michaels, kathryn

From: dailey, john
Sent: Tuesday, January 5, 2021 12:57 PM
To: michaels, kathryn
Subject: FW: Criminal Rules Matter

Hold onto this email, as I'm expecting another from Mr. Connor, both of which, if received b y Friday, I'll want to include in or packet of materials.

(which reminds me: I better get to those minutes).

From: dailey, john
Sent: Tuesday, January 5, 2021 12:40 PM

Mr. Connor,

Please follow my directions, but give us the information in an email.

From: dailey, john
Sent: Thursday, December 10, 2020 12:30 PM

Mr. Conner,

I have received your phone call, asking the criminal rules committee to consider recommending a rule limiting access in civil cases to information of unproven criminal accusations.

I can understand the frustration you have experienced.

I'm not sure, though, that there's much the criminal rules committee can do. The subject of your proposal may be a matter for the legislature (In this regard, the matter appears more substantive, than procedural, in nature, and our committee deals with procedural matters).

That said, if properly presented to me, I will present it to the criminal rules committee.

By properly presented, I mean, in writing. Near the end of your call, you made a specific proposal to amend the rules. I would ask that you include that proposal in a letter (not an email), addressed to me. The letter should specify 1) the wording of the proposal; 2) the reasons why you think such a revision is necessary; 3) references to other authorities (other states' statutes and rules) supporting the adoption of such a rule; and 4) your address and a phone number at which you can be reached.

I will not promise anything. The committee may decide not to consider the issue further; or it might assign it to a subcommittee for further review or study. I can't say.

I also can't give you a time frame in which the issue will be decided. If the matter is assigned to a subcommittee, it could take months to determine whether to recommend such a rule or not.

Our next meeting is the third Friday of January 2021. If you wish the matter considered right away, please have your letter (and electronic copy of it) to me by the first Friday in January.

After you have presented the proposal to me, as I asked, and I have, in turn, presented it to the committee, either I or a member of the committee will contact you to tell you what the committee has decided.

Sincerely,

John Daniel Dailey

Dear Justice Dailey and the Criminal Rules Committee:

Thank you very much for contacting me and allowing me to email you given the time frame and the communication snafu. I will make my letter as short and sweet as I possibly can. You expressed specific interest in what California did. I'm including two websites as both hyperlinks and pdfs for quick reference. I am also going to do my best to explain what I discovered in my numerous communications with legal professionals in California, and why I believe California did what it did. Please also redact my personal contact information, It is for the Committee's use only.

California Petition for Factual Innocence

It's a criminal procedure that has been adopted for certain civil cases, and more can be found at this link: https://www.shouselaw.com/ca/defense/penal-code/851-8/

The explanation of how it happened and how it extends to the civil court system is found here: https://www.avvo.com/legal-guides/ugc/you-can-expunge-a-civil-court-restraining-order-docket-in-california

I tried to figure out why and how a criminal procedure was granted in civil court, but I ran into these two problems:

1. The attorney who had accomplished this in 2009 died shortly after he was successful. It took me about 2 months to figure this out. Unfortunately, I couldn't find any partners that worked with him in San Francisco. Neither could the Bar Association of that area.
2. I couldn't get a hold of the judge who did this, and apparently no one else could either. The judges refused to make any sort of comments on why. His ruling, however, has been accepted statewide, and now its common practice.

What happened was this:

1. False accusation was levied against the Accused. This accusation apparently claimed that domestic violence was verified. To my best examination of the timeline there was no police record or proof of domestic violence.
2. Accused found a Lawyer willing to convince the Prosecutor to have his client arrested.
3. Prosecutor had the Accused arrested, formally investigated, then dropped the charges.
4. Accused's Lawyer took the formal arrest to the Criminal Court and had everything expunged.
5. Accused's Lawyer took the expungement order in to Civil Court in a Petition called a Petition for Factual Innocence – stating essentially: “There is no proof of a crime. There were multiple investigations unable to find a crime. The DA's office, Police Department and a Private Investigator found no proof of any event having ever occurred. Without any facts to back up the claim, the court must consider my client to be Factually Innocent, and in doing so, must recognize that maintaining a Public Record of an accusation of a severe crime without proof of any kind, is a violation of my client's rights.”

My best explanation of the law is as follows:

The law as it is written is a criminal code law. But it was apparently ruled that a criminal accusation in civil court is still subject to the criminal rules and procedures of the state. I believe it was done to cover partial visibility issues, and some previous federal rulings on the relationship between Criminal and Civil courts. Basically, a quick overview of the following requirements must be met before sealing or expungement is automatically granted:

1. It's dropped before an evidentiary hearing to be ruled on
2. No legitimate physical evidence of guilt was provided
3. and/or if it went forward and the Judge or Jury ruled the accused party innocent

In short, if no facts are presented to prove the accused party guilty, or if the facts presented are ruled to be false or lacking of any substance, then the accused party is "Factually Innocent".

As you can see, the law is almost identical to Colorado's laws of sealing and expungement. In fact, 55.1 strongly resembles it, when combined with 24-72-700 et seq.. Colorado only differs as a result of a repeal and replace of 24-72-300 et seq. with 24-72-700 et seq. which happened in 2014. Prior to the 700 series taking over, non-arrest, non-conviction records were subject to sealing and expungement. Now, only arrest and conviction records are subject to sealing and expungement despite what the Colorado Bar Association, governor's office, legislators, and State Attorney General's office assert.

I believe the rights issues come into play dating as far back as a 1958 Supreme Court Ruling in U.S. Government vs Procter and Gamble 356 U.S. 677 (1958), where Justice Douglas firmly stated that a criminal accusation in civil court is warranted only if there is cause:

"The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case. It is only when the criminal procedure is subverted that 'good cause' for wholesale discovery and production of a grand jury transcript would be warranted. No such showing was made here..."

Basically if there is no cause to a criminal accusation, then it is infringing on the rights of the individual to face a criminal accusation in a civil proceeding, as it denies the accused access to criminal rules and procedures (ignoring police reports, investigator findings, etc..,). No Evidence, No Facts = No Crime. No Crime = There should be no record of a fictional crime.

Since criminal accusations are inherently injurious to the accused party, as is recognized by numerous states (including Colorado in dozens of pieces of legislation and public statements), I'm guessing the only way for the Judge to rectify the damage was to have it all expunged in line with the criminal cases expungement.

In my particular case, this is what happened:

- My uncle found out I was trying to get my grandma diagnosed with dementia to get her a live in nurse.
- Using her for money, house work, etc.. he felt threatened and tried to have me arrested.
- He filed multiple false claims against me with the police. I provided them recorded evidence.
- He then took my Grandma to court, had her sign papers he said were eviction notices, and gave a false swearing stating the following:
    - I have a violent mental condition called aspberger's, that I cannot be in public, and I need to be "touched to be calmed down". He proceeded to give a physical description of the Sandy Hook Shooter
    - My dad would beat my Mom in front of me every day
    - My mom has battered wife syndrome
    - That I was having an episode, and I sucker punched him, sending him to the hospital when he tried to "touch me to calm me down."
    - That there were hospital bills and a police record (not an incident report, a police record which I was informed was only possible if there was an arrest).
    - That I threatened my Grandma's life and was an immediate danger to her.
- My grandma couldn't hear anything throughout the hearing and kept saying "what's going on!" to which the Judge never clarified or answered.
- My uncle tried to get me thrown in jail for observation without evidence, he was refused.
- I was granted a continuance to obtain evidence proving my innocence, and my uncle responded by immediately dropping the complaint.

The facts are:

- I was investigated by Adult Protective Services, the Police and a Private Investigator.

- I maintained numerous records, including hours of recordings of my grandma's growing instability and inability to care for herself, along with my mother and other family members.
- APS sealed their investigations, did not interview me once (I was told this was because I was not suspected of any wrong doing), and at one point the investigator stated to my grandma "You are not being abused or taken advantage of!". These sealed investigations prove my innocence, but the accusation against me claims the opposite of the results of their investigations.
- The Police told my uncle if he filed one more false claim he would be thrown in jail, and made a determination there was no evidence of any wrong doing. They also determined his medical claims were false, as verified by the EMTs. There has been no medical bill claim made against me or my insurance, as there was no harm done to him in any way.
- I have NEVER been arrested in my life, and have never gotten more than a speeding ticket (I've received 2 in my 25 years of driving).
- The Private Investigator I hired (included), concluded that my uncle has undue influence over my grandma, and no actual crime had been committed.
- My mom witnessed his assault on me. She was also a victim of an assault from his own hands (to which she does have pictures).
- The false filings still show up on my PUBLIC record as Criminal Code Actions, separate from oversight by the CBI.
- The false accusation of my "mental condition" (I have no mental condition) was published by the 21st District Court as if it had been verified.
- Both accusations prohibit me from being hired, and my current job is at risk if someone takes them and presses hard while claiming the courts verified I am a danger to the public.

I am not the only person who has been targeted with a massive abuse of the law. According to the law firms and Judges I've contacted across Colorado, false filings are at an all time high, with the vast majority being dropped or dismissed in under 3 months (many evaporating before the evidentiary hearing). In 2017 there were apparently close to 700 with no finding of guilt of any kind in Mesa County.

Additional stories I have verified:

- A mother honked her horn at 7am to get her son out to the car to take him to school. A neighbor got upset and filed a false CPO against the mother, dragging her through 3 months of court before the Judge dismissed the case. The Mother still has vehicular assault as the criminal code complaint on her Public Record – NOT the CBI record, the Public Record.
- A Student from New York who came to CU on a scholarship was kicked out of her Dorm by her roommate to make room for the roommate's friend. The roommate claimed the New York student threatened her with a gun. Trial ensued. New York Student was found innocent. She, however, lost her scholarship, and has the criminal code for assault with a deadly weapon on her Public Record – NOT the CBI record, the Public Record.

It isn't just Emergency Protection Orders which do this, there are other orders, such as emergency eviction orders for landlords as well as protection orders for Repo/Collections Agencies that operate in the exact same function. Landlords do it to build a "false narrative" of a physical threat to circumvent the eviction process, and Collections Agencies do this to immediately get Wage Garnishment orders without having to deal with any sort of communication or settlement.

Obviously you cannot fix the laws which allow this type of process, but I believe you can directly address the visibility of the Criminal Code Accusations based on federal laws, federal rulings, and Colorado's own rules and procedures, as I believe you already have the legal authority to make such changes, and if you don't, then the Civil Rules Committee does.

The reason why I believe you have these powers:

The Criminal and Civil Rules Committees are allowed to make sweeping rules of procedure based upon established federal and state laws without the need for the legislature to make any new laws.

Here are some proposed suggestions or ideas:

- The California Procedure as it is written.

- An addendum or explanation to the current system to include this wording, or something similar: "All state agencies, divisions and courts must respect the visibility of any criminal incident, investigation, court case, in accordance with Criminal Rules and Procedure. In addition, the Colorado Criminal Courts will respect the visibility of an incident of any state agency outside of the criminal court system. This is made in recognition of Federal and State rulings and positions on the inherent harm of partial visibility, especially in cases where partial visibility provides a false or misleading impression of the incident."

- "Criminal Code accusations must be processed with Criminal Rules and Procedures, in keeping with the 1958 Supreme Court Ruling in US Government vs Procter and Gamble, regardless of whether that Criminal Code Accusation is in Criminal Court, Civil Court or handled internally via a State Agency."

- "All records of Criminal Code Accusations must be maintained by the CBI and treated as a Record of a Criminal Matter, regardless of the hearing, and may not be placed in the Public Record. All Criminal Code Accusations in the Public Record or records of State Agencies must be placed under the oversight of, and transferred to, the CBI. All Criminal Accusations and Records under the oversight of the CBI are subject to Criminal Rules and Procedures and treated as Criminal Cases."

I am also sending you an email from an out of state researcher named Wilton Strickland. His research suggests that the constitutional divisions of the courts makes room for the Criminal Rules Committee to establish its authority over any and all criminal code accusation filed in the state, regardless of whether the case was held in the Criminal or Civil court system. I don't know if his research has any wisdom to it or not, but I thought it would be worth a look.

Thank you for your time!

Sincerely,

Kevin Conner

Contact is For Committee Use Onlv:

p.s.
Some other points of discussion:
Here is a Pew Study on internet Harassment: https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/

p.p.s.
I have also included my personal experiences in dealing with the legislature regarding Colorado's Repeal and Replace of 24-72-300 et seq. with 24-72-700 et seq.. There is a serious problem with how things became broken in 2014, and why they remain broken:
I have spoken with each of those branches that were mentioned above, and each of them have argued with me asserting that no-arrest, non-conviction records can be sealed and replaced. I even have a text discussion with

representative Mike Weissman where he asserts that 24-72-704 specifies non-arrest. Non-conviction. He then directly linked me to the appropriate form. This information was provided to him by the legal counsel giving the legislators this advice.

As you fully know, this is inaccurate. In fact, I believe the attorneys advising the legislators on this matter are committing malpractice, although the form doesn't specify arrest or conviction. In fact, the form seems to be outdated by 6 years because there is no mechanism that can fulfill the form's instructions. Senator Pete Lee specifically instructed me to communicate with Amy Larson, telling me it was the task force run under her direction that advised the legislature in these matters. I spoke with her **once** of the numerous times we scheduled to speak (she failed to be available for those other scheduled meetings). In that singular conversation, she was interested to speak with me up until I pointed out that flawed verbage in the repeal and replace of those laws. Then she rescheduled the meeting saying she needed to look something up, and I have not been able to get a hold of her or any other task force member since.

I do not believe the legislature is interested at all in fixing this train wreck they caused over the past 6 years, and I do believe it's going to get worse. Laws like “ban the box” do not work with the Public Record. Anyone can obtain and use that information to harm other people.

michaels, kathryn

From: dailey, john
Sent: Thursday, January 7, 2021 11:25 AM
To: michaels, kathryn; samour, carlos
Cc: gabriel, richard
Subject: FW: Criminal Court Issue (Email #2) Fwd: Conclusions re sealing records in county court
Attachments: C.R.S. 24-72-701.docx; C.R.S. 24-72-704.docx; C.R.S. 24-72-705.docx; C.R.S. 24-72-302.docx; In re R.C._ 2013 COA 77.docx; Huspeni v. El Paso County Sheriff_s Dep_t (In re Freedo.docx; 15 Colo. Prac., Criminal Practice & Procedure § 15.2.docx; 15 Colo. Prac., Criminal Practice & Procedure § 15.3.docx; C.R.C.P. 121.docx; C.R.C.P. 1.docx; RULE 3055 ELECTRONIC FILING AND SERVING.DOCX; Anderson v. Home Ins. Co._ 924 P.2d 1123.docx; Doe v. Heitler_ 26 P.3d 539.docx; In re Marriage of Purcell_ 879 P.2d 468.docx; C.R.S. 13-14.5-105.docx; C.R.S. 13-14-104.5.docx; C.R.S. 13-14-105.docx; 13 Colo. Prac., Civil Procedure Forms & Commentary § 1216.docx

It appears that this email, and all the attachments should also be sent to the committee members.

Sent: Thursday, January 7, 2021 10:05 AM
To: dailey, john <john.dailey@judicial.state.co.us>
Subject: Criminal Court Issue (Email #2) Fwd: Conclusions re sealing records in county court

If you notice Wilton Strickland does suggest 704 and 705 - which are the same laws that the Legislature tried to suggest I use as well, however, it was made clear by the Judge that those require an arrest or a conviction, in addition the Criminal Accusation against me is in the Public Record and all of the 700 series specify the CBI. This is the broken aspect of the repeal and replace I discuss in my letter - apparently nobody understands how it is broken, because they never tried it out. But it is broken.

HOWEVER

His research also does talk about how the court systems aren't as divided as common thought dictates, which may actually assist the Civil and Criminal Rules committees in bridging the gap and resolve the violation of personal privacy rights in regards to partially visible records and false criminal accusations in civil court.

Maybe I'm wrong though, even Mr Strickland wasn't entirely convinced of his findings.

-Kevin

-----Original Message-----

9 pm
Subject: Fwd: Conclusions re sealing records in county court

From: n>
Date:
Subje rt
To: m

Hello, Kevin. Your deposit cleared, so here are my conclusions after having reviewed the materials and researched Colorado authorities. Since I am not licensed in Colorado, you should not construe anything in this email as legal advice,

rather my personal opinion that should be reviewed by you and your attorney so that you can reach your own conclusions together.

I believe that your best option for sealing the records at issue in the county court civil matter is to file a petition as provided in C.R.S. §§ 24-72-704(1)(a) and/or 24-72-705(1)(a). Once I explain my reasoning, I will go on to discuss my conclusions with regard to the alternative options you mentioned.

Filing A Petition *With The District Court* Under C.R.S. §§ 24-72-704(1)(a) and/or 24-72-705(1)(a)

The most relevant portions of the two statutes are as follows:

24-72-704(1)(a):

> *Any person in interest may petition the district court of the district in which any arrest and criminal records information pertaining to the person in interest is located for the sealing of all of the records, except basic identification information, if the records are a record of official actions involving a criminal offense for which the person in interest:*
>
> *. . .*
>
> *(II) Was not charged and the statute of limitations for the offense for which the person was arrested that has the longest statute of limitations has run; or*
>
> *(III) Was not charged and the statute of limitations has not run but the person is no longer being investigated by law enforcement for commission of the offense.*

24-72-705(1)(a):

> *The court shall order the defendant's criminal justice records sealed when:*
>
> *(I) A case against a defendant is completely dismissed;*

It's important to note that **the petition should be brought in the district court**. There is no need to persuade the county court to use these statutes, since the district court has authority to seal an applicable record that is located anywhere in the district (including in county court). This is supported by the definitions in the statutes, by case law, and by the very form for bringing such a petition (which lists the county court as one of the repositories for such records).

