Colorado Adopts Statewide Rule Governing Public Access to Judicial Records in Criminal Cases

By Steve Zansberg

The indisputably terrible, horrible, no good, very bad *year* 2020 ended with at least one bright spot in Colorado: on December 17, the state Supreme Court formally adopted a new Rule of Criminal Procedure (Colo.R.Cr.P. 55.1) that sets both procedural and substantive standards for when a trial judge may "suppress" (or, in common parlance, "seal" from public view) judicial records on file in criminal cases. Regrettably, the new rule (which takes effect on May10, 2021) falls short of imposing the constitutional requirements announced in the *Richmond Newspapers* and *Press-Enterprise* cases. Nevertheless, as explained below, the adoption of Rule 55.1 marks a tremendous leap forward for Colorado courts, which heretofore granted unfettered discretion to trial court judges to deny the public's presumptive right to inspect judicial records.

Background: The Need for the Rule Becomes Clear

The effort that culminated in the adoption of new Rule 55.1 began more than twenty years earlier, when Tom Kelley, then-President of the Colorado Freedom of Information Coalition (and then a partner at "Faegre & Benson" in Denver) importuned the Justices of the Colorado Supreme Court to adopt a rule of criminal procedure to address closure of court proceedings, case files, and various restrictions on the press in covering criminal proceedings. That proposal was roundly ignored at the time. A similar proposal, submitted in 2016, was similarly turned away by the Colorado Supreme Court's Rules of Criminal Procedure Committee, as unnecessary.

Purists might argue that if any plaintiff wins, it might bring down some bricks making up the wall of actual malice, and weaken our fortress in the long run. But the

For decades, news organizations had repeatedly urged Colorado trial court judges to apply so-called "*Press-Enterprise* standard" which requires that, to "suppress" criminal court records, a sealing order must be "narrowly tailored to" promote "an overriding state interest""of the highest order" and a further finding that "no less restrictive means" exist to protect that interest. And in multiple cases trial court judges had applied that test. But each time a criminal case of national interest was prosecuted in Colorado state courts – e.g., the short-lived rape prosecution of the late NBA star Kobe Bryant, the prosecution of Aurora Theater Shooting killer James Egan Holmes, and the Planned Parenthood clinic shooter Robert Lewis Dear (who has repeatedly been deemed incompetent to stand trial) – the media petitioners, prosecutors and defense counsel were left without any state appellate precedent establishing which standard for sealing applied. Defense counsel and prosecutors urged trial court judges to apply the

discretionary "balance of interests" standard of the common law, or the essentially identical "contrary to the public interest" standard of the Colorado Criminal Justice Records Act.

The press had repeatedly succeeded in convincing trial court judges that a 1966 Colorado Supreme Court case, *Times-Call Publishing Co. v. Wingfield,* 410 P.2d 511 (Colo. 1966), had *held* that under both the First Amendment and the even more speech-protective provision of Colorado's state constitution, judicial records in criminal cases could not be sealed without satisfying the same standard (and following the same procedures) for closure of a judicial proceeding. After all, in *Wingfield*, the Supreme Court refused to apply the literal interpretation of a state statute that expressly reserved the right to access judicial records only to the parties of record and their attorneys, because to do so, the Court said, would "raise serious constitutional questions concerning . . . the freedom of the press." In other words, to avoid such a constitutional infirmity (in erecting an absolute bar to public inspection of court records), the Colorado Supreme Court interpreted the statute to allow judicial discretion to allow public access on a case-by-case basis.

Then, in 2018, the Colorado Supreme Court rejected that precedent, by pretending that it did not say what it did.

Colorado's Supreme Court Rejects Any Constitutional Protection for the Public's Right to Inspect Judicial Records

The issue came before the Colorado Supreme Court in the case of one of the three death row inmates in the state, Sir Mario Owens. The trial judge had sealed all post-conviction pleadings and court transcripts. *The Colorado Independent*, a now-defunct online newspaper, sought access to pleadings, the transcript of a closed hearing, and the court's ruling on the defendant's motion to disqualify the District Attorney's Office on grounds of conflict of interest and prosecutorial misconduct. Apparently that motion was denied, but the case's docket did not even so indicate.

In a two-page ruling on the motion to unseal, the trial judge granted access to only scant factual allegations of the defendant's disqualification motion, while denying the unsealing of *any* arguments or legal citations, the entire DA's brief in opposition, the entire transcript of the closed court hearing conducted on the defendant's motion, and the entire order by which the Court had denied the defendant's motion. The court's order stated only that "countervailing considerations" justified its decision, while providing no indication of what they were. Also, no mention whatsoever was made of the inadequacy of any alternative means to protect whatever state interests were allegedly threatened by public disclosure.

