psychiatric report of defendant); *Application of NBC, Inc. (Presser)*, 828 F.2d 340 (6th Cir. 1987) (judicial and attorney disqualification proceedings); *Matter of Chase*, 446 N.Y.S.2d 1000 (Fam. Ct. 1982) (juvenile proceedings); Westmoreland v. CBS, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985) (civil proceedings); Doe v. Meachum, 126 F.R.D. 452 (D. Conn. 1989) (privacy claim by AIDS plaintiffs); Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D. Utah 1985) (administrative fact-finding hearings); Westinghouse Broadcasting Co. v. National Transportation Safety Board, 8 MEDIA L. REP. (BNA) 1177 (D. Mass. 1982) (airplane crash sites).

26. Brennan, *Address*, 32 RUTGERS L. REV. 173, 177 (1979).

involve the exercise of judicial authority and materially affect the substantive or procedural interests of the parties."[27]

The structural theory behind the standard can be reduced to simple terms. The judges in their official capacity act as representative government officials[28] rendering a series of decisions that affect or resolve the outcome of cases or controversies submitted for public[29] resolution. Unlike the grand or even the petit jury, there is no privilege of confidentiality which inheres in the judicial decision-making process. Therefore, in order to critically evaluate the discharge of this public function, the citizenry is presumptively entitled to know not only what the judge decides on a given matter but also what relevant information and argument was in the judge's possession at the time of the decision. Public scrutiny extends to the judicial process that underlies the formal product of the courts. Access to this information should be as direct and immediate as circumstances allow. Access delayed is often information denied. Furthermore, there is no basis for distinguishing between the great variety of types of decisions a judge renders; if they bear upon the cases or controversies brought before the court, they are publicly charged decisions. Therefore the oft-drawn distinctions between trial and nontrial proceedings, between proceedings, documents and other forms of information, and between mere observation and actual possession of information sources, are all irrelevant to the issue of access. And because this right has structural significance to the realization of the enumerated First Amendment rights, it is entitled to a level of protection appropriate to protect those rights.[30]

The format of the standard is straightforward. Paragraph (a) sets out the general rule establishing a strong presumption of access to all criminal proceedings and related documents. Paragraph (b) defines a three-part test, taken largely from the case law, for a valid denial of access.

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27. Standard 3.2(d)(2), *supra*.

28. The non-representative character of the judiciary has not proven an obstacle to the structural theory. *See, e.g.*, "Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government* . . . Thus, so far as the trial is the mechanism for judicial fact-finding, as well as the initial forum for legal decision-making, it is a genuine governmental proceeding." *Richmond Newspapers*, 448 U.S. at 595–6 (Brennan, concurring).

29. The cases have not distiguished between civil and criminal matters for purposes of applying the *Richmond* doctrine. *E.g.*, Publicker Indus. v. Cohen, 733 F.2d 1059 (3d Cir. 1984); Westmoreland v. CBS, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); Doe v. Meachum, 126 F.R.D. 452 (D. Conn. 1989).

30. *See* commentary *infra* at note 36.

Paragraph (c) identifies the lesser-included, but certainly lesser, authority of courts to impose time-place-or-manner limitations on access. Paragraph (d) provides a set of definitions to the more significant terms used throughout the standard.

Paragraph (a)

This paragraph provides a single, comprehensive rule of access. It is premised on the "structural" theory of the *Richmond* doctrine. It incorporates a strong presumption of openness, subject only to the exceptional provisions of paragraph (b). It is triggered by the filing of a "criminal case" and extends to all "proceedings and related documents and exhibits." Each of the critical terms in this paragraph is separately defined in paragraph (d).