Regarding the statutory definitions, the following are most important:

- "Person in interest" = "the person who is the primary subject of a criminal justice record . . . ." C.R.S. §§ 24-72-701(7), 24-72-302(10).

- "Criminal justice records" = "all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule[.]" C.R.S. § 24-72-302(4).

- "Criminal justice agency" = "any court with criminal jurisdiction and any agency of the state[.]" C.R.S. §§ 24-72-701(4), 24-72-302(3). Note that county courts have criminal jurisdiction. *See People v. Wright*, 742 P.2d 316, 319 (1987).

- "Arrest and criminal records information" = "information reporting . . . the nature of . . . the offenses alleged against an accused person." C.R.S. §§ 24-72-701(1), 24-72-302(1).

Reading all of these definitions together leads to the conclusion that the county court is a criminal justice agency in possession of criminal justice records and/or criminal records information regarding you. As such, the district court has the ability to entertain a petition to seal those records in county court.

This conclusion is also supported by case law that construes the earlier statutory scheme found at C.R.S. §§ 24-72-301 et seq., some of which remains intact. In one decision, **an appeals court held that the district court should interpret the sealing provisions liberally and apply them to records kept in county court**. *In re R.C.*, No. 11CA1940, 2013 Colo. App. LEXIS 2059, at **8-**11 (May 23, 2013). Although *R.C.* deals with a criminal case in county court, **a decision by the state supreme court notes that the sealing provisions have been applied to records in a civil case in county court**. *Huspeni v. El Paso County Sheriff's Dep't*, 196 P.3d 892, 895 (Colo. 2008) ("In that action, which is separate from the one before us, El Paso County District Court Judge Ronald Crowder ordered the sealing of all the records in the four criminal cases involving the John Does, as well as the two civil actions in which the John Does obtained the sealing order.").

An excerpt from the Colorado Practice Series sheds more light on these sorts of petition to a district court. *See* 15 Colo. Prac., Criminal Practice & Procedure § 15.2. Better yet, the Colorado Practice Series includes a form used for these sorts of petitions to a district court, and the form lists "county courts" as among the "agencies" where records may be sealed. *See* 15 Colo. Prac., Criminal Practice & Procedure § 15.3.

This is not to say that a petition to the district court will be granted, but it does appear to be the most appropriate and effective option.

Invoking Rule 121 of the Colorado Rules of Civil Procedure

CRCP Rule 121, specifically Section 1-5, allows for the sealing of records in a civil case where "the harm to the privacy of a person in interest outweighs the public interest." I do not see this a strong option for you.

For one, this rule applies to proceedings and records in the district courts, whereas the county courts are governed by a separate set of rules (as recognized in CRCP Rule 1 itself). I checked the rules for county court and found no similar provision. Indeed, the rules of county court mention sealing only in the context of e-filing certain sensitive documents (County Court Rule 305.5(k)), which is not relevant to your case.

For another, even if you could invoke CRCP Rule 121 before the county court, the available case law is disfavorable and imposes a heavy burden for granting a sealing request. *See Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1127 (Colo. App. 1996) (affirming denial of request to seal because "a heightened expectation of privacy or confidentiality in court records has been found to exist only in those limited instances in which an accusation of sexual assault has been made, or in which trade secrets, potentially defamatory material, or threats to national security may be implicated"); *Doe v. Heitler*, 26 P.3d 539, 544 (Colo. App. 2001) (affirming denial of request to seal because "[a] claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file" and "[l]ikewise, prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records"); *In re Marriage of Purcell*, 879 P.2d 468, 469 (Colo. App. 1994) (affirming denial of request to seal even though the records in question contained "extremely personal, private, and confidential matters").

Some additional discussion about Rule 121, Section 1-5 appears in 13 Colo. Prac., Civil Procedure Forms & Commentary § 1216, but it still does not appear very promising.

No Apparent Authority To Seal Within The Context Of Civil Protection Orders

I did a search for any references to sealing in those statutes governing civil protection orders – C.R.S. §§ 13-14-101 et seq., 13-14.5-101 et seq. – but found nothing useful. The only mention of sealing appears in C.R.S. § 13-14.5-105(4)(b), which is irrelevant here: "The court may . . . [r]equest that the Colorado bureau of investigation conduct a criminal history record check related to the respondent and provide the results to the court under seal."

I also found nothing useful in the case law involving these statutes.

Making An Argument Based On "Concurrent Jurisdiction" Of County And District Courts

You mentioned a possible argument based on how county courts and district courts share "concurrent jurisdiction" over various matters, meaning that a county court should be able to seal records in the same manner as a district court.

This argument is unnecessary because you can file a petition in district court to seal records reposed in county court, as discussed above.

Additionally, however, the phrase "concurrent jurisdiction" appears in statutes concerning civil protection orders – *see* C.R.S. §§ 13-14-104.5(1)(a), 13-14-105(1) – but *not* in the sealing statutes under the Criminal Justice Records Act. As such, I don't see a strong argument to transfer the district court's authority to the county court.

Making An Argument To Seal Sensitive Medical Information

You mentioned a possible argument to seal the records to the extent they disclose confidential medical information. I found no helpful authority to support this argument, though I did not search it very deeply given my time constraints.

Conclusions

Based on my preliminary review and research, and for the reasons stated above, I believe your strongest option for sealing the records in county court is to file a petition in district court on the basis of C.R.S. §§ 24-72-704(1)(a) and/or 24-72-705(1)(a).

I now have spent five hours on this project, which is the limit of your current deposit. I'm happy to discuss my conclusions free of charge, but additional work will require an additional deposit. Thanks.

F

F

Website: mylegalwriting.com

SHOUSE CALIFORNIA LAW GROUP (/ca/)

PC 851.8 – How to Seek a "Certificate of Factual Innocence" in California

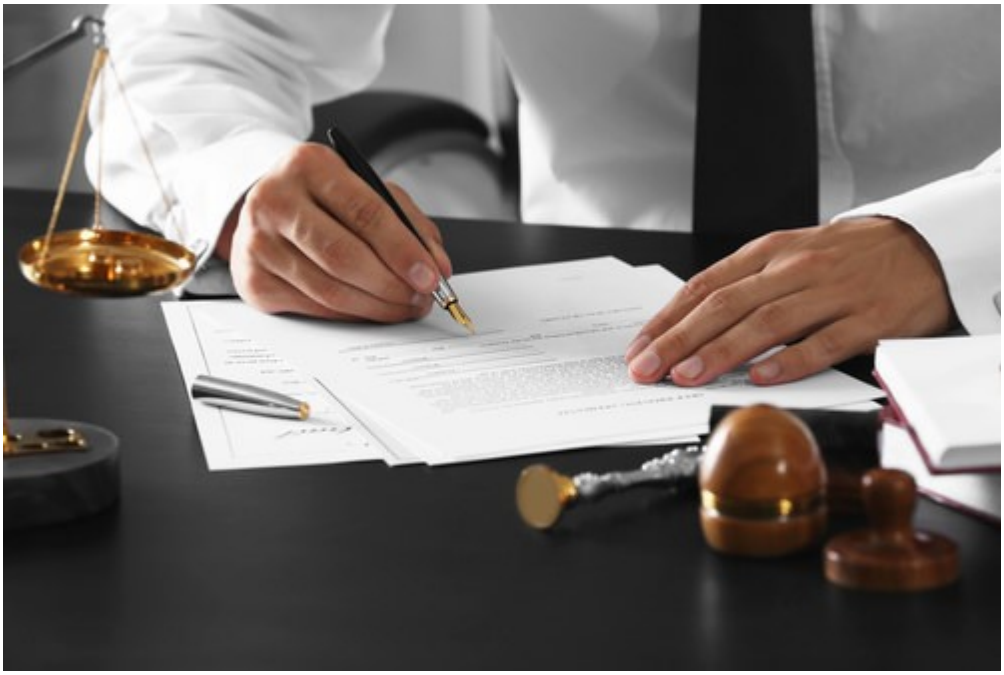
Under California **Penal Code 851.8 PC**, a **petition for a certificate of factual innocence** is where a person asks the court to make a finding that he or she **did not commit a crime** for which he or she was detained, arrested or charged, but never convicted.

Specifically, a person can seek a petition for factual innocence where he or she:

1. has been detained by police, but **not officially arrested** for a crime,
2. has been arrested for an offense, but **not formally charged**,
3. was formally charged for a crime, but the **charges were later dismissed**, or
4. was formally charged for a crime and tried for that crime, but there was **no criminal conviction.**

The person bringing the petition has the burden to show he or she is **factually innocent** of the crime. If the petition is granted, the police agencies must seal and destroy all records of the arrest (https://www.shouselaw.com/ca/defense/laws/destroy-arrest-records/).

In this article, our California criminal defense attorneys will discuss



Penal Code 851.8 PC is the California statute that directs how a party may file a petition for factual innocence ("PFFI").

1. What is a petition for factual innocence?

"**Factual innocence**" legally means that a person is innocent of any criminal act. A party files a petition for factual innocence (PFFI) following an arrest in order to have the arrest record destroyed.

A successful petition for factual innocence shows that there was no **reasonable cause** to believe a person itted an offense for which he was arrested.

rnia Penal Code (https://www.shouselaw.com/ca/defense/penal-code/) 851.8 PC sets forth the

procedures for filing the petition. If a petition is granted, the law enforcement agency having jurisdiction over the offense must seal a party's arrest records for **three years** (from the date of the arrest).[1] After this time, the records and the petition get **destroyed**.[2]

2. How do I apply?

After an arrest has been made, a party files a PFFI with the **law enforcement agency** having **jurisdiction** over the offense.[3]

In the petition, the arrested party must prove that his arrest was made without **legal cause**.[4] A party can attempt to satisfy this burden of proof by submitting any of the following pieces of **evidence**:

1. witness testimony,
2. photos,
3. surveillance video,
4. receipts,
5. cell phone records, and
6. DNA.

If a party shows that there was **no reasonable cause** for an arrest, it is then up to a **prosecutor** to show that there was reasonable cause for the arrest.

Upon hearing from both sides, a **judge** then determines:

1. whether or not the arrest was warranted, and
2. if the petition should be granted.[5]

Please note that a party must file a petition for factual innocence within **two years** from the date of the arrest.

If a judge is convinced that there was no reasonable cause for a party's arrest, then he/she will grant the PFFI.

3. What happens if I'm found to be factually innocent?

If a judge is convinced that there was **no reasonable cause** for a party's arrest, then he/she will **grant** the PFFI.

Once this occurs, the police department **and** the Department of Justice (https://www.justice.gov) must seal and destroy all records of the person's arrest. This includes any subsequent criminal proceedings.[6]

Moreover, the above entities must also destroy the following (that are associated with the arrest):

- arrest reports,
- booking information,
- mugshots,
- court records, and

  any evidence collected or gathered.

4. When am I eligible to apply?

A party can file a PFFI post-arrest. But there are actually **four distinct scenarios** under when a person can file a petition. These are when a person:

1. has been detained by police, but **not officially arrested** for a crime,
2. has been arrested for an offense, but **not formally charged**,
3. was formally charged for a crime, but the **charges were later dropped**, and,
4. was formally charged for a crime and tried for that crime, but there was **no criminal conviction.**

5. What are the benefits?

The reality is that arrest records can make it difficult for persons to accomplish basic life goals. Thus, a petition for factual innocence removes barriers to these goals.

A background check (https://www.shouselaw.com/ca/defense/background-checks/) these days may now be run for any of the following:

- a job application,
- a request for a mortgage loan,
- an apartment application, or
- a school application.

If this background check shows a past arrest, the applications or loans could get **denied**.

An arrest record could cause further complications as well. For example, if a party is arrested for violating one of **California's domestic violence laws**, then the party could lose his gun rights (https://www.shouselaw.com/ca/defense/post-conviction/restore-gun-rights/). A PFFI is helpful in making sure these rights are protected.

"Sealing" an arrest means the record will not show up on most criminal background checks in California.

6. What does it mean to seal an arrest record?

Penal Code 851.87 is the California statute that pertains to the **sealing** arrest records as a matter of right.

"**Sealing**" an arrest means the record will not show up on most **criminal background checks**.

Under PC 851.87, a person can have his arrest record sealed **as a matter of right** when:

1. criminal charges were filed but later dismissed,
2. the defendant was found "not guilty" (acquitted) in a jury trial (https://www.shouselaw.com/ca/defense/process/jury-trial/),
3. the defendant's conviction was vacated or overturned on appeal (https://www.shouselaw.com/ca/defense/appeals/), or
4. the defendant successfully completed a pretrial diversion or pre-sentencing program, such as Penal Code 1000 (https://www.shouselaw.com/ca/defense/penal-code/1000/) deferred entry of judgment.[7]

ception to sealing an arrest record as a matter of right is when the person arrested has a history of and/or convictions for:

- domestic violence (https://www.shouselaw.com/ca/defense/laws/domestic-violence/),
- child abuse (https://www.shouselaw.com/ca/defense/penal-code/273d/), and/or
- elder abuse (https://www.shouselaw.com/ca/defense/penal-code/368/).[8]

It typically takes about **ninety days** after filing a petition to get a court order to seal an arrest record in California.

Arrest records, police reports, and court records that are sealed under this section shall not be disclosed to any person or entity except:

- the person whose arrest was sealed, or
- a criminal justice agency (which may use the information to the same extent as if the arrest had not been sealed).[9]

Improper release of a sealed arrest can be punished by a civil penalty of between $500 and $2,500 per violation. The penalty may be enforced by a city attorney, district attorney, or the Attorney General (https://oag.ca.gov).

The person affected may also have the right to bring a lawsuit for compensatory damages (https://www.shouselaw.com/ca/personal-injury/damages/) or possibly even punitive damages (https://www.shouselaw.com/ca/personal-injury/damages/punitive-damages/) (if the release was reckless (https://www.shouselaw.com/ca/personal-injury/negligence/recklessness/) or intentional).

Legal References:

1. California Penal Code 851.8 PC. PC 851.8(a)
2. See same.
3. See same.
4. See same.
5. See same.
6. See same.
7. California Penal Code 851.87 PC.
8. See same.

9. Penal Code 851.92(b)(2)(B)(6) PC.

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LEGAL GUIDE

Written by attorney Brian Richard Dinday | May 8, 2009

You CAN Expunge a Civil Court Restraining Order Docket in California

Divorce (/topics/divorce/advice) Divorce appeals (/topics/divorce-appeals/advice) Child custody (/topics/child-custody/advice) Show 17 more

01

The Problem with Civil Restraining Orders in California

It is easy to file wild accusations of domestic violence, even totally false ones. It is today's best "Gotcha". It is free. It is permanent and it is devastating to the person you don't like. It can block access to a professional license, result in job terminations and fatally handicap future job applications, not to mention ruining the person's reputation. Up to now, even though proved totally false, such accusations have remained a public record in the court house, open to all, and conveniently indexed alphabetically UNDER YOUR NAME.

02

Why Are False Accusations Allowed to Remain Public?

After decades of ignoring crimes against women, the U.S. finally got on board and passed loads of laws intended to help women defend against and prevent domestic violence. Some of these laws are an Over-swing of the pendulum. For example, it is now easy to go to Family Court and apply for an Emergency Protective Order (EPO) in California. State laws make this an easy

process. What the Legislature did NOT do was anticipate that some people would see it as a golden opportunity to punish someone with whom they are angry, by filing totally false accusations. What else they did not do was provide some process to remove those false allegations from the public court records.

03

What Are the Consequences of False Accusations Remaining in an EPO Public Court Docket?

The ramifications of a permanent public court record of false accusations of domestic violence are extensive and terrible. A person can be fired, denied employment, denied credit, denied scholarships and school admissions, and denied child custody, among others. This last issue has become a big one. Some devious people are quite willing to set up a divorce by first making a false domestic violence accusation, knowing that it will prejudice a court against the alleged abuser in gaining child custody. And of course, if someone jilts his or her lover, what could be sweeter than trashing any future romance by saddling him or her with a permanent civil restraining order court record?

04

If I Am Tried and Acquitted of Domestic Violence, Won't the Restraining Order Be Expunged?

No. Getting acquitted of domestic violence or having the charges dismissed does not prove your innocence. Charges are dismissed and defendants acquitted for lots of reasons other than innocence. Even if you are acquitted and get a Petition for Factual Innocence (PFI) granted, up to now, you would only get the police arrest records and the criminal court files sealed and destroyed. The parallel Family Court (civil) Emergency Protective Order (EPO) court docket based on the same exact accusation has always remained a public record, with all its false allegations. No statute provided for sealing and destroying those false accusations.

05

That's Terribly Unfair!

You are absolutely right.

06

Can't Anything Be Done to Restore My Reputation? I Did NOTHING

Wrong!

In California, something CAN be done. In early 2009 in San Francisco, California, A Petition for Factual Innocence (PFI) was granted for one of Mr. Dinday's clients on a domestic violence case where the person was arrested but the D.A. never filed charges. For what may be the first time however, the innocent arrestee then went back to court and asked the same court to then seal and destroy the parallel Family Court EPO file, including the restraining order and all the supporting documents and declarations.

The Court granted the petition and from the date of the order onward, that EPO docket in Family Court will be sealed until three years from the date of arrest and then totally destroyed, along with all its indexing. That case was not appealed, and there is no published opinion to guide future judges. However, because it has now been done once and the the Attorney General indicated a lack of interest in appealing the order, future judges will likely follow suit.

