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April 3, 2020

Hon. Nathan B. Coats (Chief Justice)
All Associate Justices
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed Rule 55.1 of the Colorado Rules of Criminal Procedure

Dear Chief Justice and all Associate Justices:

As President of the Colorado Freedom of Information Coalition ("CFOIC")[1], and on its behalf, I respectfully offer these public comments on the Proposed Rule 55.1. The Colorado Broadcasters Association ("CBA") and the Colorado Press Association ("CPA") also join in the comments stated herein.

Introduction

The original impetus for the proposed Rule was a proposal I submitted in November 2016, on behalf of the CFOIC, to the Rules of Criminal Procedure Committee, requesting the adoption of a uniform substantive standard to guide trial court judges' decisions whether to deny public access to judicial records on file in criminal cases.

[1]Coalition members include: American Civil Liberties Union of Colorado, Associated Press, BillTrack 50, Chalkbeat Colorado, Colorado Association of Libraries Intellectual Freedom Committee, Colorado Bar Association, Colorado Broadcasters Association, Colorado Common Cause, *The Colorado Independent*, Colorado Press Association, Colorado Press Women, Colorado Public Radio, Colorado Society of Private Investigators, *Colorado Springs Independent*, Colorado Springs Press Association, Colorado Student Media Association, *Delta County Citizen Report*, 5280 Magazine, Independence Institute, KDNK Community Radio, , Professional Private Investigators Association of Colorado, Rocky Mountain PBS, and Colorado Society of Professional Journalists. The views expressed herein do not necessarily reflect those of all member organizations..

The CFOIC has consistently urged this Court to adopt the same standard for "suppressing" or "sealing" judicial records as the one promulgated by the American Bar Association's Criminal Justice Standards Committee, which has also been held by every federal court of appeal to have resolved the question, as required by the First Amendment.[2]

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[2] *See In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984) ("[T]he public has a First Amendment right of access to. . . the documents on which . . . bail decisions are based. . ."); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) ("[A] qualified First Amendment right of access extends to . . . written documents filed in connection with pretrial motions . . . ."); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) ("We conclude that the First Amendment right of access . . . extend[s] to bills of particulars"); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("[T]he First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases . . ."); *United States v. Edwards*, 823 F.2d 111, 118 (5th Cir. 1987) ("We conclude that the first amendment guarantees a limited right of access to the record of closed proceedings concerning potential jury misconduct"); *In re Applications of NBC*, 828 F.2d 340, 344 (6th Cir. 1987) (concluding that there is a First Amendment "right of the public and representatives of 'the media' to have access to documents filed in a district court at the preliminary stages of a criminal prosecution"); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) ("[T]his court has held that the first amendment right of access extends to documents submitted in connection with a judicial proceeding"); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988) ("[W]e hold that the qualified first amendment right of public access extends to the documents filed in support of search warrants"); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("We . . . find that the public and press have a first amendment right of access to pretrial documents in general."); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1028-31 (11th Cir. 2005) (mandating First Amendment access to sealed docket and judicial records in criminal case); *Washington Post v. Robinson*, 935 F.2d 282, 287-88, 290 U.S. App. D.C. 116 (D.C. Cir. 1991) (holding that the "first amendment guarantees . . . the public a general right of access to . . . court documents unless there are compelling reasons demonstrating why it cannot be observed"); *cf. United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) ("assum[ing] without deciding that [public] access to judicial documents is governed by the analysis articulated in *Press-Enterprise II*").

In addition, a dozen states' highest courts have similarly recognized a presumption of public access to judicial records arising under the First Amendment, and/or their state's constitution.

This Court declined to recognize such a constitutionally based right in *In re People v. Owens*, 2018CO55. Accordingly, the citations set forth below are all from courts applying the common law right of public access.

Regrettably, the proposed Rule does not do so, but instead, proposes a markedly lower standard (a "substantial" government interest) for denial of the public's presumptive right of access to judicial records.

The CFOIC appreciates that in March 2019 the Chief Justice asked the Rules of Criminal Procedure Committee to reconsider CFOIC's earlier-rejected proposal, and to make recommendations to this Court: (a) whether it should adopt a statewide standard, in the form of a rule, to govern trial court judges' decisions regarding sealing court records, and (b) if so, what should that substantive standard be? Our organization believes that the affirmative answer to the first question is a tremendous step forward for attorneys, the parties, judges, and the public – all of whom play an active role in the criminal justice system. At the same time, as discussed further below, we have some concerns with the Committee's proposed answer to the second question. We appreciate this opportunity to voice those concerns and we trust that you will give them due consideration as you move forward in the rule-making process.