The inclusion of "any record made thereof" is intended to underscore the principle that the right of access extends to information as such and not only to designated forms of information. Access should not depend upon the manner in which a court maintains records of various proceedings, documents or exhibits. Courts presently employ a variety of forms: stenographic recording, audiotapes, videotapes, teleconference logs, computer files. Some lower courts have conditioned access to court records on the format in which they are compiled.[31] A court record by any other name is still subject to public access.[32]

Certain proceedings and documents are "otherwise required to remain confidential" and therefore exempted from the general rule of access. Typical among these are grand jury proceedings, jury deliberations, ex parte proceedings, investigative files and privileged documents. Paragraph (a) is not intended by its terms to determine any controverted claim of confidentiality. However, it must be noted that all claims of confidentiality are now subject to constitutional review under *Richmond*. Not all traditional designations of confidentiality will survive this new scrutiny.[33]

31. *E.g.*, U.S. v. Beckham, 789 F.2d 401 (6th Cir. 1986) (denying access to copy videotape exhibit).

32. Ohio v. Bender, 494 N.E.2d 1135 (Ohio, 1986) (videorecording of trial is itself a public record subject to access). *See generally Special Topic: Telecommunications in the Courtroom*, 38 U. MIAMI L. REV. 4 (1984).

33. *E.g.*, Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989) (voids state statute requiring sealing of records of acquittal); U.S. v. Haller, 837 F.2d 84 (2d Cir. 1988) (sealed plea agreement); Matter of Chase, 446 N.Y.S.2d 1000 (Fam. Ct. 1982) (juvenile proceedings).

Paragraph (b)

Paragraph (b)(1) provides a general rule of closure to cover all denials of access, whether to a proceeding or a document. It is constructed as an exception to the general rule of paragraph (a). It adopts a three-prong test for closure which is taken from the case law. It also imposes various procedural requirements upon the determination of a valid closure order.

The three-part test requires that: (a) access would present a substantial probability of harm to a fair trial or other overriding interest, (b) closure would be effective, and (c) no less restrictive alternative to closure exists. This is essentially the standard promulgated by the Supreme Court, although there is no single or composite statement of it in any of the court opinions. The lower courts have most commonly cited passages in *Globe Newspaper Co. v. Superior Court*[34] and *Press-Enterprise Co. v. Superior Court(II)*.[35]

In *Press-Enterprise II* the Supreme Court used the term "substantial probability" to capture the high level of protection accorded the right of access.[36] This phrase is not an established term of art, which may in fact explain its attraction to the Court.[37] The Court has nonetheless made clear that a rather stringent level of protection is required.[38] This of course follows from the Court's structural analysis which assumes that the implied right of access is in some sense prior to the expressly enumerated First Amendment freedoms.[39] The lower courts have so read the cases.[40]

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34. 457 U.S. at 606–7.

35. 478 U.S. at 13–14.

36. 478 U.S. 1, 14 (1986).

37. Although arguing that the right of access was a "structural" condition of the First Amendment, the Court has been reluctant to provide it with the same status as the freedom from prior restraint. The hedging is expressed most repeatedly in the Court's unelaborated references to the right of access as a "qualified" First Amendment right. *See* Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1, 9 (1986).

38. "[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

39. "[F]undamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

40. The Ninth Circuit took an early lead in requiring very strict scrutiny of closure orders. U.S. v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982) (closure must be "strictly and inescapably necessary"). *See generally* Watson, *The Supreme Court's Development of the First Amendment Right of Access to Criminal Proceedings and the Ninth Circuit's Expansion of That Right*, 25 WILLAMETTE L. REV. 379 (1989). Following the Supreme Court ruling

The paragraph recognizes that protection of an "overriding interest" other than fair trial may support a closure order. This also is intended to reconcile the standard to the case law.[41] Although the Supreme Court is yet to uphold any closure order since its landmark decision in *Richmond,* its development of the *Richmond* doctrine clearly contemplates the inclusion of overriding interests other than fair trial.[42] The term "overriding interest" is not the unanimous choice of the cases. The high court cases have also used "compelling interest"[43] and "higher values"[44] to characterize those interests that will support a denial of access.