07

Who Is Eligible for this Relief?

Anyone who was arrested in connection with the false accusations, but never convicted can bring the Petition for Factual Innocence and request this relief. This includes persons arrested but never charged; those charged but the charges were then dismissed; and those charged but found not guilty at trial. Just getting the acquittal or dismissal alone is not enough. It is necessary to prove to the judge that under the facts known at the time of the court hearing on the PFI, "no reasonable person would think the arrestee guilty."

08

Where Do I Find This Wonderful Case?

You can't. The Court ordered all records of that arrest and the petitions themselves sealed and destroyed. Moreover, because the District Attorney did not appeal the order sealing the Family Court docket, there will be no published opinion as a precedent. Never the less, it is believed that now other courts will follow suit. There is certainly a crying need for it.

09

What Is the Down Side to Doing This?

Two, really. One: you have to pay a lawyer to do it. The PFI process is Wayyyy too complicated for any non-lawyer to do it. I mean it. Many judges and lawyers don't understand this statute. Even some published appellate cases get it wrong. The second down side is that if no arrest ever occurred, there is no remedy to be offered. But at least we now know it is possible to do

for people who were victimized by both false arrest and falsely obtained restraining orders.

Additional resources provided by the author

http://lawyer-expungement.com/petition.htm (http://lawyer-expungement.com/petition.htm)
http://lawyer-expungement.com/results.htm (http://lawyer-expungement.com/results.htm)

Factual Innocence Petitions (http://lawyer-expungement.com/petition.htm)

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13 Colo. Prac., Civil Procedure Forms & Commentary § 121:6 (3d ed.)

West's Colorado Practice Series TM | August 2019 Update
Civil Procedure Forms And Commentary
Debra Knapp and a Group of Colorado Practice Experts

Rules
Rule 121. Local Rules—Statewide Practice Standards
By Nicole M. Quintana[*]
I. Commentary

§ 121:6 Limitation of access to court files

This Practice Standard 1-5[1] creates a procedure for outsiders to the litigation to obtain access to court files[2] and provides for a limited access order to be requested by any party named in the litigation.[3] If a motion is filed with the complaint and supported by an affidavit or a hearing, the order may be entered *ex parte*.[4]

The rule provides specifically that an order limiting access may not be entered except upon a finding that the harm to a person in interest outweighs the public interest.[5] Thus, it is improper for the court to base the order on non-privacy considerations, such as the encouragement of settlement.[6] A prospective injury to reputation, which is inherent in almost every civil action, is not generally sufficient to overcome the strong presumption in favor of public access to court files.[7] For example, a charge that a licensed health care professional has engaged in unprofessional conduct implicates the public interest. If the charge is proven, the public should have access to that information, and if it is unfounded, the public should know that as well.[8] Similarly, the court in a dissolution of marriage proceeding did not abuse its discretion in denying a stipulated motion to seal the court file, where the documents sought to be sealed contained nothing unusual to such a proceeding or that would mandate sealing the court record.[9]

An order limiting access to the court file may be reviewed by the court upon its own motion, or upon the motion of any person, whether or not a party to the litigation.[10] By this provision, the rule permits a nonparty, such as the media, to challenge an order limiting access to the court records.

In an action against a psychologist for unauthorized disclosure of confidential information, in which the plaintiff requested permission to use a pseudonym or fictitious name instead of his real name, as an exception to Rule 10(a), plaintiff must show a substantive privacy right that outweighs the customary and constitutional presumption of openness in judicial proceedings and overrides the interest of the public in disclosure of plaintiff's identity. Without such a showing, mere offer by the plaintiff to disclose his/her real name to the court *in camera* is insufficient to allow him/her to use pseudonym or fictitious name. Among relevant factors for court's consideration are: a) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; b) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent nonparties; c) whether the action is against a governmental or private party; d) whether the plaintiff would be compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution; and, e) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. Additionally, the question of whether plaintiff is seeking damages for past disclosure of confidential information rather than declaratory or injunctive relief to prevent future disclosure is relevant. However, the appellate court found it error to dismiss the case due to the use of a fictitious name where an amendment could repair the defect, and held that a trial court should allow amendment to the complaint to substitute the

true name. Citing C.R.C.P. 121, § 1-5, the court also noted the strong presumption in favor of public access to court records and stated that generally the fact that a court file contains private or confidential information is insufficient to overcome this presumption to require a court file to be placed under seal.[11]

Footnotes

* Nicole M. Quintana is a partner at Ogborn Mihm, LLP.

1 *Cf.* Section 24-72-201, C.R.S. The Colorado Open Records Act voices the public policy that all public records shall be open for inspection by any person at reasonable times. Unless a legitimate reason for nondisclosure exists, any member of the public is entitled to review all public records, and there is no requirement that the person seeking access demonstrate any special interest in the records requested. Also, *cf.* C.R.C.P. 42(c) ("All sessions of court shall be public, except that when it appears to the court that the action will be of such character as to injure public morals, or when orderly procedure requires it, it shall be its duty to exclude all persons not officers of the court or connected with such case"); Curtis, Inc. v. District Court In and For City and County of Denver, 186 Colo. 226, 526 P.2d 1335, 1338 (1974) (holding that closed trial was necessary to accomplish orderly procedure where trade secrets at issue).

2 C.R.C.P. 121(c), § 1-5, Committee Comment; see also Colorado Supreme Court Directive 05-01; Colo. Pub. Acc. Rec. & Info. R. 1.

3 C.R.C.P. 121(c), § 1-5(1); see also Bowlen v. District Court, Adams County, 733 P.2d 1179, 1182, 13 Media L. Rep. (BNA) 1968 (Colo. 1987) (finding the right to speak and publish does not create an unfettered and unlimited right to gather information made available solely for discovery purposes and permits court to enter protective order under C.R.C.P. 26(c) for good cause).

4 C.R.C.P. 121(c), § 1-5(3).

5 C.R.C.P. 121(c), § 1-5(2). *Cf.* Office of State Court Adm'r v. Background Information Services, Inc., 994 P.2d 420 (Colo. 1999) (Under Rule 121, there is a presumption that individual court files will be open to the public unless a court order provides otherwise. However, Chief Justice may implement her administrative authority as executive head of judicial system by means of Chief Justice Directives, under the Supreme Court's general superintending power over the court system to direct and control the release of computer-generated bulk data containing court records. Courts do not have an implied duty to manipulate computer-generated court data under the Criminal Justice Records Act in order to create a new document solely for purposes of disclosure).

6 Anderson v. Home Ins. Co., 924 P.2d 1123, 1127 (Colo. App. 1996), *cert. denied.*

7 Anderson v. Home Ins. Co., 924 P.2d 1123, 1127 (Colo. App. 1996), *cert. denied.*

8 Anderson at 1128.

9 In re Marriage of Purcell, 879 P.2d 468, 469, 22 Media L. Rep. (BNA) 2287 (Colo. App. 1994).

10 C.R.C.P. 121(c), § 1-5(4).

11 Doe v. Heitler, 26 P.3d 539 (Colo. App. 2001).

End of Document

15 Colo. Prac., Criminal Practice & Procedure § 15.2 (2d ed.)

West's Colorado Practice Series TM | October 2019 Update
Criminal Practice And Procedure
Robert J. Dieter[a0]
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Chapter 15. Guilty Pleas and Disposition Without Trial
A. Introduction

§ 15.2. Limiting access to criminal records

West's Key Number Digest

- West's Key Number Digest, Criminal Law 1226(2)
- West's Key Number Digest, Records 32

Legal Encyclopedias

- C.J.S., Criminal Law § 1734
- C.J.S., Records §§ 65
- C.J.S., Records 67 to 75

Colorado law requires criminal justice agencies to maintain records of official action and that, with minor exception, these records be open to public inspection and that they be subject to challenge for accuracy and completeness by the person to whom they pertain.[1] Colorado also provides a procedure for the sealing of certain criminal justice records. The process involves the filing of a civil action in the district court where the records exist and issuance of an order requiring all criminal justice agencies having records pertinent to the case to "seal" those records.[2] Once sealed, the person and the agencies must deny that, except for basic identification information, such records exist.[3]

By statute any person may petition the district court for an order sealing criminal records involving a criminal offense for which the person was not charged, which was completely dismissed, or of which the person was acquitted.[4] However, the statute exempts certain criminal records from sealing, namely records pertaining to: (1) class 1 and 2 misdemeanor traffic offenses;[5] (2) class A and class B traffic infractions;[6] (3) convictions for alcohol or drug-related traffic offenses;[7] or (4) offenses involving unlawful sexual behavior.[8] Further, there is no basis in the statute for sealing records unless the case is completely dismissed.[9] Thus, a defendant is not eligible to have his criminal records sealed with respect to underlying charges that are dismissed as a result of a plea bargain where the defendant has pleaded guilty to another charge in the same case.[10] In 2004, the statute was amended to allow sealing of records involving a charge that was not filed or a case that was dismissed due to a plea bargain in a separate case, but only after 15 years have passed since the date of the final deposition of all criminal proceedings and if the

person has not been charged for any criminal offense during that time interval.[11] The statute now requires the passage of only 10 years.[11.50]

The district court reviews the petition and determines whether there are sufficient grounds to proceed to a hearing.[12] If a hearing is conducted, the court balances competing factors set forth by statute to determine whether the criminal records should be sealed.[13] Once the court makes a finding weighing the competing interests in favor of petitioner in accordance with the statutory standard, the sealing order must be directed to every custodian having custody of any of the records to be sealed.[14]

If the order is granted, the defendant may deny the fact of arrest.[15] However, an order sealing records does not authorize the physical destruction of any records[16] and basic identification information remains of record.[17] Furthermore, sealed records are discoverable under Crim.P.Rule 16,[18] and criminal justice information and records in the possession and custody of a criminal justice agency remain available to another criminal justice agency.[19] Also, a state conviction that is expunged under state law[19.50] may still carry collateral consequences and constitute a conviction for purposes of federal law.[20]

The trial court is required to provide defendants with a written advisement … concerning the sealing of criminal justice records whenever charges are dismissed or the defendant is acquitted or is sentenced following a conviction.[21]

The prosecutor may condition a plea agreement upon a stipulation that the defendant agree to give up any future right to have his records sealed by court order.[22]

Footnotes

a0 University Of Colorado School Of Law, Member Of The Colorado Bar.

a1 Colorado Public Defender's Office. Member of the Colorado Bar.

1 West's C.R.S.A. §§ 24-72-301 *et seq.* The statute excepts information concerning the victim of a sexual assault. *See also* West's C.R.S.A. § 19-1-304 (access to juvenile delinquency records); West's C.R.S.A. § 24-72-301 et seq. is now codified at § 24-72-701, et seq., C.R.S. (effective August 1, 2014).
See also Section 24-72-203(3.5), C.R.S. and Section 24-72-204, C.R.S. (effective August 9, 2017).

2 West's C.R.S.A. § 24-72-308.
C.B. v. People, 122 P.3d 1065 (Colo. App. 2005) (because C.R.S.A. § 24-72-308 concerns the sealing of criminal records, and juvenile delinquency proceedings are non-criminal in nature, juveniles should proceed under the expungement provisions set forth in C.R.S.A. § 19-1-306). Section 24-72-308(4), C.R.S. is now codified at § 24-72-702(5), C.R.S. (effective August 1, 2014); *see* F.M. v. People, 2011 WL 5436424 (Colo. App. 2011), cert. denied, 2012 WL 3642405 (Colo. 2012) (the principles of claim preclusion bar a successive action to seal the same criminal records).
Section 24-72-308(4), C.R.S. (a person may file a petition with the court for sealing of each case once every 12-month period) (effective July 1, 2013).

3 West's C.R.S.A. § 24-72-308(1)(d). This statute is now codified at § 24-72-702(1)(d), C.R.S. (effective August 1, 2014).
Section 24-72-702, C.R.S. (prosecution and law enforcement may release sealed records to victims of the case) (effective September 1, 2017).

4 West's C.R.S.A. § 24-72-308(1)(a)(I).
The statute was originally enacted in 1977, then repealed and reenacted in 1988. The pre-1988 version allowed a person

to seek an order limiting access to or sealing all criminal records whether resulting in a guilty plea or otherwise. This authority was restricted in the 1988 version, which allows only for sealing of records where the case was never filed, was dismissed or the defendant was acquitted. The 1977 enactment applies to offenses committed prior to April 4, 1988. In re R.B., 815 P.2d 999 (Colo.App.1991) (petitioner, who committed offense prior to April, 1988, entitled to automatic entry of an order limiting access to criminal records under 1977 version of statute). *See generally* Ison and Blumenthal, Sealing Criminal Records in Colorado, 21 Colo. Lawyer 247 (1992) (discusses procedure under 1977 statute). The statute was amended in 2002 and 2003.
West's C.R.S.A. § 19-1-306 establishes procedures for expungement of juvenile records.
Section 24-72-308((1)(a)(I) is now codified at § 24-72-702(1)(a)(I), C.R.S. (effective August 1, 2014). And § 24-72-308(1)(b), C.R.S. is now codified at 24-72-702(1)(b)(II)(A), C.R.S. (effective August 1, 2014); Section 24-72-702.5(1), C.R.S. (criminal records other than convictions may be sealed under an expedited process without an evidentiary hearing) (effective September 1, 2017). West's C.R.S.A. § 18-13-122 extends the right to petition to seal underage drinking cases to not only convictions, but also to cases dismissed or completed under a deferred judgment or deferred prosecution. (effective June 7, 2012); M.T. v. People, 2012 CO 11, 269 P.3d 1219 (Colo. 2012) (for purposes of section 24-72-308(3)(c), C.R.S., which bars the sealing of criminal records to convictions involving unlawful sexual behavior, a successfully completed deferred judgments for a sex offense is included within the term "conviction" and criminal records of such a conviction cannot be sealed); *see* § 24-72-308.6, C.R.S. (providing for sealing of records of drug possession offenses for convictions on or after July 1, 2011).
Section 24-72-308(1)(b), C.R.S. (if the petition pertains to a dismissal that is not the result of a completion of a deferred disposition or a multi-case disposition, the court shall order a record sealed if the petition is sufficient on its face) (effective July 1, 2013). Section 24-72-701.5, C.R.S. (allows for expungement of arrest record if arrested as a result of mistaken identity and no charges were filed) (effective June 10, 2016).

5 West's C.R.S.A. § 24-72-308(3)(a)(I).
Section 24-72-308(3)(a)(I) is now codified at 24-72-702(4)(a)(I), C.R.S. (effective August 1, 2014); In re R.C., 2013 COA 77, 2013 WL 2289258 (Colo. App. 2013) (non-traffic offenses in criminal justice records containing both traffic and non-traffic offenses may be sealed); *but see* Clark v. People, 221 P.3d 447 (Colo. App. 2009).

6 West's C.R.S.A. § 24-72-308(3)(a)(II). Section 24-72-308(3)(a)(II) is now codified at 24-72-702(4)(a)(II), C.R.S. (effective August 1, 2014).

7 West's C.R.S.A. § 24-72-308(3)(a)(III) (effective for offenses committed on or after July 1, 1996).
Section 24-72-308(3)(a)(III) is now codified at § 24-72-702(4)(a)(III), C.R.S. (effective August 1, 2014). And § 24-72-308.6 is now codified at § 24-72-704 C.R.S. (effective August 1, 2014); In re Harte, 2012 COA 183, 2012 WL 5266062 (Colo. App. 2012) (successfully completed deferred judgment constituted a "conviction" within meaning of statute prohibiting the sealing of records pertaining to a conviction involving alcohol-related driving offense, such that records pertaining to deferred judgment could not be sealed). *But see* Section 24-72-308.6, C.R.S. (discussing procedure for petitioning to seal criminal conviction records information for offenses involving controlled substances) (effective October 1, 2013, and applies to offenses committed on or after said date).

8 West's C.R.S.A. § 24-72-308(3)(c) (references offenses defined in West's C.R.S.A. § 16-22-102(9), the sex offender registration statute) (effective for offenses committed on or after July 1, 2003). Section 24-72-308(3)(c) is now codified at § 24-72-702(4)(c), C.R.S. (effective August 1, 2014).
Section 24-72-708, C.R.S. (municipal domestic violence or child abuse convictions cannot be sealed) (effective August 9, 2017).

9 People v. Chamberlin, 74 P.3d 489 (Colo.App.2003) (defendant not eligible to seal portion of records pertaining to felony burglary charge where he plead guilty to misdemeanor theft in same case as part of plea bargain because "case"

was not "completely dismissed" in light of the misdemeanor conviction). Section 24-72-308(1)(a)(II)(C) is now codified at § 24-72-702(1)(a)(II)(C), C.R.S. (effective August 1, 2014); West's C.R.S.A. § 24-72-308(1)(a)(II)(C) (arrest or criminal records information may not be sealed if the defendant still owes restitution, fines, court costs, late fees or other court-ordered fees that is the subject of the petition) (effective April 13, 2006).

10 People v. Chamberlin, 74 P.3d 489 (Colo.App.2003).
Warren v. People, 192 P.3d 477 (Colo. App. 2008) (pursuant to § 24-72-308(1)(a)(II), sealing is not allowed when a dismissal occurs as part of a plea agreement in a separate case or when an offense is not charged due to a plea agreement in such a case).

