

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>DATE FILED: September 15, 2020 10:58 AM CASE NUMBER: 2018CR1121</p> <p>Court Address: Lindsey-Flanigan Courthouse 520 W. Colfax Denver, CO 80204</p>	<p>◆ COURT USE ONLY ◆</p> <hr/> <p>Case No. 18CR1121</p> <p>Courtroom: 5H</p>
<p>THE PEOPLE OF THE STATE OF COLORADO</p> <p>v.</p> <p>ROBERT FELDMAN</p>	
<p>SUPPLEMENTAL ORDER REGARDING EXPANDED MEDIA COVERAGE AND PENDING MOTIONS</p>	

The Court has considered Defendant’s Motion Requesting a Citation to Show Cause as to why Beth Lobel, Esq. Should Not Be Held in Contempt, to Strike Ms. Lobel’s Letter to the Court, and to Restrict Video Access to Mr. Feldman’s Trial to Only Those Persons Who Appear in the Lindsey-Flanigan Courthouse to View the Proceedings in a Specifically Designated and Monitored Video Courtroom (filed September 10, 2020), and the Response to Defendant’s Motion for a Citation to Show Cause, To Strike, and to Restrict Video Access, filed on behalf of NBC News/Dateline NBC and Ms. Beth Lobel (filed on September 11, 2020).

I. Background

On August 26, 2020, 9 News and NBC News/Dateline NBC filed a request for Expanded Media Coverage (EMC) of the trial of this case under Chapter 38, Rule 3 of the Colorado Supreme Court Rules (2010). The Court received a request for Expanded Media Coverage from Court TV on September 14, 2020. 9News, NBC News/Dateline NBC and Court TV will be referred to as “Petitioners.”

The Court received and considered an objection to EMC coverage from the Defendant, filed on September 2, 2020. There was no response by the prosecution.

On September 9, 2020 (September 9th Order), the Court issued an Order Denying the request for EMC of the trial made by 9News, NBC News/Dateline NBC.

When the September 9th Order entered, the only issue was Petitioners' request to have 2 reporters and a video-camera operator physically present in the courtroom to film and broadcast the trial. The Court denied that request because of space limitations necessitated by the COVID-19 pandemic and the inability to allow family members of both Ms. Feldman and Mr. Feldman to observe the trial in person. The Court also noted that in order to insure an open, public trial as required by the Sixth and Fourteenth Amendments to the United States Constitution, the trial would be broadcast by the Court via WebEx, but noted that audio or video recordings of the WebEx feed, or live or delayed broadcast of any of the trial obtained from the WebEx feed was prohibited under the Second Judicial District Joint Order # 19-2 (Joint Order).

On September 10, 2020, the Court received an email and attached letter from Beth R. Lobel, Senior Vice President of NBCUniversal News Group, requesting permission to record the WebEx live stream of the trial. Defendant then filed his Motion later on September 10, 2020. Counsel for Petitioners filed their Response on September 11, 2020.

The Court enters the following Order to clarify its September 9th Order and to address Petitioners' request that they be allowed to record the WebEx streaming of the trial, along with the remaining issues presented.

II. Analysis and Ruling – Recording and Broadcasting the Live WebEx Streaming

The Court's September 9th Order narrowly addressed the issue raised – the physical presence of a video-camera operator and two reporters in the courtroom to record the trial. To try to avoid (rather than foster) confusion, the Court also noted the limitations of the Joint Order, which prohibits the audio or video recording of any proceeding in any courtroom in the Second Judicial District without prior permission from the judge presiding in that matter.

As Petitioners note, the Court cited a single basis for its ruling in the September 9th Order: the presence of three additional people in the courtroom would limit the number of family and friends who could observe the trial in person due to intrinsic space limitations of the courtroom and required social distancing because of the ongoing COVID pandemic.

But, as now presented, a further analysis is appropriate.