Requiring Detailed Written Findings and Explanations for Access Denials is a Well Accepted Practice of Other Courts[3]

Procedurally, the Rule's requirement that any judicial order restricting public access to a judicial record must be predicated upon a written order (which articulates the *reasons* for the decision, and includes the determination that no "less restrictive means" can adequately protect the interest threatened by disclosure) is a tremendous step forward, not only for the People, but also for the credibility of the judicial branch. Prior rulings from state court judges have denied the public's right to access court records in high-profile criminal cases based on a written order declaring only that there were unstated "countervailing considerations," Order re Motion to Unseal Judicial Records in the Court File, *People v. Owens*, No. 06-cr-705, at 3 (Arapahoe Cty. Dist. Ct. Jan. 12, 2018) (Munch, J.), or with no written order whatsoever. *See, e.g., People v. Frazee*, No. 18-cr-330 (Teller Cty. Dist. Ct. Mar. 4, 2019) (Sells, J.) (denying ABC News' request to inspect exhibits admitted into evidence during an open preliminary hearing, with no written order). A written order articulating the court's justification for denying public access not only allows

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[3] *See, e.g., United States v. Bacon*, 950 F.3d 1286 n.5 (10th Cir. 2020) (under common law right of access, courts must "explicitly undergird their conclusions with fact-specific analysis") (citation omitted); *United States v. Sealed Search Warrants*, 868 F.3d 385, 397 (5th Cir. 2017) (under common law right of access, "a district court should at least articulate any reasons that would support sealing [a judicial document . . .or . . . explain why it chose to seal [a judicial document].") (internal quotations and citations omitted); *Balt. Sun Co. v. Goetz*, 886 F.2d 60, 66 (4th Cir. 1989) (under common law right of access, trial court must "make findings and conclusions specific enough for appellate review").

for meaningful appellate review, it also (and more fundamentally) promotes the public's belief that the judicial process is fair, well-reasoned, and trustworthy.

The Proposed Rule Undervalues the Benefits of Public Access

It is disappointing that the Rules of Criminal Procedure Committee has recommended that merely "substantial interest" would be sufficient to overcome the public's presumed right of access to judicial records. This standard is significantly less stringent (less protective of the public's presumed right of access) than that contained in the American Bar Association's Criminal Justice Standards, other states' rules,[4] or the holdings of numerous courts applying the common law right of access. *See, e.g.*, *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (applying the common law right of access to judicial records, holding that "[a] party seeking to seal a judicial record . . . bears the burden of . . . meeting the 'compelling reasons' standard") (citation omitted); *Brown v. Advantage Eng'g, Inc*., 960 F.2d 1013, 1016 (11th Cir. 1992) (holding that under the common law right of public access, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to [. . .] that interest ")(citations omitted); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65-66 (4th Cir. 1989) (under common law right of access, "[t]he judicial officer may deny access when sealing is essential to preserve higher values and is narrowly tailored to serve that interest") (internal quotation marks and citation omitted); *Cf. Rufer v. Abbott Labs*., 114 P.3d 1182, 1192 (Wash. 2005) (applying state constitution's open courts provision, similar to art. II, sec. 6 of Colorado's Constitution, holding that "all documents filed with the trial court are open absent compelling interests to the contrary").

As the American Bar Association's Committee on Criminal Justice Standard has explained, "the protection of an 'overriding interest' other than [a] fair trial may support a closure order. . . The term 'overriding interest' is not the unanimous choice of the cases. The high court cases have also used 'compelling interest,' and 'higher values' to characterize those interests that will support denial of access." ABA STANDARDS FOR CRIMINAL JUSTICE – FAIR TRIAL AND FREE PRESS, 30 (3d ed. 1992) (footnotes and citations omitted).