11 Laws 2004, H.B. 04-1376 (effective August 4, 2004).

11.50 Section 24-72-702(1)(a)(III), C.R.S. (effective Aug. 1, 2014).
Section 24-72-708, C.R.S. (sealing is now permissible for subsequent municipal offenses after the passage of 10 years) (effective August 9, 2017). Robertson v. People, 2017 COA 143M, 410 P.3d 1277 (Colo. App. 2017), as modified on denial of reh'g, (Dec. 28, 2017) (Statutory 10-year waiting period for sealing criminal records of a case that was completely dismissed, if the dismissal occurred as part of a plea agreement in a separate case, cannot be waived by the parties.).

12 West's C.R.S.A. § 24-72-308(1)(b)(II) (effective for offenses committed on or after March 18, 2003). Petitioner must notify the relevant agencies and the district attorney of the hearing date. Section 24-72-308(1)(b)(II) is now codified at §§ 24-72-702(1)(b)(II)(A), 24-72-704(1)(b)(I), 24-72-708(2)(a), C.R.S. (effective August 1, 2014).

13 West's C.R.S.A. § 24-72-308(1)(c); People v. Bushu, 876 P.2d 106 (Colo.App.1994). *See also* D.W.M. v. District Court, 751 P.2d 74 (Colo.App.1988) (the trial court should consider severity of the offense sought to be sealed, time which has elapsed since conviction, subsequent criminal history of petitioner, and need for government agency to retain the records). Section 24-72-308(1)(c) is now codified at §§ 24-72-702(1)(b)(II)(B), 24-72-704(1)(c), 24-72-708(3) C.R.S. (effective August 1, 2014).

14 West's C.S.R.A. § 24-72-308(1)(c). *See* In re the Petition of T.L.M., 39 P.3d 1239 (Colo.App.2001) (statutory procedures for sealing criminal records applied to copies of the police reports in the possession of the county epartment of social services). This statutory provision is now codified at §§ 24-72-702(1)(c), 24-72-704(1)(c), 24-72-705(1)(f), 24-72-706(3), 24-72-708(3), C.R.S. (effective August 1, 2014).

15 West's C.S.R.A. § 24-72-308(1)(d) and (f)(I). Subparagraph (f)(II) exempts the Colorado state board of law examiners. Section 24-72-308(1)(d) is now codified at § 24-72-702(1)(d), C.R.S. (effective August 1, 2014).

16 West's C.S.R.A. § 24-72-308(1)(g). Section 24-72-308(1)(g) is now codified at §§ 24-72-702(1)(g), 24-72-703(6), C.R.S. (effective August 1, 2014).

17 West's C.S.R.A. § 24-72-308(1)(a)(I). Section 24-72-308(1)(a)(I) is now codified at § 24-72-702(1)(a)(I), C.R.S. (effective August 1, 2014).

18 West's C.R.S.A. § 24-72-308(3)(b) (effective for offenses committed on or after July 1, 996). Section 24-72-308(3)(b) is now codified at § 24-72-703(2)(a), C.R.S. (effective August 1, 2014).

19 West's C.R.S.A. § 24-72-308(3)(d) (effective for offenses committed on or after July 1, 1996). Section 24-72-308(3)(d) is now codified at § 24-72-703(4), C.R.S. (effective August 1, 2014).

19.50 People v. Connors, 230 P.3d 1265 (Colo. App. 2010) (expungement statute pertaining to underage drinking and driving convictions did not require expungement of entire record, specifically two possession charges brought at the same time as the underage drinking and driving charge).

20 Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) (expunged state conviction was a conviction for purposes of federal statute which prohibited convicted felon from possession a firearm).

21 West's C.R.S.A. § 24-72-308(2). Section 24-72-308(2) is now codified at § 24-72-703(1)(a), C.R.S. (effective August 1, 2014).

22 People v. Ward-Garrison, 72 P.3d 423 (Colo.App.2003) (requiring defendant to waive statutory right to seal criminal records is not contrary to public policy).

End of Document

15 Colo. Prac., Criminal Practice & Procedure § 15.3 (2d ed.)

West's Colorado Practice Series TM | October 2019 Update
Criminal Practice And Procedure
Robert J. Dieter[a0]
Pocket Part by Richard F. Bednarski[a1]
Chapter 15. Guilty Pleas and Disposition Without Trial
A. Introduction

§ 15.3. Form—Petition to seal arrest and criminal records[1]

☐ District Court _____ County, Colorado			
Court Address:			
PETITION OF:			
DEFENDANT (Primary subject of the criminal			
justice record)			
		▲ **COURT USE ONLY** ▲	
Attorney or Party Without Attorney		Case Number:	
(Name and Address):			
Phone Number:	E-mail:		
FAX Number:	Atty. Reg. #:	Division:	Courtroom:
PETITION TO SEAL ARREST AND CRIMINAL RECORDS			

1. THE PETITIONER IS: (check one only)

☐ the primary subject of the criminal justice record.

☐ the authorized representative of the Defendant (attorney for the Defendant).

☐ the parent of the Defendant.

☐ the appointed legal representative of the Defendant.

2. Defendant's date of birth: _____

3. The Petitioner asks this Court for an Order to Seal Arrest and Criminal Records information in the custody of the following agencies:

☐ District and County Courts

☐ Sheriff's Department

☐ District Attorney

☐ Law Enforcement Agency (name of agency) _____

☐ Municipal Court (location) _____

☐ Colorado Bureau of Investigation

☐ Other _____

4.
The Petitioner further shows the Court that the harm to Petitioner's privacy, or the danger of unwarranted adverse consequences, outweighs the public interest in retaining the records.
Explain:

(a) The charge(s), if any, in the Court case record to be sealed is/are as follows:

Offense Date	Arrest Date	Arrest #	Charge	F/M*	Dismissal**	Acquittal	No Charge Filed

* Felony or misdemeanor

**State if Deferred Judgment

(b) No Court case exists (i.e., no charges were filed, only an arrest occurred, no appearance in Court was made); however, the following arrest record(s) exist:

Date of Arrest	Orig. Arrest #	Charge
.....		
.....		
.....		
.....		
.....		

5. Court case numbers and criminal justice agency case numbers:

County Court case number: _____

District Court case number: _____

Municipal Court Case number: _____

Law Enforcement Agency number: _____

Arrest number (from fingerprint card): _____ Date: _____

Law Enforcement Agency case number: _____

Arrest number (from fingerprint card): _____ Date: _____

6. Petitioner requests the Court to set a date for hearing on this Petition and to enter an order sealing arrest and criminal records pertaining to the Defendant, pursuant to § 24-72-308 (1)(b)(II), C.R.S. and to seal this action.

_____
Signature of Petitioner or
Attorney
Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20__.
My Commission Expires: _____

_____
Notary Public/Clerk

Footnotes

a0 University Of Colorado School Of Law, Member Of The Colorado Bar.

a1 Colorado Public Defender's Office. Member of the Colorado Bar.

1 Colorado Supreme Court Form JDF 417 R4/03 available at: http://www.courts.state.co.us/chs/court/forms/sealingofrecords/jdf417.doc

End of Document

Anderson v. Home Ins. Co.

Court of Appeals of Colorado, Division Two

February 22, 1996, Decided

No. 94CA1846

Reporter
924 P.2d 1123 *; 1996 Colo. App. LEXIS 48 **; 20 BTR 210

Margot Anderson, Plaintiff, v. Home Insurance Company, Defendant, and Frederick A. Lewis, Jr., M.D., and Frederick A. Lewis, M.D., P.C., Defendants-Appellees, and Concerning Yolanda Martinez, Appellant.

Subsequent History: [1]** Rehearing Denied March 21, 1996. Certiorari Denied October 15, 1996 (96SC247). Cases Released for Publication on Tuesday, October 15, 1996.

Prior History: Appeal from the District Court of Boulder County. Honorable Morris W. Sandstead, Jr., Judge. No. 89CV255. No. 90PR258.

Disposition: ORDER VACATED AND CAUSE REMANDED WITH DIRECTIONS

Core Terms

limited access, court file, parties, outweighs, privacy, settlement, records, sealing, public interest, testing, confidentiality, privacy interest, public access, public record, cases, limit access, vacate, files

Case Summary

Procedural Posture

Appellant challenged the decision of the District Court of Boulder County (Colorado), which denied her motion, pursuant to *Colo. R. Civ. P. 121* § 1-5, to vacate a limited access order entered in plaintiff patient's medical malpractice action and a related action against defendant doctors. Appellant was not a party to either of the proceedings.

Overview

Plaintiff patient initiated an action against defendant doctors alleging a claim of medical malpractice. Appellant challenged the lower court's denial of her motion, pursuant to *Colo. R. Civ. P. 121* §1-5.4, requesting the lower court to vacate its order limiting access to its files. Appellant alleged that she was in an action with another insurance company and the sealed files might contain information relevant to whether the insurer defendant in her action should have been aware of defendant doctor's alleged improper practices. The court vacated the limited access order and remanded the cause to the lower court. The court concluded that, as a matter of law, given the nature of the controversy in this case, a closure of all of the court files could not properly be justified by a finding that the privacy interest of any party outweighed the public's interest in those files. The court held, however, that a court could not enter a limited access order based solely upon an agreement between the parties to the litigation because if the evidence did not support the required finding under *Colo. R. Civ. P. 121* § 1-5.2, no such order could be entered.

Outcome

The court vacated the limited access order and remanded the cause to the lower court. The court concluded that, as a matter of law, given the nature of the controversy in this case, a closure of all the court files could not properly be justified by a finding that the privacy interest of any party outweighed the public's interest in those files.

LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Privacy > General Overview

Governments > Courts > Court Records

Governments > Courts > Rule Application & Interpretation

HN1[] **Substantive Due Process, Privacy**

The Open Records Act, *Colo. Rev. Stat. § 24-72-201* (1988), restricts the public's right to obtain access to court records, if such inspection is prohibited by rules promulgated by the supreme court or by the order of any court. *Colo. Rev. Stat. § 24-72-204(1)(c)* (1988). And, the Colorado Supreme Court has promulgated *Colo. R. Civ. P. 121* § 1-5, which authorizes a district court to limit access to court files only upon a finding that the harm to the privacy of a person in interest outweighs the public interest. *Colo. R. Civ. P. 121* § 1-5.1. Further, even if any court files are initially made subject to a limited access order, such order must be reviewed upon the motion of any person. *Colo. R. Civ. P. 121* § 1-5.4.

Governments > Courts > Court Records

HN2[] **Courts, Court Records**

The rule which authorizes a district court to limit access to court files only upon a finding that the harm to the privacy of person in interest outweighs the public interest creates a presumption that all court records are to be open; it allows a court to limit access in only one instance and for only one purpose (when the parties' right of privacy outweighs the public's right to know); and it grants to every member of the public the right to contest the legitimacy of any limited access order.

Constitutional Law > Substantive Due Process > Privacy > Personal Information

Governments > Courts > Court Records

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN3[] **Privacy, Personal Information**

In view of the fact that court files are public records subject to the stated policy and disclosure provisions of the supreme court rule, it is unreasonable, as a matter of law, for the parties to litigation to expect or to assume that all of the court files will remain private.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > ... > Marital Agreements > Postnuptial & Separation Agreements > General Overview

Family Law > Marital Termination & Spousal Support > Dissolution & Divorce > Procedures

Governments > Courts > Court Records

HN4[] **Privacy, Personal Decisions**

The fact that the parties may claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of that entire file pursuant to *Colo. R. Civ. P. 121* § 1-5.

Business & Corporate Compliance > ... > Protection of Secrecy > Reasonable Measures > Limited Access

Criminal Law & Procedure > ... > Sexual Assault > Abuse of Adults > Elements

Governments > Federal Government > Domestic Security

Criminal Law & Procedure > ... > Sexual

Assault > Abuse of Adults > General Overview

Governments > Courts > Court Records

HN5 **Reasonable Measures, Limited Access**

Generally, under the common law, a heightened expectation of privacy or confidentiality in court records has been found to exist only in those limited instances in which an accusation of sexual assault has been made, or in which trade secrets, potentially defamatory material, or threats to national security may be implicated.

Governments > Courts > Court Records

HN6 **Courts, Court Records**

Prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Estate, Gift & Trust Law > Wills > Beneficiaries > Elections

Governments > Courts > Court Records

HN7 **Types of Contracts, Settlement Agreements**

Nothing within *Colo. R. Civ. P. 121* § 1-5 prevents the parties to a lawsuit from entering into a settlement agreement pursuant to which they agree to keep the terms of such agreement confidential; they may even privately agree not to disclose voluntarily information gained during the course of preparation for trial. However, such private agreement cannot be used to prevent some other party from discovering information that a later court may determine to be discoverable under *Colo. R. Civ. P. 26(b)*. And, if the parties elect to file a copy of such an agreement with the court, the burden will be upon them to demonstrate that *Colo. R. Civ. P. 121* § 1-5 authorizes the court to restrict the public's access to it.

Counsel: Kennedy & Christopher, P.C., Ronald H. Nemirow, Frank R. Kennedy, Denver, Colorado, for Defendants-Appellee.

Fest, Jessel & Hemphill, LLC, Danny R. Hemphill, Bruce F. Fest, Boulder, Colorado; Thomas D. Roberts, Asheville, North Carolina, for Appellant.

Judges: JUDGE CRISWELL. Hume and Jones, JJ., concur.

Opinion by: CRISWELL

Opinion

[*1124] Yolanda Martinez appeals the district court's denial of her motion, pursuant to *C.R.C.P. 121* § 1-5, to vacate a limited access order entered in this and a related action, in neither of which was she a party. We reverse the denial of her motion, vacate the **[*1125]** existing limited access order, and remand with directions.

The record on appeal includes the records in the two cases that are the subject of the limited access order, the entirety of which has been sealed in accordance with that order. In addition, the defendant, Frederick A. Lewis, Jr., and his professional corporation, have filed a "supplemental **[**2]** brief" with this court, a copy of which has not been provided to Martinez, which makes various references to that part of the record that Martinez has never seen.

Under these circumstances, we have limited our review of the record to that portion that has been disclosed to Martinez, and we have not considered Lewis' supplemental brief. We have considered only the court's initial order sealing all of the court files, the motion to vacate the limited access order, the transcript of the hearing on Martinez' motion, the court's order denying Martinez's motion, Martinez' motion to reconsider, and the court's order denying reconsideration. We have, of course, also considered Martinez' briefs and that brief submitted by Lewis, a copy of which was supplied to Martinez.

This review reveals the following:

Plaintiff, Margot Anderson, initiated the action at issue here against defendants, Dr. Frederick A. Lewis, Jr., Frederick A. Lewis, Jr., M.D., P.C., and The Home Insurance Company, which included, so Martinez alleges, a claim of medical malpractice against Lewis based, in part, on his use of

computerized neuropsychological testing. A second case was a related probate proceeding.

In August **[**3]** 1993, the district court granted the parties' joint motion to dismiss the malpractice action with prejudice and to prevent access by any third person to any part of the court files in both cases. In the limited access order, entered pursuant to *C.R.C.P. 121* § 1-5, the court found that "good cause has been shown for sealing and restricting access to the Court's files in these cases . . . ."; that "the parties have bargained for and agreed to extensive confidentiality, non-disclosure, [and] related enforcement . . . ."; and that "the privacy interests of the parties outweighs the public interest in access to the Court files herein." The court's order, however, does not reveal even the general nature of the parties' privacy interests that required such protection, and that order was, itself, subject to its own limited access restrictions.

Simultaneously, the court "adopted and approved" the parties' settlement agreement, which it also sealed. That agreement included confidentiality and non-disclosure provisions, and the court directed that these provisions were to be enforced, if necessary, through contempt proceedings.

Approximately one year later, Martinez moved, pursuant to *C.R.C.P. **[**4]** 121* § 1-5.4, for the court to vacate its order limiting access to the files. She alleged that she was the plaintiff in an action against another insurance company for wrongfully denying insurance benefits to her, based, in part, on examinations given by Lewis; that Lewis had performed computerized neuropsychological testing in her case that was identical to the testing used on the plaintiff in the Anderson case; that such testing methods by Lewis were invalid; that he was not qualified to use or to interpret, and he had been ordered to cease, such testing by the Colorado Board of Medical Examiners in 1990; but that he nevertheless continued to perform such tests. She asserted that the sealed files might contain information relevant to the question whether the insurer defendant in her action should have been aware of Lewis' alleged improper practices.

At a hearing on Martinez' motion, her counsel represented that Lewis worked almost exclusively for insurance companies performing independent medical examinations; that he consistently administered computerized neuropsychological testing to a certain class of victims he examined; and that he had relied on such testing to conclude, without **[**5]** exception, that such victims were malingering or were suffering from a pre-existing condition, thereby resulting in the insurance companies' refusal to pay benefits.

Lewis and Martinez stipulated that Lewis had continued to perform independent medical examinations for insurance companies, and Martinez' counsel made an offer of proof to the effect that Lewis continued to use the **[*1126]** subject testing procedures until at least April 1994.

At the conclusion of the hearing, the court, accepting this offer of proof as true, denied Martinez' motion and reaffirmed its prior orders restricting access to the files. In response, Martinez initiated this appeal. Lewis and his professional corporation have appeared in opposition; none of the other parties has participated in these appeal proceedings. Martinez argues that the court erred in initially restricting access to all of the court files in the Anderson cases because, contrary to the court's finding, the harm to the privacy of the parties did not outweigh the public's presumptive interest in open access to court files. Lewis counters that the court's sealing order was warranted because (1) it protected the parties' legitimate expectation of **[**6]** privacy; (2) it encouraged settlement of the parties' claims without a trial; and (3) the parties acted in reliance thereon. Based on the record before us, we agree with Martinez.