The paragraph refers to closure of a "portion" of a proceeding or document. It should be underscored that closure is virtually never an all-or-nothing issue. Indeed, it would be a rare set of circumstances that would support the closure of an entire trial. The Supreme Court has made this clear in several cases. In *Globe Newspaper Co. v. Superior Court*[45] the trial court closed the trial during the testimony of three minor rape victims on the mandatory authority of a state statute. The Court reversed and held that closure must be individually determined on a case-by-case basis. And in *Press-Enterprise Co. v. Superior Court (I)*[46] the trial court had closed all but approximately three days of the six-week jury voir dire to protect the candor and privacy of the potential jurors. Again the Court reversed because the closure order was overbroad and not based on findings specific to each person or portion of the voir dire. Therefore this language is intended to emphasize the narrowness and specificity of a valid closure order.

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in Press Enterprise Co. v. Superior Court (II), 478 U.S.1 (1986), many of the lower courts have adopted a strict three-prong test for closure, *e.g., In re* Washington Post Co., 807 F.2d 383 (4th Cir. 1986); Associated Press v. Bell, 510 N.E.2d 313 (N.Y. Ct. App. 1987).

41. "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980).

42. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982), the Court reversed a closure order designed to shield the testimony of a minor rape victim but did recognize that the interest of "safeguarding the physical and psychological well-being of a minor . . . is a compelling one." The Court has also made clear that the Sixth Amendment also recognizes the propriety of closures to protect interests other than fair trial. Waller v. Georgia, 467 U.S. 39, 47 (1984).

43. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

44. Press-Enterprise Co. v. Superior Court (I), 464 U.S. 501, 510 (1984).

45. 457 U.S. 596 (1982).

46. 464 U.S. 501 (1984).

Paragraph (b)(1) also establishes certain procedural prerequisites to a valid closure order. Essentially it requires three things: notice, an opportunity to be heard and explicit findings of fact. The requirement of "reasonable notice" is meant to be flexible.[47] It certainly does not contemplate personal service upon representatives of the press or public. But it does require public notice that is adequate to the circumstances.

The "opportunity to be heard" by those seeking and opposing closure is likewise designed to be flexible. The courts have recognized a great variety of often make-shift proceedings.[48] But a certain measure of greater formality is encouraged. A court reporter covering a proceeding should not be expected spontaneously to deliver legal argument against a proposed closure order announced from the bench.[49] On the other hand, not all closure motions will reasonably require the court to suspend the proceeding until such time as press counsel have an opportunity to prepare and be present. It is likely that the development of a better system for providing advance notice of closure motions will resolve many of the fair hearing difficulties the courts have experienced.

Paragraph (b)(2) deals with the procedural problem of granting the public an opportunity to be heard at the closure hearing while at the same time not requiring the moving party to disclose in order to close. The procedural requirements are not intended to be self-defeating. The position taken here is that a closure hearing is itself no different from any other proceeding: it may be closed, in whole or in part, only when the court enters the findings designated in paragraph (b)(1). However, it does permit these findings to be entered conditionally on the basis of a prima facie showing made "under seal, in camera or in any other manner" that will preserve the closure issue.[50]

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47. *See, e.g.*, U.S. v. Criden, 675 F.2d 550 (3d Cir. 1982); Application of Storer Communications, Inc. (Presser), 828 F.2d 330 (6th Cir. 1987); *In re* Washington Post Co., 807 F.2d 383 (4th Cir. 1986); Application of the Herald Co., 734 F.2d 93 (2d Cir. 1984); U.S. v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

48. *E.g., In Re* Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984); U.S. v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

49. "[I]t seems entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public spirited citizen willing to complain about closure." Application of the Herald Co., 734 F.2d 93, 102 (2d Cir. 1984).

50. *See* Application of Storer Communications, Inc. (Presser), 828 F.2d 330, 335 (6th Cir. 1987) (submissions on closure motion may be made *in camera*).

