



LAW OFFICE OF
STEVEN D. ZANSBERG, L.L.C.

March 14, 2023

via email [supremecourtrules@judicial.state.co.us]

Chief Justice Brian Boatright
Colorado Supreme Court
Ralph Carr Judicial Center
2 East 14th Avenue
Denver, CO 80203

Re: **Public Comments on Proposed/Draft C.J.D. 23-XX (Live Streaming Coverage of Criminal Court Proceedings in The Trial Courts)**

Dear Chief Justice Boatright:

I am submitting these public comments on behalf of the following three organizations: (1) The Colorado Broadcasters Association, (2) The Colorado Freedom of Information Coalition, and (3) The Colorado Press Association. All three organizations are committed to providing the general public with the accurate and truthful information about the conduct of the state's judicial branch of government, including news reports, commentary, and analyses of proceedings conducted in open court in both criminal and civil cases.

We write to urge your Honor to please revise the proposed Chief Justice Directive (CJD) on Live Streaming Coverage of Criminal Court Proceedings in the Trial Courts, in four ways:

1. Do not prohibit the live streaming of all evidentiary hearings and trials;
2. Do not preclude the live streaming of video-only portrayals of bench conferences and conferrals between counsel and client; and
3. There should be a strong presumption in favor of live streaming of judicial proceedings that are open to the public; trial judges can exercise discretion to allow live streaming of portions of such proceedings.
4. The CJD should apply equally to civil court proceedings.

Each of these requests is discussed below.

1. Do Not Prohibit the Live Streaming of all Evidentiary Hearings and Trials

As proposed, section IV(C) subsections (i) and (ii) categorically — in all cases — prohibit the live streaming of any evidentiary hearing and any trial in any criminal case.

(The authority of trial judges to “expand” live streaming of proceedings, set forth in the second sentence of section IV(A), does not extend to those proceedings that are listed in section IV(C)). Suffice it to say this would be a radical departure from the status quo, in which numerous criminal trials have been live streamed, and, to our knowledge, no court has heretofore encountered any difficulty or problem as a result thereof.

As the Court is aware, live streaming of court proceedings predated the COVID-19 pandemic. Perhaps the most notable criminal trial that was live streamed, and closely watched by viewers not only across the state but across the planet, was [*People v. James Egan Holmes*](#), 12-CR-1522 (Arapahoe Cty. Dist. Ct.), a capital murder case over which Justice Carlos A. Samour presided. That trial, which spanned almost seven months, included 256 witnesses. No one has ever raised any concerns about the fairness of that trial, a lack of decorum, or the contamination of any sequestered witness as a result of exposure to the court’s live WebEx streaming.

During the COVID-19 pandemic, because of health precautions barring public attendance in courtrooms, several high-profile criminal trials were also live streamed over WebEx, and again, not one of them gave rise to any of the concerns cited in Policy Statement (Section I) as justification for limiting live streaming. Among those cases are:

- [*People v. Abcug*](#), No. 19-CR-1074 (Douglas Cty. Dist. Ct.) (mother tried and convicted for attempted kidnapping of her son after succumbing to QAnon conspiracy theories)
- [*People v. Redwine*](#), No. 17-CR-343 (La Plata Cty. Dist. Ct.) (father tried and convicted for murder of his son, whose body has never been recovered)
- [*People v. Erickson*](#), No. 19-CR-451 (Douglas Ct. Dist. Ct.) (trial and conviction of gunman in fatal attack on STEM School Highlands Ranch)
- [*People v. Feldman*](#), No. 18-CR-1121 (Denver Cty. Dist. Ct.) (husband tried and convicted of murdering his first wife)

Moreover, the concern articulated in the Policy Statement, that live streaming “*can potentially jeopardize* the effectiveness of . . . sequestration,” is equally applicable to Expanded Media Coverage, under which the news media is permitted to live stream or contemporaneously broadcast the trial. Yet for decades now, Colorado’s trial judges have had the discretion to authorize Expanded Media Coverage of criminal trials (and the Court of Appeals has held that it is not an abuse of discretion to apply a presumption in favor of such authorization, *People v. Wieghard*, 727 P.2d 383, 386 (Colo. App. 1986), rather than prohibiting such authorization, categorically, as section IV(C)(i) does with respect to live streaming. Once again, the three organizations tendering these public comments are not aware of a single instance in which Expanded Media Coverage of any criminal trial has given rise to a single tainted witness subject to sequestration.