In the Open Records Act, *§ 24-72-201, C.R.S.* (1988 Repl. Vol. 10B), the General Assembly has declared that, with certain specified exceptions, it is "the public policy of this state that all public records shall be open for inspection by any person at reasonable times . . . ." This public policy means that, unless there exists a legitimate reason for non-disclosure, any member of the public is entitled to review all public records. There is no requirement that the party seeking access must demonstrate a special interest in the records requested. *Denver Publishing Co. v. Dreyfus, 184 Colo. 288, 520 P.2d 104 (1974)*.

HN1[↑] The Act restricts the public's right to obtain access to court records, if such inspection "is prohibited by rules promulgated by the supreme court or by the order of any court." *Section 24-72-204(1)(c), C.R.S.* (1988 Repl. Vol. 10B). And, our supreme court has promulgated *C.R.C.P. 121* § 1-5, which authorizes a district court to "limit access" to court files only "upon a finding that the harm **[**7]** to the privacy of a person in interest outweighs the public interest." *C.R.C.P. 121* § 1-5.1. Further, even if any court files are initially made subject to a limited access order, such order must be reviewed "upon the motion of any person." *C.R.C.P. 121* § 1-5.4 (emphasis supplied).

Whether the supreme court rule was adopted pursuant to a legislative grant of authority under *§ 24-72-204(1)(c)* or whether it was adopted pursuant to the judicial power granted to the supreme court by Colorado's Constitution, see *Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)*, its implications here are the same. In either case, the rule reflects a policy consistent with and complementary to the general policy of openness of public records established by the Act.

Hence, HN2[] the rule creates a presumption that all court records are to be open; it allows a court to limit access in only one instance and for only one purpose (when the parties' right of privacy outweighs the public's right to know); and it grants to every member of the public the right to contest the legitimacy of any limited access order.

Interpreting the provisions of a court rule substantially **[**8]** identical to *C.R.C.P. 121* § 1-5, the Georgia Supreme Court has stated: "The aim of this presumption [of openness] is to ensure that the public will continue to enjoy its traditional right of access to judicial records, except in cases of clear necessity." *Atlanta Journal v. Long, 258 Ga. 410, 413, 369 S.E.2d 755, 758 (1988)*. We agree with this view and, thus, conclude that *C.R.C.P. 121* § 1-5 squarely places the burden upon the party seeking to limit access to a court file to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files.

I.

We first address, and reject, Lewis' contention that the court's limited access order was proper because, as the court found, it encouraged settlement of the parties' claims without a trial, and the parties acted in reliance thereon.

In addressing the motion to limit access pursuant to *C.R.C.P. 121* § 1-5, the only **[*1127]** criterion the court could properly consider was whether the parties' privacy rights outweighed the public interest in the subject matter. Since that is the sole standard stated in the rule, we must assume **[**9]** that the supreme court, in promulgating *C.R.C.P. 121* § 1-5, took into account other non-privacy considerations and determined that such were not of sufficient moment to justify limiting the public's access to the court's public records. See *Atlanta Journal v. Long, supra.* Thus, the court's consideration of factors other than harm to the privacy of the parties, including policy consideration with respect to settlement, or whether the parties relied on such an order, was improper and could not, as a matter of law, provide the basis for the limited access order.

Indeed, even under a court's exercise of its inherent authority, such factors have been held insufficient to overcome the presumption in favor of public disclosure. See *Bank of America National Trust & Savings v. Hotel Rittenhouse, 800 F.2d 339, 346 (3rd Cir. 1986)* ("Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access."); *Daines v. Harrison, 838 F. Supp. 1406 (D. Colo. 1993)* (parties' reliance on **[**10]** confidentiality order insufficient to warrant limited access order); *In re Estates of Zimmer, 151 Wis. 2d 122, 442 N.W.2d 578 (1989)* (possibility that parties may void settlement agreement if record is unsealed does not outweigh public's right to inspect public documents).

II.

In spite of the presumption in favor of open public records, Lewis argues, and the district court found, that the privacy interests of the parties here outweighed the public interest. Specifically, he asserts that the parties to the cases had a "legitimate expectation of privacy" in the contents of all of the court files. We disagree.

HN3[] In view of the fact that court files are public records subject to the stated policy and disclosure provisions of the supreme court rule, it is unreasonable, as a matter of law, for the parties to litigation to expect or to assume that all of the court files will remain private. See *Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)* (no constitutional right of privacy in court files); *Restatement (Second) of Torts § 652D*, special note and comment b (1977) (no common law right of privacy in court files).

Further, HN4[] the fact that the parties may **[**11]** claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of that entire file pursuant to *C.R.C.P. 121* § 1-5. *In re Marriage of Purcell, 879 P.2d 468 (Colo. App. 1994)* (upholding district court's refusal to seal dissolution of marriage file containing the parties' financial affidavits and separation agreement).

HN5[] Generally, under the common law, a heightened expectation of privacy or confidentiality in court records has been found to exist only in those limited instances in which an accusation of sexual assault has been made, or in which trade secrets, potentially defamatory material, or threats to national security may be implicated. See *Daines v. Harrison, supra*; *H.S. Gere & Sons, Inc. v. Frey, 400 Mass. 326, 509 N.E.2d 271 (1987)*. While such instances may not furnish the exclusive bases for a limited access order, no claim has been made that any similar factor is present here.

Likewise, HN6[] prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records. **[**12]** *Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir. 1983)*, cert. denied, *465 U.S. 1100, 104 S. Ct. 1595, 80 L. Ed. 2d 127 (1984)*.

Here, Lewis has failed to demonstrate how any possible harm to his reputation differs in this case from the possible harm that

might be suffered by any other professional sued for malpractice. See *State v. Cottman Transmission, 75 Md. App. 647, 542 A.2d 859 (1988)*. There has, in any case, **[*1128]** been no showing made as to how the possibility of such harm outweighs the public interest in any of the judicial records pertaining to the claim asserted.

On the contrary, because Lewis is a licensed health care professional, a charge that he has engaged in unprofessional conduct implicates the public interest and involves more than a private dispute between individuals. If the charge is proven accurate, the public should have access to that information; if the charge if unfounded, the public should be made aware of that fact, as well. Indeed, in such a case, the public may have an interest in a settlement agreement that they would not have in the typical private agreement.

Hence, we conclude, as a matter of law, that, given the nature of the controversy **[**13]** here, a closure of all of the court files could not properly be justified by a finding that the privacy interest of any party outweighed the public's interest in those files. The court erred, therefore, in entering the type of limited access order employed here and in denying to Martinez and to the public access to all of the documents filed with the court.

III.

In reaching the conclusion that a broad limited access order denying access to all parts of the court files was not warranted here, we do not mean to suggest that a less restrictive order, limiting access to certain, selected documents within the record, might not be justified. We do hold, however, that a court cannot enter a limited access order based solely upon an agreement between the parties to the litigation; if the evidence does not support the required finding under *C.R.C.P. 121* § 1-5.2, no such order may be entered. See *Brown & Williamson Tobacco Corp. v. Federal Trade Commission, supra.*

Lewis has suggested that there are several portions of the present record that would justify some limitation upon public access, even if the broad order that is the subject of our review is an improper limitation.

He asserts, **[**14]** for example, that one part of the court files discloses privileged communications between counsel and client. The filing of such a document with the court could be considered, in and of itself, to constitute a waiver of such privilege. We leave that question for resolution by the district court on remand. However, if we assume that filing does not constitute such a waiver, we would agree that a limited access order with respect to that single document might be justified.

Likewise, if the court has previously entered a protective order under *C.R.C.P. 26(c)*, sealing materials produced in the discovery phase of the case, such an order may be continued. Finally, *HN7*[] nothing within *C.R.C.P. 121* § 1-5 prevents the parties to a lawsuit from entering into a settlement agreement pursuant to which they agree to keep the terms of such agreement confidential; they may even privately agree not to disclose voluntarily information gained during the course of preparation for trial. However, such private agreement cannot be used to prevent some other party from discovering information that a later court may determine to be discoverable under *C.R.C.P. 26(b)*. See *Hock v. New York Life Insurance Co., 876 [**15] P.2d 1242 (Colo. 1994)* (court properly allowed Lewis to be cross-examined on some aspects of the case that is the subject of the limited access order here). And, if the parties elect to file a copy of such an agreement with the court, the burden will be upon them to demonstrate that *C.R.C.P. 121* § 1-5 authorizes the court to restrict the public's access to it. See *In re Marriage of Purcell, supra.*

Under these circumstances, therefore, we shall remand the cause to the trial court to give it an opportunity to limit access to selected documents within the present record as may be warranted under the governing rule. In doing so, however, the court must make findings of fact, consonant with the requirements of *C.R.C.P. 121* § 1-5, and must specify at least the general nature of any privacy interest that its order is designed to protect.

The present limited access order is vacated, and the cause is remanded to the trial court, provided, however, that the present order shall remain in effect for a period of **[*1129]** sixty calendar days following the issuance of the mandate of this court, during which time the trial court may, upon notice, reconsider whether an amended limited access order of the **[**16]** nature described in this opinion is appropriate.

JUDGE HUME and JUDGE JONES concur.

End of Document

West's Colorado Revised Statutes Annotated West's Colorado Court Rules Annotated Colorado Rules of Civil Procedure Chapter 1. Scope of Rules, One Form of Action, Commencement of Action, Service of Process, Pleadings, Motions and Orders

C.R.C.P. Rule 1

RULE 1. SCOPE OF RULES

Effective: December 1, 2019

Currentness

(a) Procedure Governed. These rules govern the procedure in the supreme court, court of appeals, district courts, and in the juvenile and probate courts of the City and County of Denver, in all actions, suits and proceedings of a civil nature, whether cognizable as cases at law or in equity, and in all special statutory proceedings, with the exceptions stated in Rule 81. These rules shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.

Rules of civil procedure governing county courts shall be in accordance with Chapter 25 of this volume. Rules of Procedure governing probate courts and probate proceedings in the district courts shall be in accordance with these rules and Chapter 27 of this volume. (In case of conflict between rules, those set forth in Chapter 27 shall control.) Rules of Procedure governing juvenile courts and juvenile proceedings in the district courts shall be in accordance with these rules and Chapter 28 made effective on the same date as these rules. In case of conflict between rules those set forth in Chapter 28 shall control. Rules of Procedure in Municipal Courts are in Chapter 30.

(b) Effective Date. Amendments of these rules shall be effective on the date established by the Supreme Court at the time of their adoption, and thereafter all laws in conflict therewith shall be of no further force or effect. Unless otherwise stated by the Supreme Court as being applicable only to actions brought after the effective date of an amendment, they govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(c) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P.

Credits

Amended eff. Jan. 1, 1997; Feb. 1, 2012, nunc pro tunc Jan. 1, 2012; effective July 1, 2015 for cases filed on or after July 1, 2015.

Editors' Notes

COMMENTS

2015

[1] The 2015 amendments are the next step in a wave of reform literally sweeping the nation. This reform movement aims to create a significant change in the existing culture of pretrial discovery with the goal of emphasizing and enforcing Rule 1's mandate that discovery be administered to make litigation just, speedy, and inexpensive. One of the primary movers of this reform effort is a realization that the cost and delays of the existing litigation process is denying meaningful access to the judicial system for many people.

[2] The changes here are based on identical wording changes proposed for the Federal Rules of Civil Procedure. They are designed to place still greater emphasis on the concept that litigation is to be treated at all times, by all parties and the courts, to make it just, speedy, and inexpensive, and, thereby, noticeably to increase citizens' access to justice.

Notes of Decisions (39)

Rules Civ. Proc., Rule 1, CO ST RCP Rule 1
Current with amendments received through November 1, 2019.

C.R.C.P. 121

This document reflects changes received through December 9, 2019.

CO - Colorado Local, State & Federal Court Rules > COLORADO RULES OF CIVIL PROCEDURE > CHAPTER 17A PRACTICE STANDARDS AND LOCAL COURT RULES > PRACTICE STANDARDS AND LOCAL COURT RULES

Rule 121. Local Rules -- Statewide Practice Standards.

(a) Repeal of local rules. All District Court local rules, including local procedures and standing orders having the effect of local rules, enacted before April 1, 1988 are hereby repealed.

(b) Authority to enact local rules on matters which are strictly local. Each court by action of a majority of its judges may from time to time propose local rules and amendments of local rules not inconsistent with the Colorado Rules of Civil Procedure or Practice Standards set forth in *C.R.C.P. 121 (c)*, nor inconsistent with any directive of the Supreme Court. A proposed rule or amendment shall not be effective until approved by the Supreme Court. No local procedure shall be effective unless adopted as a local rule in accordance with this Section (b) of *C.R.C.P. 121*. To obtain approval, three copies of any proposed local rule or amendment of a local rule shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of local rules is required. Numbering and format of any proposed local rule or amendment of a local rule shall be as prescribed by the Supreme Court. The Supreme Court's approval of a local rule or local procedure shall not preclude review of that rule or procedure under the law of circumstances of a particular case.

(c) Matters of statewide concern. The Colorado Rules of Civil Procedure and the following rule subject areas called "Practice Standards" are declared to be of statewide concern and shall preempt and control in their form and content over any differing local rule:

DISTRICT COURT* PRACTICE STANDARDS

§§ 1-1 to End

*Includes Denver Probate Court where applicable.

Local Rules -- Statewide Practice Standards

Section 1-1 ENTRY OF APPEARANCE AND WITHDRAWAL

1. Entry of Appearance. No attorney shall appear in any matter before the court unless that attorney has entered an appearance by filing an Entry of Appearance or signing a pleading. An entry of appearance shall state (a) the identity of the party for whom the appearance is made; (b) the attorney's office address; (c) the attorney's telephone number; (d) the attorney's E-Mail address; and (e) the attorney's registration number.

2. Withdrawal From an Active Case.

(a) An attorney may withdraw from a case, without leave of court where the withdrawing attorney has complied with all outstanding orders of the court and either files a notice of withdrawal where there is active co-counsel for the party represented by the withdrawing attorney, or files a substitution of counsel, signed by both the withdrawing and replacement attorney, containing the information required for an Entry of Appearance under subsection 1 of this Practice Standard as to the replacement attorney.

(b) Otherwise an attorney may withdraw from a case only upon approval of the court. Such approval shall rest in the discretion of the court, but shall not be granted until a motion to withdraw has been filed and served on the client and the other parties of record or their attorneys and either both the client and all counsel

for the other parties consent in writing at or after the time of the service of said motion, or at least 14 days have expired after service of said motion. Every motion to withdraw shall contain the following advisements:

(I) the client has the burden of keeping the court and the other parties informed where notices, pleadings or other papers may be served;

(II) if the client fails or refuses to comply with all court rules and orders, the client may suffer possible dismissal, default or other sanctions;

(III) the dates of any proceedings, including trial, which dates will not be delayed nor proceedings affected by the withdrawal of counsel;

(IV) the client's and the other parties' right to object to the motion to withdraw within 14 days after service of the motion;

(V) if the client is not a natural person, that it must be represented by counsel in any court proceedings unless it is a closely held entity and first complies with section 13-1-127, C.R.S.; and

(VI) the client's last known address and telephone number.

(c) The client and the opposing parties shall have 14 days after service of a motion to withdraw within which to file objections to the withdrawal.

(d) If the motion to withdraw is granted, the withdrawing attorney shall promptly notify the client and the other parties of the effective date of the withdrawal.

3. Withdrawal From Completed Cases. In any civil case which is concluded and in which all related orders have been submitted and entered by the court and complied with by the withdrawing attorney, an attorney may withdraw from the case without leave of court by filing a notice in the form and content of Appendix to Chapters 1 to 17A, Form 36, C.R.C.P. [JDF Form 83], which shall be served upon the client and all other parties of record or their attorneys, pursuant to *C.R.C.P. 5*. The withdrawal shall automatically become effective 14 days after service upon the client and all other parties of record or their attorneys unless there is an objection filed, in which event the matter shall be assigned to an appropriate judicial officer for determination.

4. Entries of Appearance and Withdrawals by Members or Employees of Law Firms, Professional Corporations or Clinics. The entry of an appearance or withdrawal by an attorney who is a member or an employee of a law firm, professional corporation or clinic shall relieve other members or employees of the same law firm, professional corporation or clinic from the necessity of filing additional entries of appearance or withdrawal in the same litigation unless otherwise indicated.

5. Notice of Limited Representation Entry of Appearance and Withdrawal. In accordance with *C.R.C.P. 11 (b)* and *C.R.C.P. Rule 311 (b)*, an attorney may undertake to provide limited representation to a pro se party involved in a court proceeding. Upon the request and with the consent of a pro se party, an attorney may make a limited appearance for the pro se party in one or more specified proceedings, if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the proceeding(s) for which the attorney appears. At the conclusion of such proceeding(s), the attorney's appearance terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance. Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceeding(s) for which the attorney appears.

COMMITTEE COMMENT

The purpose of section 1-1 (5) is to implement *Colorado Rules of Civil Procedure 11 (b)* and *311 (b)*, which authorize limited representation of a pro se party either on a pro bono or fee basis, in accordance with *Colorado Rule of Professional Conduct 1.2*. This provision provides assurance that an attorney who makes a limited appearance for a pro se party in a specified case proceeding(s), at the request of and with the consent of the pro se party, can withdraw from the case upon filing a notice of completion of the limited appearance, without leave of court.

Source: Committee comment amended and adopted June 17, 1999, effective July 1, 1999; entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 2. (b) amended and effective January 7, 2010; 5. added and effective October 20, 2011; IP 2. (b), 2. (b)(IV), 2. (c), and 3. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to *C.R.C.P. 1 (b)*.

COMMITTEE COMMENT

An "active case" is any case other than a "completed case" as described in subsection 3 of the Practice Standard.