Paragraph (c)

This paragraph is meant to restate, yet circumscribe, the courts' traditional power to impose time-place-or-manner limitations on the exercise of First Amendment freedoms.[51] The case law is that such limitations may be imposed where: there is a substantial governmental interest at stake, the limitation is both reasonable and necessary, and the limitation does not amount to an actual denial of the right because there are alternatives to satisfying the right.[52]

The purpose of inserting the paragraph in the standard is to clearly distinguish a court's time-place-manner authority from its authority to issue a closure order. The two are often confused.[53] The authority to exercise administrative control over access should not be used as a subterfuge to deny access to certain information. For instance, while it is often administratively appropriate for a court to entertain motion or argument at side bar or in camera, this practice should not be permitted to operate as a complete denial of access. A limitation on access is reasonable only if alternative means of providing the underlying information, such as a written transcript, are provided.

Section (d)

Paragraph (d)(1) defines a "criminal case." It identifies the point at which a right of access attaches, namely, the filing of an accusatory proceeding. The filing is what triggers the exercise of judicial authority over a case or controversy and the consequent right of the public to review the exercise of that authority. This definition therefore excludes from the scope of paragraph (a) all pre-charge investigative proceedings.

This is not intended to suggest that there is no legal basis to access prior to a case filing. Indeed, the courts have recognized claims to access

51. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581, n.18 (1980).

52. *See* Renton v. Playtime Theaters, 475 U.S. 41 (1985).

53. "[G]overnment will ordinarily defend a restriction on free expression by reference to some danger beyond the speech itself—often, by invoking the permissive talisman of "time, place or manner" regulation. . . . The distinctions between types of speech restrictions, however clear in the abstract, may thus prove arbitrary and manipulable." TRIBE, AMERICAN CONSTITUTIONAL LAW 794, 803 (2d ed. 1988).

in a variety of pre-charge circumstances.[54] The point is that pre-charge access stands on a different footing than the *Richmond* right of access to criminal proceedings. The former must be separately grounded in a common-law rule[55] or statute.[56]

Paragraph (d)(2) defines the central concept of "judicial proceeding" to which the right of access attaches. The definition is informed by the structural theory of access. The touchstone is the official "exercise of judicial authority" by the court. The public has a right of access not to particular places or things but to the discharge of public power by the judge. The right of access is the public right to be informed. It is not limited to open court proceedings. In modern practice much of the most significant and determinative work on a case is done on paper or by oral directive. This information is necessarily included within the right.

However, the theory need not be taken to its "theoretically endless" extreme. The standard limits access to those events which "materially affect" the case or controversy. Thus the innumerable side bars and conferences held with counsel dealing with minor or collateral matters in the ordinary course of managing litigation would ordinarily not fall within the standard. This is the basis for excluding "bench conferences or conferences on matters customarily conducted in chambers."

Plea bargaining practice presents a clear challenge to the new emphasis on openness. Paragraph (d)(2) includes "plea acceptances" within the judicial proceedings subject to public access but it does not include the underlying plea bargaining, regardless of whether the judge has participated in the negotiations. The central significance of plea bargaining to the criminal justice systems nationwide cannot be denied.[57] It should follow that something so central to the system should be fore-

54. *E.g., In re* Search Warrant (Gunn I), 855 F.2d 569 (8th Cir. 1988) (First Amendment right of access extends to warrant documents filed prior to indictment); *In re* Application of Newsday, 895 F.2d 74 (2d Cir. 1990) (common-law right of access applies to executed warrants); Commonwealth Fenstermaker, 530 A.2d 414 (Pa. 1987) (common-law right of access applies to probable cause affidavits submitted with already executed arrest warrant); Detroit Free Press v. Oakland County Sheriff, 418 N.W.2d 124 (Mich. Ct. App. 1987) (mugshots); Freedom Newspapers v. Bowerman, 739 P.2d 881 (Colo. Ct. App. 1987) (autopsy reports).

55. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

56. *E.g.*, Detroit Free Press v. Oakland County Sheriff, 418 N.W.2d 124 (Mich. Ct. App. 1987) (mugshots within state freedom-of-information statute).