Taken to its logical extreme, that same concern could justify for closing all criminal trials to the public, to prevent anyone attending from “tipping off” or poisoning the testimony of a future sequestered witness. Obviously, such an extreme measure would be unconstitutional. But the point of this somewhat absurd hypothetical is to demonstrate that our criminal justice system generally presumes that all trial participants will abide by judicial orders and admonitions (e.g., jurors and sequestered witnesses are to avoid all press coverage of the case), and any suspected violations of such orders are to be addressed by the court.

Accordingly, we respectfully urge Your Honor to strike subsections (i) and (ii) of section IV(C), and thereby make both evidentiary hearings and trials subject to same discretionary standard set forth sections IV(A) and IV(B).

2. Do Not Preclude Live Streaming of Video-Only Portrayals of Bench Conferences and Conferrals Between Counsel and Client

Subsections (iii) and (iv) of Section IV(C) categorically prohibit live streaming of any image of a criminal court proceeding (including wide shots of the courtroom, such as the one below)



that might include a bench conference or any conferral between counsel and the defendant. Of course, the public is not entitled to “listen in” on the attorney-client privileged communications between a defendant and his/her counsel; nor is there necessarily a right of the public to monitor, contemporaneously, the discussions between counsel and the Court at a bench conference. But the proposed CJD goes further, precluding even the transmission of images of such meetings, even when they are visible to anyone in the courtroom. Were those section of section IV(C) to remain in place, the following examples of routine courtroom coverage would be precluded:



ASSOCIATED PRESS

James Holmes listens to his defense attorney
Tamara Brady in court in 2013.



Clearly, no party’s rights are violated by such photographic, or videotaped but silent, display in which none of the actual communications between the participants is audible. And judges can turn off their microphone and/or use a white noise generator to prohibit anyone in the courtroom from hearing what is said at a bench conference; so too, with live streamed video.

Accordingly, these organizations respectfully ask that the revised CJD make clear that only *the audio portion* of consultations between defendants and their counsel or bench conferences are not to be live streamed.

3. There Should be a Strong Presumption in Favor of Live Streaming Judicial Proceedings That are Open to the Public; Trial Judges Can Exercise Discretion to Allow Live Streaming of Portions of Such Proceedings

As proposed, section IV(A) of the CJD authorizes trial judges to permit live streaming of judicial proceedings in criminal cases, subject to the balancing of interests set forth in section IV(B). This regime suggests that the state judicial branch is “neutral” as to whether such transmission should occur, relegating to each trial judge, on a case-by-case basis to weigh the various factors with no presumption, either way, favoring or disfavoring web access. These organizations respectfully urge your Honor to put your “thumb on the scales” by recognizing a presumption in favor of access.

As mentioned above, Colorado’s Court of Appeals long ago endorsed a presumption in favor of granting press requests for Expanded Media Coverage, which can be overcome by a *showing* (by a preponderance of evidence) that EMC poses a “reasonably likelihood” of interfering with any party’s fair trial rights, would unduly detract from the solemnity, decorum and dignity of the court or would create other adverse effects which would be greater than those caused by traditional media coverage. *People v. Wieghard*, 727 P.2d 383, 386 (Colo. App. 1986) (“the trial court held that the presumption was in favor of open coverage and that a party opposing such coverage would have the burden of proving adverse effects therefrom. . . . We find no abuse of discretion by the trial court here.”).