Local Rules -- Statewide Practice Standards

Section 1-2 SPECIAL ADMISSION OF OUT-OF-STATE AND FOREIGN ATTORNEYS

Special admission of an out-of-state or foreign attorney shall be in accordance with C.R.C.P. Chapter 18, Rules Governing Admission to the Bar 205.3 and 205.5.

Source: Entire section amended and adopted and committee comment repealed October 20, 2005, effective January 1, 2006; amended and effective September 9, 2015.

Local Rules -- Statewide Practice Standards

Section 1-3 JURY FEES

Each party exercising the right to trial by jury shall file and serve a demand therefor and simultaneously pay the requisite jury fee. The demand and payment of the jury fee shall be in accordance with Rule 38. The jury fee shall not be returned under any circumstances. Failure of a party to timely file and serve a demand for trial by jury and pay the jury fee shall constitute a waiver of that party's right to trial by jury. When any party exercises the right to trial by jury, every other party to the action must pay the requisite jury fee unless such other party files a notice of waiver of the right to trial by jury pursuant to Rule 38 (a)(2). Any party who has demanded a trial by jury and has paid the requisite jury fee and any party who has not waived the right to trial by jury and has paid the requisite jury fee is entitled to trial by jury of all issues properly designated for trial by jury unless that party waives such right pursuant to Rule 38 (e).

Source: Entire section repealed and reenacted July 12, 1990, effective September 1, 1990.

COMMITTEE COMMENT

Amendment of this practice standard is to conform it to the requirements of *C.R.S. 13-71-144* (1989) and amended *C.R.C.P 38*. Under that statutory requirement, each party who wishes to be assured of having a jury trial, must demand a jury trial and pay a jury fee within the time specified. The case will be tried to a jury if the party demanding a jury trial makes a timely demand, pays the jury fee at the time of the demand and does not later waive a jury trial. If a demand is timely made and the jury fee timely paid, the right to jury trial cannot be withdrawn as against a party who has demanded a jury trial and timely paid a jury fee. For a party to be certain of having a jury trial, that party must demand it and timely pay a jury fee.

Local Rules -- Statewide Practice Standards

Section 1-4 SUPPRESSION FOR SERVICE OF PROCESS

In any civil action, upon written request of the claiming party, the fact of the filing of a case shall be suppressed by the clerk only upon order of the court to secure service of summons or other process and such order shall expire upon service of such summons or other process.

COMMITTEE COMMENT

This Practice Standard was a local rule found in most districts. It provides the machinery for the clerk to temporarily suppress the fact of filing of a case temporarily to avoid publicity that may affect ability to serve process. Such temporary suppression in aid of service of process, is different from the Practice Standard pertaining to limitation of access to court files.

Local Rules -- Statewide Practice Standards

Section 1-5 LIMITATION OF ACCESS TO COURT FILES

1. Nature of Order. Upon motion by any party named in any civil action, the court may limit access to court files. The order of limitation shall specify the nature of limitation, the duration of the limitation, and the reason for limitation.

2. When Order Granted. An order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

3. Application for Order. A motion for limitation of access may be granted, **ex parte**, upon motion filed with the complaint, accompanied by supporting affidavit or at a hearing concerning the motion.

4. Review by Order. Upon notice to all parties of record, and after hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person.

COMMITTEE COMMENT

This Practice Standard was made necessary by 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.

Local Rules -- Statewide Practice Standards

. . .

C.R.S. 13-14.5-105

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 13. COURTS AND COURT PROCEDURE > CIVIL PROTECTION ORDERS > ARTICLE 14.5. EXTREME RISK PROTECTION ORDERS

13-14.5-105. Hearings on petition - grounds for order issuance

(1) (a) Upon filing of the petition, the court shall order a hearing to be held and provide a notice of hearing to the respondent. The court must provide the notice of the hearing not later than one court day after the date of the extreme risk protection order petition. The court may schedule a hearing by telephone pursuant to local court rule to reasonably accommodate a disability or, in exceptional circumstances, to protect a petitioner from potential harm. The court shall require assurances of the petitioner's identity before conducting a telephonic hearing.

(b) Before the next court day, the court clerk shall forward a copy of the notice of hearing and petition to the law enforcement agency in the jurisdiction where the respondent resides for service upon the respondent.

(c) A copy of the notice of hearing and petition must be served upon the respondent in accordance with the rules for service ofprocess as provided in rule 4 of the Colorado rules of civil procedure or rule 304 of the Colorado rules of county court civil procedure. Service issued pursuant to this section takes precedence over the service of other documents, unless the other documents are of a similar emergency nature.

(d) The court may, as provided in *section 13-14.5-103*, issue a temporary extreme risk protection order pending the hearing ordered pursuant to subsection (1)(a) of this section. The temporary extreme risk protection order must be served concurrently with the notice of hearing and petition.

(2) Upon hearing the matter, if the court finds by clear and convincing evidence, based on the evidence presented pursuant to subsection (3) of this section, that the respondent poses a significant risk of causing personal injury to self or others by having in his or her custody or control a firearm or by purchasing, possessing, or receiving a firearm, the court shall issue an extreme risk protection order for a period of three hundred sixty-four days.

(3) In determining whether grounds for an extreme risk protection order exist, the court may consider any relevant evidence, including but not limited to any of the following:

(a) A recent act or credible threat of violence by the respondent against self or others, whether or not such violence or credible threat of violence involves a firearm;

(b) A pattern of acts or credible threats of violence by the respondent within the past year, including but not limited to acts or credible threats of violence by the respondent against self or others;

(c) A violation by the respondent of a civil protection order issued pursuant to article 14 of this title 13;

(d) A previous or existing extreme risk protection order issued against the respondent and a violation of a previous or existing extreme risk protection order;

(e) A conviction of the respondent for a crime that included an underlying factual basis of domestic violence as defined in *section 18-6-800.3 (1)*;

(f) The respondent's ownership, access to, or intent to possess a firearm;

(g) A credible threat of or the unlawful or reckless use of a firearm by the respondent;

(h) The history of use, attempted use, or threatened use of unlawful physical force by the respondent against another person, or the respondent's history of stalking another person as described in *section 18-3-602*;

(i) Any prior arrest of the respondent for a crime listed in *section 24-4.1-302 (1)* or *section 18-9-202*;

(j) Evidence of the abuse of controlled substances or alcohol by the respondent;

(k) Whether the respondent is required to possess, carry, or use a firearm as a condition of the respondent's current employment; and

(l) Evidence of recent acquisition of a firearm or ammunition by the respondent.

(4) The court may:

(a) Examine under oath the petitioner, the respondent, and any witnesses they may produce, or, in lieu of examination, consider sworn affidavits of the petitioner, the respondent, and any witnesses they may produce; and

(b) Request that the Colorado bureau of investigation conduct a criminal history record check related to the respondent and provide the results to the court under seal.

(5) The court shall allow the petitioner and respondent to present evidence and cross-examine witnesses and be represented by an attorney at the hearing.

(6) In a hearing pursuant to this article 14.5, the rules of evidence apply to the same extent as in a civil protection order proceeding pursuant to article 14 of this title 13.

(7) During the hearing, the court shall consider any available mental health evaluation or chemical dependency evaluation provided to the court.

(8) (a) Before issuing an extreme risk protection order, the court shall consider whether the respondent meets the standard for a court-ordered evaluation for persons with mental health disorders pursuant to *section 27-65-106*. If the court determines that the respondent meets the standard, then, in addition to issuing an extreme risk protection order, the court shall order mental health treatment and evaluation authorized pursuant to *section 27-65-106 (6)*.

(b) Before issuing an extreme risk protection order, the court shall consider whether the respondent meets the standard for an emergency commitment pursuant to *section 27-81-111* or *27-82-107*. If the court determines that the respondent meets the standard, then, in addition to issuing an extreme risk protection order, the court shall order an emergency commitment pursuant to *section 27-81-111* or *27-82-107*.

(9) An extreme risk protection order must include:

(a) A statement of the grounds supporting the issuance of the order;

(b) The date and time the order was issued;

(c) The date and time the order expires;

(d) The address of the court in which any responsive pleading should be filed;

(e) The requirements for relinquishment of a firearm and concealed carry permit pursuant to *section 13-14.5-108*; and

(f) The following statement:

> To the subject of this extreme risk protection order: This order will last until the date and time noted above. If you have not done so already, you must immediately surrender any firearms in your custody, control, or possession and any concealed carry permit issued to you. You may not have in your custody or control a firearm or purchase, possess, receive, or attempt to purchase or receive a firearm while this order is in effect. You have the right to request one hearing to terminate this order during the period that this order is in effect, starting from the date of this order and continuing through any renewals. You may seek the advice of an attorney as to any matter connected with this order.

(10) When the court issues an extreme risk protection order, the court shall inform the respondent that he or she is entitled to request termination of the order in the manner prescribed by *section 13-14.5-107*. The court shall provide the respondent with a form to request a termination hearing.

(11) (a) If the court issues an extreme risk protection order, the court shall state the particular reasons for the court's issuance.

(b) If the court denies the issuance of an extreme risk protection order, the court shall state the particular reasons for the court's denial.

(12) If the court denies the issuance of an extreme risk protection order but ordered a temporary extreme risk protection order and a law enforcement agency took custody of the respondent's concealed carry permit or the respondent surrendered his or her concealed carry permit as a result of the temporary extreme risk protection order, the sheriff who issued the concealed carry permit shall reissue the concealed carry permit to the respondent within three days, at no charge to the respondent.

(13) If the court issues an extreme risk protection order and the petitioner is a law enforcement officer or agency, the petitioner shall make a good-faith effort to provide notice of the order to a family or household member of the respondent and to any known third party who may be at direct risk of violence. The notice must include referrals to appropriate resources, including domestic violence, behavioral health, and counseling resources.

History

Source: L. 2019: Entire article added, *(HB 19-1177), ch. 108, p. 387,* Section 1, effective April 12.

C.R.S. 13-14-104.5

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 13. COURTS AND COURT PROCEDURE > CIVIL PROTECTION ORDERS > ARTICLE 14. CIVIL PROTECTION ORDERS

13-14-104.5. Procedure for temporary civil protection order

(1) (a) Any municipal court of record, if authorized by the municipal governing body; any county court; and any district, probate, or juvenile court shall have original concurrent jurisdiction to issue a temporary or permanent civil protection order against an adult or against a juvenile who is ten years of age or older for any of the following purposes:

(I) To prevent assaults and threatened bodily harm;

(II) To prevent domestic abuse;

(III) To prevent emotional abuse of the elderly or of an at-risk adult;

(IV) To prevent sexual assault or abuse; and

(V) To prevent stalking.

(b) To be eligible for a protection order, the petitioner does not need to show that he or she has reported the act that is the subject of the complaint to law enforcement, that charges have been filed, or that the petitioner is participating in the prosecution of a criminal matter.

(2) Any civil protection order issued pursuant to this section shall be issued using the standardized set of forms developed by the state court administrator pursuant to *section 13-1-136*.

(3) Venue for filing a motion or complaint pursuant to this section is proper in any county where the acts that are the subject of the motion or complaint occur, in any county where one of the parties resides, or in any county where one of the parties is employed. This requirement for venue does not prohibit the change of venue to any other county appropriate under applicable law.

(4) A motion for a temporary civil protection order shall be set for hearing at the earliest possible time, which hearing may be ex parte, and shall take precedence over all matters, except those matters of the same character that have been on the court docket for a longer period of time. The court shall hear all such motions as expeditiously as possible.

(5) Any district court, in an action commenced under the "Uniform Dissolution of Marriage Act", article 10 of title 14, C.R.S., shall have authority to issue temporary and permanent protection orders pursuant to the provisions of subsection (1) of this section. Such protection order may be as a part of a motion for a protection order accompanied by an affidavit filed in an action brought under article 10 of title 14, C.R.S. Either party may request the court to issue a protection order consistent with any other provision of this article.

(6) At the time a protection order is requested pursuant to this section, the court shall inquire about, and the requesting party and such party's attorney shall have an independent duty to disclose, knowledge such party and such party's attorney may have concerning the existence of any prior protection or restraining order of any court addressing in whole or in part the subject matter of the requested protection order. In the event there are conflicting restraining or protection orders, the court shall consider, as its first priority, issues of public safety. An order that prevents assaults, threats of assault, or other harm shall be given precedence over an order that deals

with the disposition of property or other tangible assets. Every effort shall be made by judicial officers to clarify conflicting orders.

(7) (a) A temporary civil protection order may be issued if the issuing judge or magistrate finds that an imminent danger exists to the person or persons seeking protection under the civil protection order. In determining whether an imminent danger exists to the life or health of one or more persons, the court shall consider all relevant evidence concerning the safety and protection of the persons seeking the protection order. The court shall not deny a petitioner the relief requested because of the length of time between an act of abuse or threat of harm and the filing of the petition for a protection order. The court shall not deny a petitioner the relief requested because a protection order has been issued pursuant to *section 18-1-1001* or *18-1-1001.5*.

(b) If the judge or magistrate finds that an imminent danger exists to the employees of a business entity, he or she may issue a civil protection order in the name of the business for the protection of the employees. An employer is not be liable for failing to obtain a civil protection order in the name of the business for the protection of the employees and patrons.

(8) Upon the filing of a complaint duly verified, alleging that the respondent has committed acts that would constitute grounds for a civil protection order, any judge or magistrate, after hearing the evidence and being fully satisfied therein that sufficient cause exists, may issue a temporary civil protection order to prevent the actions complained of and a citation directed to the respondent commanding the respondent to appear before the court at a specific time and date and to show cause, if any, why said temporary civil protection order should not be made permanent. In addition, the court may order any other relief that the court deems appropriate. Complaints may be filed by persons seeking protection for themselves or for others as provided in *section 26-3.1-102 (1)(b)* and (1)(c), C.R.S.

(9) A copy of the complaint, a copy of the temporary civil protection order, and a copy of the citation must be served upon the respondent and upon the person to be protected, if the complaint was filed by another person, in accordance with the rules for service of process as provided in rule 304 of the rules of county court civil procedure or rule 4 of the Colorado rules of civil procedure. The citation must inform the respondent that, if the respondent fails to appear in court in accordance with the terms of the citation, a bench warrant may be issued for the arrest of the respondent, and the temporary protection order previously entered by the court made permanent without further notice or service upon the respondent.

(10) The return date of the citation must be set not more than fourteen days after the issuance of the temporary civil protection order and citation. If the petitioner is unable to serve the respondent in that period, the court shall extend the temporary protection order previously issued, continue the show of cause hearing, and issue an alias citation stating the date and time to which the hearing is continued. The petitioner may thereafter request, and the court may grant, additional continuances as needed if the petitioner has still been unable to serve the respondent.

(11) (a) Any person against whom a temporary protection order is issued pursuant to this section, which temporary protection order excludes the person from a shared residence, is permitted to return to the shared residence one time to obtain sufficient undisputed personal effects as are necessary for the person to maintain a normal standard of living during any period prior to a hearing concerning the order. The person against whom a temporary protection order is issued is permitted to return to the shared residence only if the person is accompanied at all times by a peace officer while the person is at or in the shared residence.

(b) When any person is served with a temporary protection order issued against the person excluding the person from a shared residence, the temporary protection order must contain a notification in writing to the person of the person's ability to return to the shared residence pursuant to paragraph (a) of this subsection (11). The written notification shall be in bold print and conspicuously placed in the temporary protection order. A judge, magistrate, or other judicial officer shall not issue a temporary protection order that does not comply with this section.

(c) Any person against whom a temporary protection order is issued pursuant to this section, which temporary protection order excludes the person from a shared residence, may avail himself or herself of the forcible entry and detainer remedies available pursuant to article 40 of this title. However, such person is not entitled to return to the residence until such time as a valid writ of restitution is executed and filed with the

court issuing the protection order and, if necessary, the protection order is modified accordingly. A landlord whose lessee has been excluded from a residence pursuant to the terms of a protection order may also avail himself or herself of the remedies available pursuant to article 40 of this title.

History

Source:

L. 2013: Entire section added with relocations, *(HB 13-1259), ch. 218, p. 1005,* Section 10, effective July 1.L. 2018: (7)(a) amended, *(SB 18-060), ch. 50, p. 489,* Section 3, effective November 1.

COLORADO REVISED STATUTES

C.R.S. 13-14-105

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 13. COURTS AND COURT PROCEDURE > CIVIL PROTECTION ORDERS > ARTICLE 14. CIVIL PROTECTION ORDERS

13-14-105. Provisions relating to civil protection orders

(1) A municipal court of record that is authorized by its municipal governing body to issue protection or restraining orders and any county court, in connection with issuing a civil protection order, has original concurrent jurisdiction with the district court to include any provisions in the order that the municipal or county court deems necessary for the protection of persons, including but not limited to orders:

(a) Restraining a party from threatening, molesting, or injuring any other party or the minor child of either of the parties;

(b) Restraining a party from contacting any other party or the minor child of either of the parties;

(c) Excluding a party from the family home upon a showing that physical or emotional harm would otherwise result;

(d) Excluding a party from the home of another party upon a showing that physical or emotional harm would otherwise result;

(e)

(I) Awarding temporary care and control of any minor children of either party involved for a period of not more than one year.

(II) If temporary care and control is awarded, the order may include parenting time rights for the other party involved and any conditions of such parenting time, including the supervision of parenting time by a third party who agrees to the terms of the supervised parenting time and any costs associated with supervised parenting time, if necessary. If the restrained party is unable to pay the ordered costs, the court shall not place such responsibility with publicly funded agencies. If the court finds that the safety of any child or the protected party cannot be ensured with any form of parenting time reasonably available, the court may deny parenting time.

