



The Voice for Open Government in Colorado

1120 Lincoln St., Suite 912
Denver, CO 80203
720-274-7177
coloradofoic@gmail.com
@CoFOIC on Twitter

Steve Zansberg
(303) 376-2409
szansberg@skslaw.com

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★★★ CORRECTED/UPDATED VERSION ★★★

Hon. John Dailey, Chair
Colorado Supreme Court
Rules of Criminal Procedure Committee
c/o Colorado Supreme Court
Ralph R. Carr Judicial Center
2 E. 14th Ave.
Denver, CO 80203

Re: Proposed New Rule of Criminal Procedure

Dear Judge Dailey and Members of the Criminal Procedure Committee:

I write as the President of the Colorado Freedom of Information Coalition, an association of organizations and individuals committed to furthering and increasing government transparency in the State of Colorado. Among the constituent member organizations of the CFOIC Coalition member organizations include the American Civil Liberties Union of Colorado, the Associated Press, BillTrack 50, Chalkbeat Colorado, the Colorado Bar Association, the Colorado Broadcasters Association, Colorado Common Cause, Colorado Ethics Watch, *The Colorado Independent*, the Colorado Press Association, Colorado Press Women, the Colorado Springs Independent, the Colorado Springs Press Association, the Colorado Student Media Association, the Independence Institute, Krystal Broadcasting, Inc., the League of Women Voters of Colorado, the Professional Private Investigators Association of Colorado, Rocky Mountain PBS I-News and the Society of Professional Journalists. Members also include newspapers affiliated with the Colorado Press Association and broadcast stations affiliated with the Colorado Broadcasters Association. **The views and proposal set forth herein do not necessarily reflect that of CFOIC's member organizations or individuals.**

Attached hereto, for the Committee's consideration, is a proposed new Rule of Criminal Procedure governing access to the court file and all documents therein, in criminal matters adjudicated in Colorado state courts. The proposed rule is modeled after, and practically a verbatim copy of, the American Bar Association's Standard of Criminal Justice, Fair Trial and Public Disclosure Rule No. 8-5.32 (2013). The prior version of this Criminal Justice Standard, § 8-3.2, was adopted by the Colorado Supreme Court in *Star Journal Publ'g Corp. v. Cty. Ct.*, 591 P.2d 1028 (Colo. 1979). That case addressed only the question of closure of a court proceeding (a preliminary hearing) in a criminal case, but even at that time the earlier version of

Standard 8-3.2 declared that the same standard for closing a courtroom *proceeding* applied to all judicial *records* in the court's file.

There is a decided need for the Rules Committee to adopt the proposed Rule we have tendered. As members of the Committee are themselves familiar, in the recent past, Colorado state courts have adjudicated several high-profile criminal cases of local, national, and even international interest (*e.g.*, *People v. James Eagan Holmes*, *People v. Robert Lewis Dear*, *People v. Kobe Bean Bryant*, to name a few). Ironically, in the ordinary run-of-the-mill criminal case, including homicides and other felony crimes, the entire court file is almost always unsuppressed and open to public inspection; yet in those exceptional cases where the public interest is greatest, courts have granted motions by defendants and prosecutors to suppress, and to maintain under suppression, numerous documents – not only at the outset of the case, but for months after a case has been filed. When members of the press, acting as surrogates for the public, have filed motions in these cases seeking the unsealing or unsuppression of documents in the court file, the parties often dispute not only whether unsealing should occur, but more importantly, *by what standard* such motions are to be adjudicated.

While it is incontestable that a Colorado statute, § 24-72-301, *et seq.*, the Colorado Criminal Justice Records Act, sets forth a standard --“contrary to the public interest”-- for public disclosure of “criminal justice records,” and includes among the custodians of such records “courts of law,” it is also incontestable that the Colorado Supreme Court, in 1966, recognized that a statutory prohibition on access to records on file in a court of law (even in a civil case) violates the rights of the free press and the public under the First Amendment to the Constitution of the United States. *See Times-Call Publ'g Co. v. Wingfield*, 410 P.2d 511 (Colo. 1966). Thus, whether it be under the balancing of all competing interests, as required by the CCJRA (*see In re Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892 (Colo. 2008), as Judge Samour did in the *People v. Holmes* case (courtesy copy attached), or directly under the Fourteenth Amendment's incorporation of the First Amendment, it is incumbent upon a trial court judge to satisfy the standards imposed by the First Amendment prior to restricting the public's fundamental rights thereunder.

While the press, the public, the prosecutor, and the defendant will inevitably disagree about how such a constitutionally-required standard should be applied in a particular case, or with respect to particular documents in a court file, it would greatly behoove all parties, the public, and the judiciary, to have this Committee recommend for adoption a Rule of Criminal Procedure that sets forth the standard that is to be applied in such cases. Such a standard has been adopted by the Civil Rules Committee with respect to records on file in civil cases. *See* C.R.C.P. § 121(c); 1-5. Notably, the Committee that promulgated the Statewide Practice Standards contained in Chapter 17A in 1988 commented that the Practice Standard for “limitation of access to court files” in civil cases

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was made necessary by [the] lack of uniformity throughout the districts concerning access to court files. Some districts permitted free access after service of process was obtained. Others, particularly in malpractice or domestic relations cases, almost routinely prohibited access to court file information. The Committee deemed it preferable to have machinery available for limitation in an appropriate case, but also a means for other entities having interest in the litigation, including the media, to have access.

It is on this same basis that we commend the attached Rule of Criminal Procedure to this Committee's consideration.

Please do not hesitate to contact me if I can be of any assistance to the Committee as it considers the proposed rule attached hereto.

Sincerely,



Steven D. Zansberg
President
Colorado Freedom of Information Coalition

SDZ/cdh
Enclosure

cc: Thomas R. Raynes, Executive Director, District Attorneys Council
Douglas Wilson, State Public Defender
Maureen Cain, Policy Director, Colorado Criminal Defense Bar (cainmoya@aol.com)