A. Background – Denver District Court Functioning During the COVID Pandemic

The Court first notes that the Joint Order was promulgated before the COVID pandemic and in no way envisions (or could have envisioned) the recording of live-streamed videoconference proceedings via WebEx in the COVID era.

When the criminal divisions of the Denver District Court resumed on April 3, 2020, proceedings were conducted via videoconferencing using the WebEx platform. In large part, even up to the present day, criminal dockets in Denver (the vast majority of the work of the criminal courts) are conducted via WebEx, to minimize the movement of individuals into and out of the courtroom, enforce state and federal orders regarding social distancing, and minimize the risk of the courtroom becoming the vector for a COVID outbreak. The use of a platform like WebEx was explicitly permitted by the Colorado Supreme Court by its adoption of revised Crim. P. 43(f), adopted on March 19, 2020 and further amended on March 23, 2020, which permits the Court to conduct certain proceedings in criminal cases “by contemporaneous audio communication.” See Colorado Supreme Court Rule Changes 2020(04) (March 19, 2020) and 2020(05) (March 23, 2020). In certain limited circumstances not covered by amended Crim. P. 43(f), this Court has permitted a defendant to appear in person for certain proceedings, such as a preliminary hearing or a motions hearing in which a witness or witnesses testified. But, by and large, all court business has been conducted via WebEx since April 2020.

Beginning on July 20-21, 2020, the Denver District Court conducted the first two intra-pandemic criminal jury trials. Since August 3, 2020, limited jury trials have been and are being conducted in the Denver District Court. See CHIEF JUDGE ORDER REGARDING SECOND JUDICIAL DISTRICT JURY CALL AND TRIAL PROCEDURES IN RESPONSE TO THE COVID-19 PANDEMIC,

Second Judicial District, Administrative Order 20-08, ¶¶ XII.E¹ and XIII.D.2(a) and (b) and E², (eff. August 2, 2020).

Approximately 10-12 criminal cases have gone to jury trial since August 3, 2020. To the Court's knowledge, all of those criminal trials have been streamed via WebEx to ensure that the trials were public, but no request has been made by any news organization, other entity or individual, to record and/or republish any portion of the WebEx streamed trial by either audio or audiovisual means.

B. Constitutional Right to a Public Trial

A criminally charged defendant has a right to a public trial under both the state and federal Constitutions:

Both the United States and the Colorado Constitutions guarantee criminal defendants the right to a public trial. U.S. Const. amends. VI, XIV; Colo. Const. art. II, § 16. . . . Although the public trial right is enshrined in the Constitution . . . the right itself is not absolute. It may yield to competing interests. . . . The [United States] Supreme Court has cautioned, however, that “[s]uch circumstances will be rare” and that “the balance of interests must be struck with special care.”

People v. Hassen, 351 P.3d 418, 420–21 (Colo. 2015) (internal citations omitted).

The purpose of the constitutional requirement for a public trial is “to guarantee that the accused would be fairly dealt with and not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. As [was] so well said in *In Re Oliver*, 333 U.S. 257, 68 S.Ct. 499,

¹ “A sign will be posted outside the courtroom identifying the number of seats available to the public for observation and/or advising **how members of the public for whom insufficient space is available in the courtroom may access the proceeding via WebEx**. At the judge's discretion, the camera may be disabled, and the proceedings may be available via audio only.”

² “At the Court's discretion, remaining seats will be divided equitably between the victim and the families of the parties. **All other members of the public wishing to observe the trial may, at the Court's discretion, be able to do so via WebEx.**”

“E. Exhibits

a. Positioning of laptop webcam is at the judge's discretion, but if using camera, we recommend focusing it on the witness.

b. Judges may draft an order prohibiting recording of proceedings and sequestration order. May include additional content/restrictions.”

(Emphasis added).

92 L.Ed. 682 (1948): ‘The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the lettre de cachet. * * * Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.’” *Estes v. Texas*, 381 U.S. 532, 538-39 (1965).