57. "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea-bargaining,' is an essential component of the administration of justice." Santobello v. New York, 404 U.S. 257, 260 (1971).

most among those things to which the public has access. Yet the traditional policy of the law in all areas has been to encourage negotiated settlements of disputes, both civil and criminal, and to recognize that negotiation by nature requires confidentiality.[58] Therefore the position taken here is not to require that plea negotiation itself be subject to public access but instead to insist that the agreement ultimately obtained, if any, be subject to retroactive scrutiny by virtue of the factual record required at an open plea acceptance proceeding.

The definition of "related documents and exhibits" in paragraph (d)(3) is meant to include within the right of access all documents and exhibits which are made a matter of record and have a bearing on judicial conduct in a criminal case. The intent is to provide access to the data base which either informed or should have informed the decision of the court.

The "relevant to any judicial proceeding" language is meant to equate document access with the policy and standard of access to proceedings. It carries the point that the form of information should not govern its accessibility; if the public has a constitutionally protected interest in access to legal proceedings, the documents which either do or should influence the court's official behavior appear to stand necessarily on the same footing.

This definition is intended to include those papers to which access has been recognized in the case law. Therefore motion papers, the various accompanying documents submitted with motion papers, exhibits, affidavits, reports, and records would all be included if they otherwise meet the relevance requirement. The definition would not include the correspondence, discovery, agreements and the like exchanged between counsel but not involving the "exercise of judicial authority." The confidentiality that attaches to some papers is recognized by limiting access only to those writings "to which both sides have access."

Paragraph (d)(5) provides a broad definition of "access." The central purpose of the right of access is not simply to maintain an open courtroom. The point is for the public, not just those attending a proceeding, to be able to gain information relevant to an assessment of the performance of the judicial authority. The nature of the information will often dictate the most appropriate form of genuinely public access. For instance, exhibits presented in open court which are either shown, read or played to the jury are not thereby necessarily accessible to the public,

58. *See* FED. R. EVID. 410.

even those attending the trial, in any meaningful way. Such exhibits may need to be made available to the public outside the courtroom for purposes of reading or viewing in order to facilitate informed and accurate dissemination of that information.

Standard 8-3.3. Change of venue or continuance

The following standards govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial:

(a) Except as federal or state constitutional or statutory provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.

(b) A motion for change of venue or continuance should be granted whenever it is determined that, because of the dissemination of potentially prejudicial material, there is a substantial likelihood that, in the absence of such relief, a fair trial by an impartial jury cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.

(c) If a motion for change of venue or continuance is made prior to the impaneling of the jury, the court may defer ruling until the completion of voir dire. The fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in paragraph (b) has been met.

(d) It should not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted should not be considered to have been waived by the subsequent waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

History of Standard

The second edition of this standard made two principal changes from the first edition: it dropped one provision identifying waiver of a jury

Rule 2.19. Sealing or Redacting Court Records
Arizona Revised Statutes Annotated
Local Rules of Practice Superior Court

Arizona Revised Statutes Annotated
Local Rules of Practice Superior Court (Refs & Annos)
Maricopa County (Refs & Annos)
Rule 2. General Procedure

17C A.R.S. Super.Ct.Local Prac.Rules, Maricopa County, Rule 2.19

Rule 2.19. Sealing or Redacting Court Records

Currentness

a. Request to Seal or Redact Court Records; Service. Any person may request that the court seal or allow the filing of a redacted court record for a case that is subject to these rules by filing a written motion, or the court may, upon its own motion, initiate proceedings to seal or allow the filing of a redacted court record. A motion to seal or allow the filing of a redacted court record must disclose in its title that sealing or redaction is being sought. The motion must be served on all parties in accordance with the applicable rules of service for the case type.

b. Hearing. The court may conduct a hearing on a motion to seal or allow the filing of a redacted court record.

c. Grounds to Seal or Redact; Written Findings Required. The court may order the court files and records, or any part thereof, to be sealed or redacted, provided the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling interests that outweigh the public interest in access to the court record. The findings should include the following:

(1) there exists a compelling interest that overcomes the right of public access to the record;

(2) the compelling interest supports sealing or redacting the record;

(3) a substantial probability exists that the compelling interest will be prejudiced if the record is not sealed or redacted;

(4) the proposed sealing or redaction is narrowly tailored; and

(5) no less restrictive means exist to achieve the compelling interest.