Lowering the standard for denial of public access to court records – the documents that, in many circumstances, form the basis for judicial action – to merely a "substantial interest" (such as efficient operations of the courts, or the avoidance of administrative

[4] *See, e.g.*, Ariz. R. Civ. P. Rule 5.4 (2019) ("overriding interest"); Cal. R. Court Rule 2.550 (2019) ("overriding interest"); Tex. R. Civ. P. Rule 76a (2019) (requiring a judicial finding that "a specific, serious and substantial interest clearly outweighs [the] presumption of openness"); *see also* D.C.COLO.LCrR 47.1(c)(2) & (3) (2019) (requiring party seeking to seal a court record to demonstrate that "the interest protected . . . outweighs the presumption of public access" and "identify a clearly defined and *serious injury* that would result if access is not restricted") (emphasis added).

burdens on court personnel) would seriously undermine the strength of that presumption. Doing so, in turn, would harm not only the public, but the judicial branch itself. Openness "enhances both the basic fairness of the criminal [justice system] and the appearance of fairness so *essential to public confidence in the system*." *Press Enterprise Co. v. Superior Ct.*, 464 U.S. 50, 508 (1984) (emphasis added); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 (1980) ("Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."); *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988) (public access "promote[s] trustworthiness of the judicial process . . . including a better perception of fairness"); *U.S. v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) ("Transparency is pivotal to public perception of the judiciary's legitimacy and independence."). As Justice Samour wrote (in the final order he issued as a District Court Judge): "The justice system, which is one of the bedrocks of this nation's democracy, cannot survive if the public loses trust in it, and the public does not trust that which is concealed from it." Order Regarding The Denver Post's Amended/Revised Petition To Unsuppress Judicial Records In Court File, *People v. Holmes*, No. 12-cr-1522 at 6 (Arapahoe Cty. Dist. Ct. Jun. 29, 2018) (available at https://files.acrobat.com/a/preview/b205a6f3-80e7-4b24-a95f-6d670de3db5a)

Of course, there are, and will always be, circumstances that warrant denying public access to some portions, or even the entirety, of certain judicial records on file in criminal cases – to protect one or more "interest(s) of the highest order" or "overriding interests." No one can seriously dispute that a criminal defendant's constitutionally guaranteed right to a fair trial by an impartial jury is an "interest of the highest order," as the Supreme Court has repeatedly recognized. And, so, too, is the protection of the legitimate privacy rights of minors and the safety other parties involved in criminal prosecutions. Protecting the integrity of an ongoing criminal investigation, or the identities of undercover law enforcement personnel or confidential informants are also undoubtedly sufficiently weighty ("compelling") government interests.[5] In all such cases, *portions* of court records are appropriately withheld from public inspection, provided the requisite judicial findings are made, on the record in a written order, that such *compelling* interests would be harmed by the disclosure and that no less restrictive alternative means adequately protects such interests.

[5] As the commentary to the American Bar Association's Criminal Justice Standards states, "[c]ourts have found the following additional interests sufficient to justify full or partial closure [or sealing]: the privacy rights and safety of jurors, witnesses, and defendants; the continuing nature of government investigations; the security of government buildings; and national security interests more broadly." ABA STANDARDS FOR CRIMINAL JUSTICE – FAIR TRIAL AND PUBLIC DISCLOSURE, 73-74 (4th ed. 2015) (footnotes and citations omitted), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/fair_trial_commentaries.pdf

But because the proposed Rule authorizes the denial of public access to court records upon a judicial finding that a "substantial" interest may be threatened by disclosure, it significantly undervalues the relative weight of the presumption of public access – such that it could be deemed "outweighed" by less-than-compelling governmental interests (i.e., judicial efficiency or avoiding administrative burdens on an underfunded judicial branch). Accordingly, CFOIC, CBA, and CPA urge this honorable Court to reject the proposed standard that must be met before the public's strong presumption of public access to judicial records can be denied, and adopt the "compelling" or "overriding" interest standard instead.