This presumption recognizes that in general (outside of specific countervailing interests in individual circumstances), the public is served by being able to observe, themselves, the actual conduct of in-court proceedings, and to do so from the comfort of their own homes or offices, without being required to travel (sometimes hundreds of) miles to the courthouse. As former Justice Oliver Wendell Holmes famously declared:

[This] privilege and the *access of the public to the courts* stand in reason upon common ground. . . . It is desirable that the trial of causes should take place *under the public eye*, not because the controversies of one citizen with another are of public concern, but because *it is of the highest moment that those who administer justice should always act under the sense of public responsibility*, and that *every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed*.

Cowley v. Pulsifer, 137 Mass. 392, 394 (1884), (as quoted in *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 n.10 (1979)) (emphases added).

This same rationale applies, with even greater force, to live streaming of judicial proceedings, where members of the public need not rely on the decisions of traditional news media in selecting which cases will be subject to such coverage — indeed, an extremely small percentage (far less than 1%) of all criminal court proceedings are subject to EMC.

One useful lesson that the COVID-19 epidemic taught us is that judicial proceedings can be made available for public viewing (“attendance” in the words of the proposed CJD) over the internet without causing *any* of the negative impacts itemized in section IV(B). Given the tremendous public benefit of providing convenient access to the official public proceedings of government — including the live streaming all oral arguments before this states’ appellate courts and the live-streamed proceedings of the General Assembly and multiple other public bodies across the state — a *presumption* in favor of live streaming of criminal proceedings should be expressly recognized in the CJD.

Accordingly, these organizations respectfully recommend that section IV(A) be reworded as follows:

A. Access to Live Streaming

Absent a finding that live streaming will create negative effects, as identified below in section IV(B), a judicial officer shall provide live streaming during initial bond setting proceedings and any other criminal proceedings, except those limited by this Directive pursuant to section IV(C).

Lastly, as is true of the Administrative Rule that authorizes trial judges to grant Expanded Media Coverage, the CJD should expressly state that judges are empowered to transmit, via live streaming, certain portions of a judicial proceeding while disallowing audio or audio and video transmission of other portions of that same proceeding. One clear example is a lengthy criminal trial in which one or a few witnesses will be minors who are alleged to be victims of sexual assault. The CJD should state, clearly and unmistakably, that authorizing the live streaming of the trial (from opening statements, through both sides' presentation of witness testimony, closing arguments, and the return of jury's verdict) does not prohibit the trial judge from limiting, restricting, or prohibiting the live streaming of discreet portions of that proceeding. (The wording of the EMC rule is "A judge may restrict or limit expanded media coverage as may be necessary to preserve the dignity of the court or to protect the parties, witnesses, or jurors.").

4. The CJD Should Apply Equally to Civil Court Proceedings

As presently proposed, the CJD applies only to judicial proceedings conducted in criminal cases. While the public's interest in the functioning of the criminal justice system is unquestionably a compelling one, many civil cases involve questions of profound public interest and concern, including class actions for violation of consumer protection laws, cases seeking damages for injuries caused by dangerous or unsafe consumer products, or claims asserted against those acting "under color of state law" in violation of constitutionally-guaranteed rights (by way of example only). One currently pending case should suffice to prove the point: in [*Coomer v. Donald J. Trump for President, Inc, et al.*](#), No 2020-cv-34319 (Denver Cty. Dist Ct.), the former head of security for Dominion Voting Systems has sued, among others, One America News ("OAN"), Rudolph Giuliani, and Sidney Powell for allegedly defaming him by stating, repeatedly, that on an alleged Antifa conference call he stated that he intended to subvert the 2020 presidential election that he actually did subvert the results of the 2020 presidential election.

Because the public's interest in observing how this state's judicial branch handles such claims, and myriad others, is of as much significance (and often of greater significance) than that associated with "garden variety" misdemeanor or felony cases, the Court should not limit the reach of the CJD to apply only to criminal court proceedings, just as the Administrative Rule governing authorization of Expanded Media Coverage is not so limited.

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On behalf of the three organizations identified above, I thank your Honor for taking the above thoughts and suggestions into consideration. Please do not hesitate to contact me if you have any questions.

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Warm regards,



Steven D. Zansberg

cc: Justin Sasso, Executive Director, Colorado Broadcasters Association
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