Because we are in an ongoing, worldwide pandemic unprecedented since at least 1917-1918, WebEx is a tool that is being used to minimize the risk to all participants of becoming infected with the SARS-CoV-2 virus while, at the same time, ensuring – to the greatest extent possible – that court proceedings and trials are conducted in public. In the Court’s view, the use of WebEx during the COVID pandemic does not represent either an explicit or implicit modification of the Joint Order. Rather, WebEx broadcast of court proceedings and criminal jury trials is presently being used as a temporary, work-around fix-it, intended to guaranty a defendant’s constitutional right to a public trial and to optimize public access to court proceedings, while simultaneously striving to take public health risks into consideration and minimize the risk of spreading COVID to court participants and observers from assembling large groups of people together in a closed, indoor space.

Thus, Petitioner’s request to record and broadcast/republish portions of the trial of this case by recording it from the WebEx live stream is, in effect, a request for EMC, just in a different format – one necessitated by the COVID pandemic. While anyone who signs on to the WebEx link is welcome to observe the trial or other court proceedings, the use of the WebEx as a patched-together ‘solution’ necessitated by the intersection of a worldwide public health crises and the easy availability of video streaming is not an open invitation for any and all to record and redistribute parts or all of a trial or other court proceeding on television, YouTube, Facebook, Instagram, Twitter, Court TV, or by other means.

C. Considerations Regarding Petitioner’s Request to Record and Distribute the WebEx Live Stream of the Trial

“The mere presence of a camera in the courtroom does not in itself deny a defendant due process.” *People v. Wiegard*, 727 P.2d 383, 386 (Colo. App. 1986) (citing *Chandler v. Florida*, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981)). But, “there is no constitutional right to have [live witness] testimony

recorded and broadcast.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 610, 98 S. Ct. 1306, 1318, 55 L. Ed. 2d 570 (1978) (citing *Estes, supra*); see, e.g., *Courtroom Television Network, LLC v. State of New York*, 833 N.E.2d 1197, 1201 (N.Y. 2005).

While the media, including television, “are plainly free to report whatever occurs in open court through their respective media”, *Estes, supra*, 381 U.S. 541-42, “the guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry.” *Id.*, 381 U.S. at 583.

When representatives of the communications media attend trials they have no greater rights than other members of the public. Just as an ordinary citizen might be prohibited from using field glasses or a motion picture camera in the courthouse because by so doing he would interfere with the conduct of the trial, representatives of the press and broadcasting industries are subject to similar limitations when they attend court.

Id., 381 U.S. at 584 (Warren, C.J., concurring).

This case has already generated enormous publicity during the past two years, both locally and nationally. See, e.g.:

- <https://www.9news.com/article/news/investigations/colorado-murder-suspect-robert-feldman-dates-house-arrest/73-9ea09ed2-2cb8-41af-a2f0-7e71a42de6ad> (posted July 9, 2020);

- <https://kdvr.com/news/problem-solvers/accused-killer-renting-out-pool-in-denver-backyard/> (posted July 1, 2020);

- <https://nypost.com/2019/07/23/murder-suspect-can-use-dead-wifes-life-insurance-to-pay-for-his-defense/> (posted July 23, 2019);

- <https://patch.com/colorado/denver/robert-feldmans-tinder-date-contacted-wife-denver-cops> (posted March 5, 2018);

and there is a current Facebook site entitled “Justice for Stacy³ Now.” See <https://www.facebook.com/pg/Justice-for-Stacy-Now-2051920458251395/posts/>

The Court has heard that there is a yard sign at a house in east Denver stating: “Justice for Stacy” and the date of the trial.

³ This refers to Ms. Feldman’s first name, “Stacy”.

And as the United States Supreme Court stated in *Chandler*, “[a]ny criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law.” *Chandler*, 449 U.S. at 574.

Paramount among the Court’s responsibilities is to ensure a fair trial. “While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.” *Estes, supra*, 381 U.S. 541-2.