The Proposed Rule Violates the *Presumption* of Public Access to Judicial Records

The other significant concern we have with the proposed Rule is that it automatically places certain court records – the entirety of the motion papers addressing whether public access should be denied – and entire judicial proceedings (any hearing convened to resolve such motions) hidden from public scrutiny. We suspect that the Committee intended to place the motion papers *presumptively* or *temporarily* under seal, to protect the asserted confidential information from being publicly disclosed, until the sealing motion is resolved. But the proposed Rule does not say that; instead it decrees that the *entirety* of the motion papers is not available for public inspection "until otherwise ordered by the Court." Placing the motion papers, in their entirety, outside of public view, without any showing of necessity for such sealing, fundamentally reverses the *presumption of public access* to all judicial records. *See United States v. Bacon*, 950 F.3d 1286, 2020 U.S. App. LEXIS 5377 at *10 (10th Cir. Feb. 21, 2020) (finding plain error because "the district court did not apply the presumption that judicial records should be open to the public") (internal quotation marks and citation omitted); *United States v. Pickard*, 733 F.3d 1297, 1304 (10th Cir. 2013) (collecting case law where trial courts' failure to apply the presumption of access was deemed an abuse of discretion).

All motions and responses thereto contain legal arguments and citations of published judicial precedents; the public disclosure of *those portions* of the motion papers cannot possibly pose a substantial probability of harm to *any* governmental interest. Parties seeking to deny the public's presumptive right to inspect court records should be required to file redacted versions of those papers – removing only the particular information that is sought to be withheld from public inspection – but allowing the public to view the legal arguments in favor of, and against, the requested sealing order.

Moreover, the fact that a motion has been filed that seeks to deny the public's presumptive right to inspect court records must be publicly disclosed, via the entry of that filing on a public docket ("Register of Actions"). *See, e.g., In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988) ("The docketing of motions to . . . seal certain documents provides notice to the public, as well as to the press, that such a motion has been made and, assuming that such motions are docketed sufficiently in advance of a hearing on or the disposition of the motion, affords the public and the press an opportunity to present objections to the motion.").

The Proposed Rule Violates the Public's Presumptive Right, Under the First Amendment, to Attend Judicial Proceedings in Criminal Cases

Similarly, the provision in the proposed Rule that automatically bars the public from attending any hearing on a sealing motion violates the public's presumptive right, under the First Amendment, to attend judicial proceedings in criminal cases – a least with respect to proceedings for which there has been both a tradition of such access and where public access plays a positive role in the functioning of the judicial process. *See, e.g., Star Journal Publishing Co. v. Dist. Ct.*, 591 P.2d 1028 (Colo. 1979); *In re People v. Sigg*, 2013SA21, https://www.courts.state.co.us/Media/Opinion_Docs/13SA21%20-%20In%20re%20People%20v%20Sigg%20Order.pdf. In this respect, the proposed Rule is functionally equivalent to the Massachusetts state law at issue in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). In that case, the state statute required excluding the public from any portion of a criminal trial when a minor victim of sexual assault testified. The Supreme Court declared that statute unconstitutional, because by mandating closure in *all* such instances, it infringed on the public's presumptive right to attend judicial proceedings: "the trial court [must] determine *on a case-by-case basis* whether the State's legitimate concern for the well-being of the minor victim necessitates closure." 457 U.S. at 609.

Merely because the attorneys participating in a hearing on a motion to seal may, at some point therein, discuss the material sought to be kept from the public, does not "necessitate" closure of the *entire* hearing. Indeed, hearings on motions to suppress evidence, even where the evidence sought to be suppressed has been redacted from publicly available pleadings, are routinely conducted in open court. *See Waller v. Georgia*, 467 U.S. 39, 45 (1984) (noting that in *Gannett v. DePasquale*, 443 U.S. 368 (1979) ("a majority of the Justices concluded that the public had a qualified constitutional right to attend [a pretrial suppression hearing]."); *Id.*, 467 U.S. at 48-49 (holding a trial court's order closing *all* of a suppression hearing was unconstitutional: "The court did not consider alternatives to immediate closure *of the entire hearing*: directing the government to provide more detail about its need for closure, *in camera* if necessary, and *closing only those parts of the hearing* that jeopardized the interests advanced") (emphasis added); s*ee also Stackhouse v. People*, 386 P.3d 440, 451 (Colo. 2015) (Marquez, J., dissenting) ("the *Waller* factors evolved to protect the rights of *all stakeholders* to a public trial, and a trial court's careful consideration of these factors will satisfy both the Sixth and the First Amendments. Without satisfying these factors, a trial court cannot constitutionally close a courtroom.")