(III) The court may award interim decision-making responsibility of a child to a person entitled to bring an action for the allocation of parental responsibilities under *section 14-10-123, C.R.S.*, when such award is reasonably related to preventing domestic abuse as defined in *section 13-14-101 (2)*, or preventing the child from witnessing domestic abuse.

(IV) Temporary care and control or interim decision-making responsibility must be determined in accordance with the standard contained in *section 14-10-124, C.R.S.*

(f) Restraining a party from interfering with a protected person at the person's place of employment or place of education or from engaging in conduct that impairs the protected person's employment, educational relationships, or environment;

(g) Restraining a party from molesting, injuring, killing, taking, transferring, encumbering, concealing, disposing of or threatening harm to an animal owned, possessed, leased, kept, or held by any other party or a minor child of any other party;

(h) Specifying arrangements for possession and care of an animal owned, possessed, leased, kept, or held by any other party or a minor child of any other party;

(i) Granting such other relief as the court deems appropriate;

(j)

(I) Entering a temporary injunction restraining the respondent from ceasing to make payments for mortgage or rent, insurance, utilities or related services, transportation, medical care, or child care when the respondent has a prior existing duty or legal obligation or from transferring, encumbering, concealing, or in any way disposing of personal effects or real property, except in the usual course of business or for the necessities of life and requiring the restrained party to account to the court for all extraordinary expenditures made after the injunction is in effect.

(II) Any injunction issued pursuant to this paragraph (j) is effective upon personal service or upon waiver and acceptance of service by the respondent for a period of time determined appropriate by the court not to exceed one year after the issuance of the permanent civil protection order.

(III) The provisions of the injunction must be printed on the summons, and the petition and the injunction become an order of the court upon fulfillment of the requirements of subparagraph (I) of this paragraph (j).

(IV) Nothing in this paragraph (j) precludes either party from applying to the district court for further temporary orders, an expanded temporary injunction, or modification or revocation. Any subsequent order issued by the district court as part of a domestic matter involving the parties supersedes an injunction made pursuant to this paragraph (j).

(2) Any order for temporary care and control issued pursuant to subsection (1) of this section is governed by the "Uniform Child-custody Jurisdiction and Enforcement Act", article 13 of title 14, C.R.S.

History

Source:

L. 2013: Entire section added with relocations, *(HB 13-1259), ch. 218, p. 1008,* Section 11, effective July 1.

C.R.S. 24-72-302

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 24. GOVERNMENT - STATE > PUBLIC (OPEN) RECORDS > ARTICLE 72. PUBLIC RECORDS > PART 3. CRIMINAL JUSTICE RECORDS

24-72-302. Definitions

As used in this part 3, unless the context otherwise requires:

(1) "Arrest and criminal records information" means information reporting the arrest, indictment, or other formal filing of criminal charges against a person; the identity of the criminal justice agency taking such official action relative to an accused person; the date and place that such official action was taken relative to an accused person; the name, birth date, last-known address, and sex of an accused person; the nature of the charges brought or the offenses alleged against an accused person; and one or more dispositions relating to the charges brought against an accused person.

(2) "Basic identification information" means the name, place and date of birth, last-known address, social security number, occupation and address of employment, physical description, photograph, handwritten signature, sex, fingerprints, and any known aliases of any person.

(3) "Criminal justice agency" means any court with criminal jurisdiction and any agency of the state, including but not limited to the department of education, or any agency of any county, city and county, home rule city and county, home rule city or county, city, town, territorial charter city, governing boards of institutions of higher education, school district, special district, judicial district, or law enforcement authority that performs any activity directly relating to the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders; or criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information.

(4) "Criminal justice records" means all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule, including but not limited to the results of chemical biological substance testing to determine genetic markers conducted pursuant to *sections 16-11-102.4* and *16-23-104, C.R.S.*

(5) "Custodian" means the official custodian or any authorized person having personal custody and control of the criminal justice records in question.

(6) "Disposition" means a decision not to file criminal charges after arrest; the conclusion of criminal proceedings, including conviction, acquittal, or acquittal by reason of insanity; the dismissal, abandonment, or indefinite postponement of criminal proceedings; formal diversion from prosecution; sentencing, correctional supervision, and release from correctional supervision, including terms and conditions thereof; outcome of appellate review of criminal proceedings; or executive clemency.

(7) "Official action" means an arrest; indictment; charging by information; disposition; pretrial or posttrial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole, or participation in correctional or rehabilitative programs; and any decision to formally discipline, reclassify, or relocate any person under criminal sentence.

(8) "Official custodian" means any officer or employee of the state or any agency, institution, or political subdivision thereof who is responsible for the maintenance, care, and keeping of criminal justice records, regardless of whether such records are in his actual personal custody and control.

(9) "Person" means any natural person, corporation, limited liability company, partnership, firm, or association.

(10) "Person in interest" means the person who is the primary subject of a criminal justice record or any representative designated by said person by power of attorney or notarized authorization; except that, if the subject of the record is under legal disability, "person in interest" means and includes his parents or duly appointed legal representative.

(11) "Private custodian" means a private entity that has custody of the criminal justice records in question and is in the business of providing the information to others.

History

Source:

L. 77: Entire part added, p. 1244, Section 1, effective December 31. L. 81: (3) amended, p. 1238, Section 1, effective June 4. L. 88: (2) amended, p. 979, Section 2, effective April 20. L. 89: (2) amended, p. 845, Section 114, effective July 1. L. 90: (9) amended, p. 449, Section 22, effective April 18. L. 98: (2) amended, p. 947, Section 6, effective May 27. L. 99: (4) amended, p. 1170, Section 5, effective July 1.L. 2000: (4) amended, p. 1266, Section 5, effective May 26; (4) amended, p. 1027, Section 7, effective July 1.L. 2002: (4) amended, p. 1023, Section 43, effective June 1; (4) amended, p. 1155, Section 15, effective July 1.L. 2006: (4) amended, p. 1692, Section 15, effective July 1, 2007. L. 2007: (4) amended, p. 2040, Section 60, effective June 1. L. 2008: (3) amended, p. 1668, Section 13, effective May 29. L. 2009: (4) amended, *(SB 09-241), ch. 295, p. 1577,* Section 2, effective September 30, 2010. L. 2010: (4) amended, *(HB 10-1422), ch. 419, p. 2087,* Section 76, effective August 11. L. 2011: (11) added, *(HB 11-1203), ch. 72, p. 199,* Section 1, effective August 10.

C.R.S. 24-72-701

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 24. GOVERNMENT - STATE > PUBLIC (OPEN) RECORDS > ARTICLE 72. PUBLIC RECORDS > PART 7. CRIMINAL JUSTICE RECORD SEALING

24-72-701. Definitions

As used in this part 7, unless the context otherwise requires:

(1) "Arrest and criminal records information" has the same meaning as in *section 24-72-302*.

(2) "Basic identification information" has the same meaning as in *section 24-72-302*.

(3) "Conviction records" means arrest and criminal records information and any records pertaining to a judgment of conviction.

(4) "Criminal justice agencies" has the same meaning as in *section 24-72-302*.

(5) "Custodian" has the same meaning as in *section 24-72-302*.

(6) "Official actions" has the same meaning as in *section 24-72-302*.

(7) "Person in interest" has the same meaning as in *section 24-72-302*.

(8) "Private custodian" has the same meaning as in *section 24-72-302*.

(9) "Victim" means any natural person against whom any crime has been perpetrated or attempted, unless the person is accountable for the crime or a crime arising from the same conduct or plan as the crime is defined under the laws of this state or of the United States, or, if such person is deceased or incapacitated, the person's spouse, parent, legal guardian, child, sibling, grandparent, grandchild, significant other, or other lawful representative.

History

Source:

L. 2019: Entire part R&RE, *(HB 19-1275), ch. 295, p. 2732,* Section 1, effective August 2.

C.R.S. 24-72-704

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 24. GOVERNMENT - STATE > PUBLIC (OPEN) RECORDS > ARTICLE 72. PUBLIC RECORDS > PART 7. CRIMINAL JUSTICE RECORD SEALING

24-72-704. Sealing of arrest records when no charges filed

(1) (a) Any person in interest may petition the district court of the district in which any arrest and criminal records information pertaining to the person in interest is located for the sealing of all of the records, except basic identification information, if the records are a record of official actions involving a criminal offense for which the person in interest:

(I) Completed a diversion agreement pursuant to *section 18-1.3-101* and no criminal charges were ever filed;

(II) Was not charged and the statute of limitations for the offense for which the person was arrested that has the longest statute of limitations has run; or

(III) Was not charged and the statute of limitations has not run but the person is no longer being investigated by law enforcement for commission of the offense.

(b) Any petition to seal criminal records shall include a listing of each custodian of the records to whom the sealing order is directed and any information that accurately and completely identifies the records to be sealed.

(c)

(I) Upon the filing of a petition, the court shall review the petition and determine whether the petition is sufficient on its face. If the court determines that the petition on its face is insufficient or if the court determines that, after taking judicial notice of matters outside the petition, the petitioner is not entitled to relief pursuant to this section, the court shall enter an order denying the petition and mail a copy of the order to the petitioner or, as permitted, serve the order pursuant to Colorado supreme court rules. The court's order must specify the reasons for the denial of the petition.

(II) If the court determines that the petition is sufficient on its face and that no other grounds exist at that time for the court to deny the petition pursuant to this section, the court shall set a date for a hearing at least thirty-five days after the determination and notify the prosecuting attorney, the arresting agency, and any other person or agency identified by the petitioner of the hearing date. If no objection is received by the court seven days prior to the hearing date, the court shall vacate the hearing and order such records, except for basic identification information, to be sealed. If an objection is filed and the court determines at a hearing or otherwise that the objection provides facts that make the petitioner ineligible for sealing of the arrest records, the court shall deny the petition and provide a copy of the order to the petitioner. The court's order must specify the reasons for the denial of the petition. If the objection does not provide facts that make the petitioner ineligible for sealing of the arrest records, the court shall order such records, except basic identification information, to be sealed.

(d) Inspection of the records included in an order sealing criminal records may be permitted by the court only upon petition by the person who is the subject of the records or by the prosecuting attorney and only for those purposes named in the petition.

History

Source:

L. 2019: Entire part R&RE, *(HB 19-1275), ch. 295, p. 2738,* Section 1, effective August 2.

End of Document

C.R.S. 24-72-705

Current through all laws passed during the 2019 Legislative Session.

CO - Colorado Revised Statutes Annotated > TITLE 24. GOVERNMENT - STATE > PUBLIC (OPEN) RECORDS > ARTICLE 72. PUBLIC RECORDS > PART 7. CRIMINAL JUSTICE RECORD SEALING

24-72-705. Sealing criminal justice records other than convictions - simplified process - processing fees - applicability

(1) (a) The court shall order the defendant's criminal justice records sealed when:

(I) A case against a defendant is completely dismissed;

(II) The defendant is acquitted of all counts in the case;

(III) The defendant completes a diversion agreement pursuant to *section 18-1.3-101* when a criminal case has been filed; or

(IV) The defendant completes a deferred judgment and sentence pursuant to *section 18-1.3-102* and all counts are dismissed.

(b) If the court did not order the record sealing at the time of the dismissal or acquittal, the defendant may make such motion at any time subsequent to the dismissal or acquittal through the filing of a written motion in the criminal case with written notice to the prosecuting attorney.

(c) If the defendant moves pursuant to subsection (1)(a) of this section to seal his or her criminal justice records pursuant to the expedited procedures of this section, the court shall promptly process the defendant's request to seal the criminal justice records within the criminal case without the filing of an independent civil action and without any further evidence except for evidence of the dismissal or acquittal. Motions filed pursuant to this section are procedural in nature, and sealing pursuant to this section applies retroactively for all eligible cases when the case has been completely dismissed or the defendant has been acquitted of all counts in a state or municipal criminal case.

(d) Notwithstanding the provision of subsection (1)(c) of this section, if the defendant is acquitted or if the case dismissed is a crime enumerated in *section 24-4.1-302 (1)* in which notice of a hearing on a motion to seal is required pursuant to *section 24-4.1-303 (11)(b.7)*, the court shall allow the district attorney the opportunity to inform the victim that the record will be sealed and shall set a return date for the sealing motion no later than forty-two days after receipt of the motion.

(e) The provisions of *section 24-72-703 (2)(b)* and *section 24-72-703 (5)* apply to this section.

(f) This section does not apply to records that are subject to the procedure set forth in *section 18-13-122 (13)*.

(2) (a) A defendant moving to have his or her criminal justice records sealed or a defendant who has his or her criminal justice records sealed by the court pursuant to this section shall pay a processing fee of sixty-five dollars to cover the actual costs related to the sealing of the criminal justice records, which the court may waive upon a determination of indigency.

(b) When the motion to seal the criminal case is filed in state court, the processing fees collected pursuant to subsection (2)(a) of this section must be transmitted to the state treasurer and credited to the judicial stabilization cash fund created in *section 13-32-101 (6)*.

(c) When the motion to seal the criminal case is filed in municipal court, the processing fees collected pursuant to subsection (2)(a) of this section must be reported and paid as municipal costs and must be transmitted to the treasurer of the municipality and deposited in the general fund of the municipality pursuant to *section 13-10-115*.

History

Source:

L. 2019: Entire part R&RE, *(HB 19-1275), ch. 295, p. 2739,* Section 1, effective August 2.

Doe v. Heitler

Court of Appeals of Colorado, Division One

April 26, 2001, Decided

Court of Appeals No. 00CA0849

Reporter
26 P.3d 539 *; 2001 Colo. App. LEXIS 706 **; 2001 Colo. J. C.A.R. 2155

John Doe, Plaintiff-Appellant, v. Susan Heitler, Defendant-Appellee.

Subsequent History: **[**1]** Released for Publication July 13, 2001.

Prior History: City and County of Denver District Court No. 99CV5763. Honorable Gloria A. Rivera, Judge.

Disposition: JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS.

Core Terms

pseudonym, amend, trial court, seal, disclosure, fictitious name, cases, privacy interest, public interest, district court, deny leave, real name, anonymously, privacy, courts, subject matter jurisdiction, responsive pleading, bring an action, leave to amend, own name, lawsuit, parties

Case Summary

Procedural Posture
Plaintiff filed an action for damages against defendant psychologist for breach of her duty of confidentiality. Plaintiff filed the complaint as John Doe, without requesting permission to proceed under a pseudonym. Defendant moved to dismiss. The District Court for the City and County of Denver, Colorado, dismissed the action and denied plaintiff's motion for reconsideration and/or for leave to amend the complaint. Plaintiff appealed.

Overview
Plaintiff alleged that defendant had breached her duty of confidentiality by referencing his cocaine abuse in a thank-you letter she sent to the physician who had referred plaintiff to her. In response to defendant's motion to dismiss for lack of subject matter jurisdiction, plaintiff stated only that he would be willing to disclose his identity to the court if required to do so, and asked to have the file sealed to protect him from further harm. The appellate court found that: (1) plaintiff was not entitled to proceed as John Doe, (2) precluding plaintiff from proceeding anonymously would not subject him to criminal liability, (3) the trial court did not err in denying plaintiff leave to proceed as John Doe and dismissing the complaint for failure to name a party plaintiff, (4) the trial court properly declined plaintiff's request to have the file placed under seal, and (5) the trial court erred in refusing to allow plaintiff to amend his complaint.

Outcome
The judgment was affirmed insofar as it dismissed plaintiff's

complaint and denied his request to order the file sealed. The judgment was reversed insofar as it denied plaintiff's motion to amend his complaint. The cause was remanded with directions to permit plaintiff to file an amended complaint, in his real name.

LexisNexis® Headnotes

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Parties, Capacity of Parties**

See *Colo. R. Civ. P. 10(a)*.

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN2[] **Parties, Capacity of Parties**

Colo. R. Civ. P. 10(a) embodies the fundamental common law concept that for litigation there must be a controversy and for a controversy there must be adverse parties. It is, therefore, indispensable that a complaint name a party plaintiff and a party defendant in order to present to a court subject matter that may be litigated.

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN3[] **Parties, Capacity of Parties**

Federal courts applying *Fed. R. Civ. P. 10(a)* which, like *Colo. R. Civ. P. 10(a)*, requires that the title of the action in the complaint include the names of all the parties, similarly conclude that failure to name a party plaintiff may deprive the court of jurisdiction.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Parties > Capacity of Parties > General Overview

HN4[] **Real Party in Interest, Fictitious Names**

A district court lacks jurisdiction over unnamed plaintiffs who do not seek permission to proceed anonymously, as the case does not commence with respect to them.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > Parties > Capacity of Parties > General Overview

HN5[] **Real Party in Interest, Fictitious Names**

Federal cases allow plaintiffs to sue under a fictitious name in certain limited circumstances where there are significant privacy interests or threats of physical harm implicated by the disclosure of the plaintiff's name.

Civil Procedure > Parties > Capacity of Parties > General Overview

HN6[] **Parties, Capacity of Parties**

A plaintiff seeking to proceed anonymously must show that he or she has a substantial privacy right that outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings. Among the factors relevant

to a determination of whether this showing is made are: whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent non-parties; whether the action is against a governmental or a private party; whether the plaintiff would be compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution; and the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > Parties > Capacity of Parties > General Overview

HN7[] **Real Party in Interest, Fictitious Names**

It is the public, not the court, which has an interest in the disclosure of the parties' identities, and a mere offer to disclose a party's real identity to the court in camera does not suffice to allow that party to proceed under a pseudonym if he or she is not otherwise entitled to do so.