Credits
Added June 12, 2013, effective July 1, 2013.

Editors' Notes

HISTORICAL NOTES
Former Rule 2.19 was renumbered as Rule 2.18.

17C A. R. S. Super. Ct. Local Prac. Rules, Maricopa County, Rule 2.19, AZ ST MARICOPA SUPER CT Rule 2.19
Current with amendments received through 02/1/19

END OF DOCUMENT

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLORADO

***

LOCAL RULES OF PRACTICE

***

Effective December 1, 2017

X. GENERAL PROVISIONS

D.C.COLO.LCrR 46.1
COURT REGISTRY

(a) **Deposit of Funds in Court Registry.** Unless a statute requires otherwise, funds shall be tendered to the court or its officers for deposit into the registry only pursuant to court order. A depositor shall identify in writing the order authorizing deposit by reference to the relevant docket entry in CM/ECF.

(b) **Investment of Funds in Registry.** Unless otherwise ordered, no deposit into an interest bearing account shall be permitted and the Court Registry Investment System (CRIS) shall be the authorized investment mechanism.

(c) **Registry Fee.** Registry fees shall be deducted under 28 U.S.C. § 1914 and any regulation promulgated thereunder.

(d) **Disbursement of Funds in Registry.** Funds in the registry shall be disbursed only by court order. A proposed order to disburse funds shall include the payee's full name and complete address and the amount to be disbursed. If more than $10.00 of interest is to be disbursed, the proposed order shall be accompanied by a completed IRS Form W-9 (which shall be filed under restricted access). The party requesting disbursement of funds shall provide to the clerk a copy of the order authorizing disbursement including its CM/ECF docket number.

D.C.COLO.LCrR 47.1
PUBLIC ACCESS TO CASES, DOCUMENTS, AND PROCEEDINGS

(a) **Policy.** Unless restricted by statute, rule of criminal procedure, or order, the public shall have access to all cases and documents filed with the court and all court proceedings.

(b) **Levels of Restriction.** Unless otherwise ordered, there are four levels of restriction. Level 1 limits access to the parties and the court. Level 2 limits access to the filing party, the affected defendant(s), the government, and the court. Level 3 limits access to the filing party and the court. Level 4 limits access to the court.

(c) **Motion to Restrict.** Unless otherwise ordered, a motion to restrict public access shall be open to public inspection. The motion shall identify the case, the document, or the proceeding for which restriction is sought. The motion shall be accompanied by a brief that is filed as a restricted document. The brief shall:

(1) identify the case, document, or the proceeding for which restriction is sought;

(2) address the interest to be protected and why such interest outweighs the presumption of public access (stipulations between the parties or stipulated protective orders with regard to discovery, alone, are insufficient to justify restriction);

(3) identify a clearly defined and serious injury that would result if access is not restricted;

(4) explain why no alternative to restriction is practicable or why only restriction will adequately protect the interest in question (e.g., redaction, summarization, restricted access to exhibits or portions of exhibits); and

(5) identify the level of restriction sought.

(d) Public Notice of Motions to Restrict; Objections. Notice of the filing of such motion shall be posted on the court's website on the court business day following the filing of the motion. Any person may file an objection to the motion to restrict no later than three court business days after posting. Absent exigent circumstances, no ruling on a motion to restrict shall be made until the time for objection has passed. The absence of objection alone shall not result in the granting of the motion.

(e) Filing Restricted Documents. A document subject to a motion to restrict shall be filed as a restricted document, and shall be subject to restriction until the motion is determined by the court. If a document is filed as a restricted document without an accompanying motion to restrict, it shall retain a Level 1 restriction for 14 days. If no motion to restrict is filed within such time period, the access restriction shall expire and the document shall be open to public inspection.