The Colorado Independent sought an extraordinary writ from Colorado's Supreme Court to review that ruling. After granting that writ, and without any oral argument, Colorado's Supreme Court issued a unanimous terse (5-page) order affirming the trial court's decision. The Colorado Supreme Court held that the First Amendment provides no presumptive right,

whatsoever, for the public to inspect judicial records; the First Amendment, the Court declared, protects only the public's presumptive right to attend judicial proceedings.

The Colorado Independent petitioned for *certiorari* review supported by some 78 amici, including 21 Constitutional Law and Journalism Scholars and 56 media organizations. Nevertheless, the U.S. Supreme Court denied review.

Thus, with Colorado Supreme Court's ruling in *In re Owens* left standing, Colorado became the only state (or federal) court in the nation to expressly disavow any constitutional protection for the public's right to monitor the workings of its judicial branch by recognizing a constitutionally-based presumption of public access to judicial records.

Also in 2018, *Denver Post* investigative reporter David Migoya published a series of reports, "Shrouded Justice," that further embarrassed the state judiciary: Migoya exposed that more than 6,000 criminal case files were entirely sealed from public view, some not even appearing on any public docket, and most without any publicly available order that sealed the case file.

Dual Track Approach Adopted

In the immediate aftermath of the U.S. Supreme Court's denial of *certiorari,* three organizations – the Colorado Press Association, the Colorado Broadcasters Association, and the Colorado Freedom of Information Coalition – initiated a dual track approach: encouraging and lobbying lawmakers in the General Assembly to enact legislation that would impose the "*Press-Enterprise* standards" to justify the sealing of state court files, and simultaneously urging the state Judicial Branch, for the third time, to adopt that standard by way of a rule of criminal procedure. In identical proposals to both branches of government the three organizations advocated for the adoption of the ABA's Criminal Justice Standard 8-5.2 ("Fair Trial and Public Discourse"), which applies the *Press-Enterprise* standard with equal force to closure of judicial *proceedings* and sealing of court *records*. The proposal to the Judicial Department also cited and provided copies of existing court rules in several states (including California and Arizona as "best practices") that codify the *Press-Enterprise* standards.

The Rule is Proposed, Commented Upon, and Revised Prior to Adoption

In February 2020, the Rules of Criminal Procedure Committee tendered its proposed rule to the Colorado Supreme Court for adoption. The proposal was decidedly weaker than the ABA Criminal Justice Standard. Among other travesties, it required any hearing held on a motion to suppress court records be closed to the public, and it mandated that all filed pleadings related to a motion to suppress court records themselves be suppressed from public inspection.

The three organizations that had sought the new rule submitted an extensive set of written comments on the proposed rule, again urging the adoption of the ABA's Standard that is, after all, grounded on the First Amendment. On October 13, 2020, the Justices heard oral comments, via Zoom, on the proposed rule.

Two months later, on December 17, 2020, the Colorado Supreme Court formally adopted new Rule of Criminal Procedure 55.1. The rule (when it takes effect in May) requires that any time a trial court judge grants any motion (or acts *sua sponte*) to suppress from public inspection any judicial record on file in any criminal case, (s)he must issue a written order that is open to the public. That written order must include written findings that:

- specifically identifies one or more substantial interests served by making the court record inaccessible to the public or by allowing only a redacted copy of it to be accessible to the public;
- finds that no less restrictive means than making the record inaccessible to the public or allowing only a redacted copy of it to be accessible to the public exists to achieve or protect any substantial interests identified; and
- concludes that any substantial interests identified override the presumptive public access to the court record or to an unredacted copy of it.
- Furthermore, the Rule requires that any order suppressing any portion of any court record in a criminal case "shall indicate a date or event certain by which the order will expire. That date or event shall be considered the order's expiration date or event." The rule allows only the parties (not any member of the public) to seek the lifting a record suppression order prior to the expiration date.

A Marked Improvement in Public Access

Although Colorado's newly adopted rule falls short of the *Press-Enterprise* standard in some significant respects (the governmental interest supporting sealing need not be a "compelling" one or "of the highest order," and appellate review of any suppression order will presumably be for "abuse of discretion," not *de novo*), the adoption of a statewide rule – one that trial judges must abide by – that requires detailed written findings and a mandated "expiration date" for any suppression order, undoubtedly represents a major step forward, and is therefore "truly a cause for celebration." It remains to be seen how well the new rule will operate in practice.

(*Personal note: The new rule takes effect on the 30th anniversary of my first date with a lovely and brilliant woman I met in law school, Lisa Weil, whom I married two years later. This year, we'll have even more to celebrate on May 10.)*

Steve Zansberg opened The Law Office of Steven D. Zansberg, in Denver, on January 19, 2021.