Mandating the *complete* closure of *all* hearings on *all* motions to deny public access to court records would not only be unconstitutional, it would inevitably erode the public's trust in the trial judges' rulings, even if those court orders are public filed: "[s]ecret hearings—though they be scrupulously fair in reality—are suspect by nature." *Gannett Co. v. DePasquale*, 443 U.S. at 429 (Blackmun, J., concurring in part and dissenting in part); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

The Proposed Rule Fails to Provide the Public Notice or the Opportunity to Assert *Its* Right to Access Judicial Records

Lastly, for members of the public meaningfully to exercise *their rights* of presumptive access to court records (and to judicial proceedings), they must be provided both notice of any proposed denial of access, *and* the opportunity to be heard in opposition to such a request. *See, e.g., Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 609 n.25 (1982) ("representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion") (internal quotation marks and citation omitted); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989) ("If someone desires to inspect the papers, an opportunity must be afforded to voice objections to the denial of access."); *Washington Post Co. v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (the court "must promptly allow interested persons the opportunity to be heard" before ruling on sealing motion); *see also* D.C.COLO.LCrR 47.1(d) (requiring public posting of any motion to seal judicial records for three days before court action can be taken and declaring "[a]ny person may file an objection to [a] motion to restrict [public access]").

In this regard, the proposed Rule falls woefully short: although a party who files a motion to deny public access to a court record must serve it on the opposing party, the Rule does not require, explicitly, that *the public be provided notice* of the request (i.e., by identifying the subject of the motion on the public docket a/k/a Register of Actions). The public's limited access to Registers of Actions, through CoCourts.com or Lexis/Nexis, presently identifies docket entries only as "Motion," "Response," and "Order":

12/21/2018	NOTC	Notice Filed
12/21/2018	MROG	Mandatory Protection Ord Grntd
12/21/2018	MOTN	Motion
12/21/2018	MOTN	Motion
12/21/2018	MOTN	Motion
12/21/2018	MINC	Minute Order (print)
12/24/2018	ORDR	Order

These cryptic identifiers, devoid of any substance, are fundamentally inadequate to apprise the public that one or more parties (or the court, *sua sponte*) is seeking to deny the public's right to monitor the workings of the court. Such entries also violate Rule 55(a)(1) of the Colorado Rules of Criminal Procedure, which expressly requires that "The entries [on a Register of Actions] *shall* . . . show . . . the *complete title* of each document filed." Notably, for more than a decade now, the U.S. District Court in Colorado has utilized a workable system that requires broader public posting of all motions to seal. *See* D.C.COLO.LCrR 47.1(d).

In addition to providing the public with notice of any pending request or court-initiated effort to deny public access, the public must also be given *the opportunity to be heard* in opposition to such a request. *See* authorities cited *supra* at 7-8. By affirmatively

mandating closure of any hearing on a motion to deny public access, the proposed Rule categorically precludes such participation, and is therefore unacceptable.

Line-by-Line Analysis of the Proposed Rule

Attached hereto, for the Court's consideration, is a redlined version of Proposed Rule 55.1 in which certain phrases have been deleted and other phrases added. For each phrase that has been deleted, a footnote explains the reasoning for such deletion.

In offering a series of proposed edits to the Proposed Rule, I intended to build upon the Committee's work, while bringing it closer in substance to the American Bar Association's Criminal Justice Standard 8-5.2 for Fair Trial and Public Discourse (2013). If the Court finds the attached edited version of Proposed Rule 55.1 cumbersome or otherwise difficult for trial judges to administer, the aforementioned ABA standard could be substituted, wholesale, for the Proposed Rule. Alternatively, the Court could adopt, wholesale, a different state's existing rule governing denial of access to judicial records. In our opinion, Rule 2.550 of the California Rules of Court and Rule 5.4 of Arizona's Rules of Civil Procedure are the best articulations of the standards and procedures for overcoming the presumption of public access to judicial records.

Conclusion

For the reasons set forth above, and as incorporated in the attached red-line version of the Proposed Rule, the CFOIC, CBA and CPA respectfully request that the Court adopt a revised version of Proposed Rule 55.1 of the Colorado Rules of Criminal Procedure. The revised version, attached, more closely tracks the approach promulgated by the American Bar Association. Adoption of the revised rule would greatly contribute to the People's trust in this branch of their government and would promote respect for the decisions it generates.

Sincerely,

Steve Zansberg

Steve Zansberg

Enclosure: Redline version of Proposed Rule 55.1

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