(f) Documents Subject to Presumptive Restriction. The following documents shall be filed subject to the specified presumptive restriction levels without the order of a judicial officer:

(1) Documents that shall be filed with Level 2 restriction (access limited to the filing party, the affected defendant(s), the government, and the court):

(A) Presentence reports and addenda and related documents, including correspondence or other documents related to sentencing, including letters, reports, certificates, awards, photographs, or other documents pertaining to the defendant.

(B) Probation or supervised release violation reports.

(C) Statements of reasons in judgments in criminal cases.

(D) Information provided by a person or entity posting bond.

(2) Documents that shall be filed with Level 3 restriction (access limited to the filing party and the court):

(A) Unexecuted bond revocation orders and supporting documents. Unless otherwise ordered, this restriction shall expire on the execution of the order.

(B) Documents and orders under the Criminal Justice Act. Unless otherwise ordered, this restriction shall expire on the entry of final judgment.

(C) Indictments. Unless otherwise ordered, this restriction shall expire on the earlier of the arrest or initial appearance of the first or only defendant.

(3) Documents that shall be filed with Level 4 restriction (access limited to the court):

(A) Pretrial services reports (bail reports).

(B) Petitions for summonses or arrest warrants based upon petitions for revocation of probation or supervised release. Unless otherwise ordered, this restriction shall expire on the service of the summons or execution of the warrant.

(g) Cases Subject to Presumptive Restriction. A case (including the docket sheet, case number and caption) initiated by any of the following documents shall be filed under Level 4 restriction:

(1) Unexecuted summonses and warrants of any kind and supporting documents. Unless otherwise ordered, this restriction shall expire on the execution of the summonses or warrants.

(2) Pen register and trap/trace orders and supporting documents. This restriction shall remain in effect unless otherwise ordered.

(3) Orders and supporting documents under 18 U.S.C. § 2703(d). Unless otherwise ordered, this restriction shall expire after 90 days.

(4) Title III and clone pager orders and supporting documents. This restriction shall remain in effect unless otherwise ordered.

(5) Grand Jury material and other documents with restricted access pursuant to statute. This restriction shall remain in effect unless otherwise ordered.

D.C.COLO.LCrR 49.1
FORMATTING, SIGNATURES, FILING, AND SERVING PLEADINGS AND DOCUMENTS

(a) **Electronic Formatting, Signatures, and Filing.** Unless otherwise provided in this rule or otherwise ordered, each pleading and document filed in a criminal case shall be formatted, signed, and filed electronically in CM/ECF as prescribed by the Electronic Case Filing Procedures, incorporated in these rules and available HERE.

(b) **Exceptions to Electronic Formatting and Filing.**

(1) **Materials that Cannot Be Converted to Electronic Form.** An item such as a videotape, audiotape, etc. shall be filed by delivery to the clerk's office.

(2) **Pleadings and Documents by Unrepresented Prisoners**. These shall be filed in paper.

(3) **Pleadings and Documents by Other Unrepresented Parties.** Unless otherwise ordered, these shall be filed in paper.

(4) **E-mailed Documents.** The Electronic Case Filing Procedures specify the documents that shall be e-mailed to the court to open a case HERE.

(c) **Formatting and Filing of Pleadings and Documents and Maintenance of Contact Information by an Unrepresented Prisoner or Party.** If not filed electronically, an unrepresented prisoner or party shall use the procedures, forms, and instructions posted on the court's website HERE. If the unrepresented party is a prisoner and is unable to access the website, on request the clerk shall provide copies of the necessary procedures, forms, and instructions. Notice of change of name, mailing address, or telephone number of an unrepresented prisoner or party shall be filed not later than five days after the change. A user of CM/ECF shall keep his/her primary and alternative e-mail address current. Instructions for a user to update and maintain his/her CM/ECF account are HERE.