Having portions of the trial recorded from WebEx by Petitioners and then posted on the internet or replayed during news broadcasts or on Court TV poses the following concerns to the Court:

- “From the moment the trial judge announces that a case will be televised it becomes a *cause celebre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged. . . . And we must remember that realistically it is only the notorious trial which will be broadcast. . . . The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his [or her] vote as to guilt or innocence.” *Estes, supra*, 381 U.S. at 545.

- “[A]wareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension, cause an increased concern about appearances, and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their full attention to their proper functions at trial. Thus, the evil of televised trials. . . lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts

the reliability of the trial process.” *Id.*, at 569-70 (Warren, C.J., concurring) (footnotes omitted).

- “For the most part, however, the most important factor that would draw television to the courtroom would be the nature of the case. The alleged perpetrator of the sensational murder . . . who, like [Defendant], has attracted the public interest would find his trial turned into a vehicle for television. Yet, these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television.” *Id.*, at 584 (Warren, C.J., concurring).

- If portions of the trial of this case were posted on-line or broadcast on the news, it is inevitable that there would be greater awareness of and discussion about the trial among the community. In turn, this would increase the possibility that a family member, friend, or acquaintance of a juror would attempt to discuss the case with the juror during trial. This also increases the risk that something reported in the media that will not be admissible at trial (*e.g.*, Defendant’s alleged renting of the backyard pool at his home or dating while on home detention, etc.) would or could be brought to the attention of a juror.

- The two minor children of Ms. Feldman and the Defendant were present at home when Ms. Feldman was allegedly discovered deceased in the shower with the water running. One of the children will apparently testify at trial. Attention directed to or questions posed to the children by friends and schoolmates, or random strangers, about the death of their mother cannot inure to their benefit in any way. *See C.C. v. D.D.*, 64 Misc. 3d 828, 845, 105 N.Y.S.3d 794, 805 (N.Y. Sup. Ct. 2019). For a school bully to obtain and post clips of the testimony of one of the children, or the Defendant (should he testify), on social media could have devastating results. Given the particular facts and circumstances of this case, this is a particular concern of the Court.

- And, in the end, “[f]reedom of the press, hard-won over the centuries by men [and women] of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth.” *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958). The “atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.” *Estes, supra*, 381 U.S. at 1632.

Considering these principles, and weighing the Petitioners’ interests in recording and broadcasting all or parts of the WebEx live stream of the trial on

television or posting it on line, against the rights of the Defendant, and of Ms. Feldman's children and family, to a fair trial governed by the law and rules of evidence, the Court concludes that **no audio or video recording of any portion of the WebEx streaming of the trial shall be permitted**. If technically possible, this admonition will be posted on the bottom of the screen for anyone who watches the trial on WebEx, and the Court will repeat this admonition each day and after each recess.

III. Request for Show Cause Citation to Ms. Lobel

The Defendant's request for a show cause citation is **denied**.

IV. Defendant's Motion to Restrict Trial Access to Only Those Persons Present in Person

The Defendant's Motion to Restrict is **denied**. There are numerous interested family members, some of whom reside outside of Denver. Because WebEx is being used for the reasons discussed above and to ensure an open, public trial, consistent with the public health requirements of the pandemic, the Court will utilize a computer for WebEx streaming of the trial, subject to the restriction that **no one** may record any portion of the trial by audio or audiovisual means.

The Court lacks both the equipment and space (compliant with COVID requirements) to create a 'video courtroom' with a live-feed into that room as proposed by the Defendant.

Dated: September 15, 2020.

BY THE COURT:



Edward D. Bronfin
District Court Judge

cc: DA (Ms. Washburn and Ms. Conboy); Defense (Mr. Pagliuca and Ms. Menninger); Petitioners (Mr. Zansberg); Rob McCallum; Jon Sarché; by email to Ms. Tiffany Smith (Court TV)