Civil Procedure > Parties > Capacity of Parties > General Overview

HN8[] **Parties, Capacity of Parties**

The public's interest in an open judicial process is no more served by an in camera disclosure than by the use of the pseudonym itself.

Civil Procedure > Parties > Capacity of Parties > General Overview

Family Law > Parental Duties & Rights > Nonmarital Children > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

HN9[] **Parties, Capacity of Parties**

In balancing the interests, courts are to bear in mind that proceeding under a pseudonym is an unusual procedure and is reserved for exceptional cases. Thus, cases permitting plaintiffs to proceed under fictitious names are generally limited to those involving matters such as abortion, homosexuality, illegitimacy, privacy rights of children, and the like.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > Parties > Capacity of Parties > General Overview

HN10[] **Real Party in Interest, Fictitious Names**

The federal courts generally deny leave to proceed under a pseudonym where the plaintiff simply claims that he or she will be embarrassed or humiliated, or will suffer economic loss, if required to sue in his or her own name.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN11[] **Real Party in Interest, Fictitious Names**

The decision of whether to allow a plaintiff to proceed anonymously is committed in the first instance to the discretion of the trial court.

Civil Procedure > Parties > Capacity of Parties > General Overview

Evidence > Privileges > Doctor-Patient Privilege > General Overview

Evidence > Privileges > Psychotherapist-Patient Privilege > General Overview

HN12[] **Parties, Capacity of Parties**

Even assuming a communication between a psychologist and the referring physician about the problem for which the patient was referred can somehow amount to a breach of the physician-

patient privilege, that fact alone is not sufficient to permit plaintiff to proceed as John Doe.

Civil Procedure > Parties > Capacity of Parties > General Overview

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

HN13 **Parties, Capacity of Parties**

When plaintiff is suing a private party, not the government, and is seeking damages for past disclosure rather than declaratory or injunctive relief to prevent the future disclosure of confidential information, these facts weigh against permitting him to proceed under a pseudonym.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > Parties > Capacity of Parties > General Overview

HN14 **Real Party in Interest, Fictitious Names**

Most important for the court's analysis of plaintiff's request to proceed under a fictitious name is the nature of the specific claims he is making against the defendants. His claims directly accuse the defendants of several forms of serious and deliberate wrongdoing. He attacks the defendants' integrity and reputations. Basic fairness requires that where a plaintiff makes such accusations publicly, he should stand behind those accusations, and the defendants should be able to defend themselves publicly.

Governments > Courts > Court Records

HN15 **Courts, Court Records**

Pursuant to *Colo. R. Civ. P. 121* § 1-5, a trial court may limit access to court files upon motion of any party. However, an order limiting access is not to be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

Constitutional Law > Substantive Due Process > Privacy > Personal Information

Governments > Courts > Court Records

HN16 **Privacy, Personal Information**

A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file. Likewise, prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Court Records

HN17 **Subject Matter Jurisdiction, Jurisdiction Over Actions**

To the extent that a plaintiff seeks sealing of the file without at the same time agreeing to bring the action in his own name, such action does not cure the jurisdictional defect in his complaint.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN18 **Pleadings, Amendment of Pleadings**

See *Colo. R. Civ. P. 15(a)*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN19 **Defenses, Demurrers & Objections, Motions to Dismiss**

For purposes of *Colo. R. Civ. P. 15(a)*, a motion to dismiss does not constitute a responsive pleading. It is error to grant defendants' motion to dismiss without giving plaintiff opportunity to file an amended complaint.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN20 **Amendment of Pleadings, Leave of Court**

A trial court should allow an amendment to a complaint even following its grant of a motion to dismiss; because there are no exceptions to express language of *Colo. R. Civ. P. 15(a)* allowing one amendment as a matter of right before a responsive pleading is filed.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN21 **Pleadings, Amendment of Pleadings**

If a final judgment is entered, the absolute right to amend is lost, and amendment should not be allowed unless the judgment is set aside or vacated under *Colo. R. Civ. P. 59* or *60*.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN22 **Standards of Review, Abuse of Discretion**

Even where amendment of a complaint is no longer a matter of right, refusal to permit an amendment may be an abuse of discretion if the plaintiff's claims will otherwise be barred by the applicable statute of limitations.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN23 **Pleadings, Amendment of Pleadings**

Divisions of the Colorado Court of Appeal reject contentions that an amendment should be denied where a complaint is dismissed for lack of subject matter jurisdiction.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN24 **Pleadings, Amendment of Pleadings**

The appellate court rejects the contention that claims dismissed for lack of subject matter jurisdiction cannot be amended as a matter of law and as a matter of public policy. There are no exceptions to the rule permitting amendments where no responsive pleadings have been filed. Moreover, the appellate court specifically holds that a defect in allegations conferring subject matter jurisdiction can be cured by amendment.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Pensions & Benefits Law > ERISA > Civil Litigation > Standing

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Parties > Capacity of Parties > General Overview

Pensions & Benefits Law > ERISA > Civil Litigation > General Overview

HN25 **Real Party in Interest, Fictitious Names**

Although some federal courts refuse to allow amendment of a complaint to name a different plaintiff where the original plaintiff lacks standing that rule is generally not applied where the original named plaintiff is a pseudonym for the actual plaintiff. In that circumstance, the courts permit an amendment.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN26[] **Real Party in Interest, Fictitious Names**

If the court does not find compelling reasons to permit a plaintiff to proceed under a pseudonym, then the complaint is usually dismissed with leave to file a new complaint setting forth plaintiff's true identity.

Counsel: Stafford & Stafford, L.L.C., John T. Stafford, Jr., Lakewood, Colorado, for Plaintiff-Appellant.

Ewing & Ewing, PC, Laurence B. James, Englewood, Colorado, for Defendant-Appellee.

Judges: Opinion by JUDGE VOGT. Metzger and Dailey, JJ., concur.

Opinion by: VOGT

Opinion

[*540] Plaintiff, John Doe, appeals the judgment entered on the trial court's orders dismissing his complaint against defendant, Susan Heitler, and denying his subsequent motion to amend the complaint. We affirm in part, reverse in part, and remand with directions.

Plaintiff brought an action for damages against defendant, a psychologist, alleging that she had breached her duty of confidentiality by referencing his cocaine abuse in a thank-you letter she sent to the physician who had referred plaintiff to her. Plaintiff filed the complaint as "John Doe," without first requesting the court's permission to proceed under a pseudonym.

Defendant moved to dismiss, arguing **[**2]** that plaintiff's failure either to use his real name or to obtain court approval for his use of a pseudonym violated *C.R.C.P. 10(a)* and deprived the court of subject matter jurisdiction. Plaintiff responded by requesting leave to proceed under a pseudonym. He stated in his response that he would be willing to **[*541]** disclose his identity to the court under seal, if required to do so, and concluded with a one-sentence alternative request that, "if the court determines that no 'significant privacy interest' exists, . . . the entire file be sealed in an effort to protect Plaintiff from any further emotional and financial harm."

The trial court granted defendant's motion and dismissed the case. It subsequently denied plaintiff's motion for reconsideration or, in the alternative, for leave to amend the complaint to substitute his real name.

I.

Plaintiff first contends that, because he would suffer additional injury if required to proceed in his real name, the trial court erred in granting the motion to dismiss. We disagree.

HN1[] *C.R.C.P. 10(a)* provides, in relevant part, that: "In the complaint initiating a lawsuit, the title of the action shall include the names of all the parties to the **[**3]** action," unless those names are not known.

In *Barker v. District Court, 199 Colo. 416, 419, 609 P.2d 628, 630 (1980)*, the supreme court observed that this *HN2*[] rule embodies the "fundamental common law concept . . . that for litigation there must be a controversy and for a controversy there must be adverse parties . . . . It is, therefore, indispensable . . . that a complaint name a party plaintiff and a party defendant in order to present to a court subject matter that may be litigated." The court then held that, because the district attorney had designated only a building and not any specific individual or legal entity as a party defendant, the trial court should have dismissed the action for lack of subject matter jurisdiction.

Although *Barker* involved an unnamed defendant, *HN3*[] federal courts applying *Fed. R. Civ. P. 10(a)* -- which, like *C.R.C.P. 10(a)*, requires that the title of the action in the complaint include the names of all the parties -- have similarly concluded that failure to name a party plaintiff may deprive the court of jurisdiction. *See National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989)*(district *HN4*[] court **[**4]** lacked jurisdiction over unnamed plaintiffs who had not sought permission to proceed anonymously, "as a case had not been commenced with respect to them"); *see generally* 2 *Moore's Federal Practice § 10.02[2]* (3d ed. 2000).

Notwithstanding the rule requiring that a plaintiff be named in

the caption of the complaint, plaintiff argues that he should have been allowed to proceed as John Doe because disclosing his real name would cause further injury to the privacy interest he seeks to protect. In so arguing, plaintiff relies on HN5[] federal cases that have allowed plaintiffs to sue under a fictitious name in certain limited circumstances where there are significant privacy interests or threats of physical harm implicated by the disclosure of the plaintiff's name. *See*, *e.g.*, James v. Jacobson, 6 F.3d 233 (4th Cir. 1993); Doe v. Frank, 951 F.2d 320 (11th Cir. 1992); National Commodity & Barter Ass'n v. Gibbs, supra; Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981).

Under these cases, HN6[] a plaintiff seeking to proceed anonymously must show that he or she has a substantial privacy right that outweighs the "customary **[**5]** and constitutionally-embedded presumption of openness in judicial proceedings." Doe v. Stegall, supra, 653 F.2d at 186.

Among the factors relevant to a determination of whether this showing has been made are: Whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent non-parties; whether the action is against a governmental or a private party; whether the plaintiff would be compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution; and the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. *See* James v. Jacobson, supra; Doe v. Shakur, 164 F.R.D. 359 (S.D.N.Y. 1996).

Because HN7[] it is the public, not the court, which has an interest in the disclosure of the parties' identities, a mere offer to disclose a party's real identity to the court *in camera* **[*542]** does not suffice **[**6]** to allow that party to proceed under a pseudonym if he or she is not otherwise entitled to do so. *See* Free Market Compensation v. Commodity Exchange, Inc., 98 F.R.D. 311, 313 (S.D.N.Y. 1983)("The HN8[] public's interest in an open judicial process is no more served by an *in camera* disclosure than by the use of the pseudonym itself.").

HN9[] In balancing the interests, courts are to bear in mind that proceeding under a pseudonym is an unusual procedure and is reserved for exceptional cases. Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000); Doe v. Frank, supra. Thus, cases permitting plaintiffs to proceed under fictitious names have generally been limited to those involving matters such as abortion, homosexuality, illegitimacy, privacy rights of children, and the like. *See* 2 *Moore's Federal Practice*, *supra*, § 10.02[2][c][ii]; *see also*, *e.g.*, James v. Jacobson, supra (spouses suing doctor who had fraudulently used his own sperm rather than husband's sperm to impregnate wife could proceed under pseudonym to protect their children's privacy interests); Doe v. Stegall, supra **[**7]** (approving pseudonym for child plaintiffs challenging prayer and Bible reading in Mississippi public schools, where record indicated they could expect extensive harassment and potentially violent reprisals); Doe v. Blue Cross & Blue Shield, 794 F. Supp. 72 (D.R.I. 1992)(allowing use of pseudonym by transsexual suing insurer for medical expenses incurred in connection with sex change operation).

Conversely, HN10[] the federal courts have generally denied leave to proceed under a pseudonym where the plaintiff simply claims that he or she will be embarrassed or humiliated, or will suffer economic loss, if required to sue in his or her own name. *See* Doe v. Frank, supra (employee suing for unlawful discrimination based on his alcoholism); Coe v. United States District Court, 676 F.2d 411 (10th Cir. 1982)(doctor facing professional discipline based on allegations of immoral conduct); Doe v. Shakur, supra (victim of a sexual assault suing assailants); Free Market Compensation v. Commodity Exchange, Inc., supra (co-plaintiff claiming disclosure of his identity would cause him to suffer professional embarrassment **[**8]** and economic loss).

HN11[] The decision whether to allow a plaintiff to proceed anonymously is committed in the first instance to the discretion of the trial court. *See* James v. Jacobson, supra. The trial court's brief order in this case does not indicate whether it considered any of the factors set forth above in deciding to deny plaintiff leave to bring the action as John Doe. Nevertheless, inasmuch as plaintiff did not seek an evidentiary hearing in the trial court and has not suggested on appeal that further factual development is necessary for resolution of any issues in this case, we conclude that a remand on the fictitious name issue is unnecessary and that the issue can be decided based on the record before us.

Applying the analysis set forth in the cases discussed above, we conclude that plaintiff was not entitled to proceed as John Doe.

The information plaintiff seeks to keep confidential is not the sort of "sensitive and highly personal" information that the courts have generally been willing to protect. *See* James v. Jacobson, supra; *see also* Doe v. Indiana Black Expo, Inc., 923 F. Supp. 137 (S.D. Ind. 1996)(plaintiff **[**9]** challenging employment discrimination would not be permitted to proceed under fictitious name despite his claim that, among other things, suing under his real name would reveal his history of substance abuse); *cf.* Doe v. Smith, 105 F. Supp. 2d 40, 44

(E.D.N.Y. 1999)(where patient suing her psychiatrist for assault, molestation, and sexual abuse agreed that defendant could also proceed under a pseudonym and presented "particularized and undisputed evidence that proceeding publicly would seriously threaten her mental health, requiring her to choose between dropping her action and placing her life in jeopardy," she had established exceptional circumstance warranting authorization to proceed anonymously).

Plaintiff argues that his case is unique because it involves a breach of the physician-patient privilege. However, he cites no authority for the proposition that such claims warrant an exception to the general test for **[*543]** determining whether the case involves matter of a sensitive and highly personal nature. *James v. Jacobson, supra*, on which plaintiff relies, did not turn on the existence of a physician-patient relationship; rather, the appellate **[**10]** court was concerned about protecting the plaintiffs' children. Thus, ***HN12***[⬆] even assuming a communication between a psychologist and the referring physician about the problem for which the patient was referred could somehow amount to a breach of the physician-patient privilege, that fact alone is not sufficient to permit plaintiff to proceed as John Doe.

Further, ***HN13***[⬆] plaintiff is suing a private party, not the government, and is seeking damages for past disclosure rather than declaratory or injunctive relief to prevent the future disclosure of confidential information. These facts weigh against permitting him to proceed under a pseudonym. *See Femedeer v. Haun, supra* (noting that disclosure of appellee's status as a sex offender had already occurred in the underlying criminal case); *Doe v. Indiana Black Expo, Inc., supra* (fact that plaintiff was asserting damages claims against private parties, while not alone dispositive, took case outside category of cases generally allowing use of fictitious names); *Doe v. Shakur, supra* (sexual assault victim brought civil suit for damages to vindicate her own interests, not to vindicate public **[**11]** interest in bringing criminal defendants to justice); *Doe v. Hallock, 119 F.R.D. 640 (S.D. Miss. 1987)*(plaintiff claiming sexual harassment alleged improper conduct by private individuals but did not seek to challenge the validity of any governmental activity). These facts also distinguish this case from *Roe v. Ingraham, 364 F. Supp. 536, 541 n.7 (S.D.N.Y. 1973)*, relied on by plaintiff, in which fictitious names were permitted for patients challenging the constitutionality of statutes requiring disclosure of their identity, because, "if [they were] required to reveal their identity prior to the adjudication on the merits of their privacy claim, they [would] already have sustained the injury which by this litigation they seek to avoid."

We also reject plaintiff's argument that precluding him from proceeding anonymously will somehow subject him to criminal liability. While the lawsuit might reveal that plaintiff used cocaine at some time prior to January 1996, there is nothing in this case to suggest that, by bringing the lawsuit, plaintiff would be "compelled to admit [his] intention to engage in illegal conduct, thereby risking criminal prosecution. **[**12]** " *See Doe v. Frank, supra, 951 F.2d at 323*; *Doe v. Shakur, supra, 164 F.R.D. at 361*.

A final factor to consider is the risk of unfairness to defendant from allowing plaintiff to proceed with a pseudonym. Plaintiff argues that defendant will not be prejudiced because she knows his real identity. However, that does not end the fairness inquiry. We agree with the observation of the court in *Doe v. Indiana Black Expo, Inc., supra, 923 F. Supp. at 141-142*, regarding fairness to the defendant in cases such as this:

HN14[⬆] Most important for this court's analysis of plaintiff's request to proceed under a fictitious name is the nature of the specific claims he is making against the defendants. His claims directly accuse the defendants of several forms of serious and deliberate wrongdoing. He attacks the defendants' integrity and reputations. *Basic fairness requires that where a plaintiff makes such accusations publicly, he should stand behind those accusations, and the defendants should be able to defend themselves publicly.* (Emphasis supplied.) *Accord Mateer v. Ross, Suchoff, Egert, Hankin, Maidenbaum & Mazel, P.C.*, (S.D.N. **[**13]** Y. No. 96 Civ. 1756, April 7, 1997) (*1997 U.S. Dist. LEXIS 4517*)(denying leave to proceed with pseudonym where plaintiff with AIDS brought serious charges relating directly to defendants' professionalism, and fairness required that he stand by those allegations).

Here, too, plaintiff's lawsuit attacks defendant's professional integrity. In our view, fairness requires that he bring his allegations in his own name.

In sum, the trial court did not err in denying plaintiff leave to proceed as John Doe and dismissing the complaint for failure to name a party plaintiff.

[*544] II.

Plaintiff next contends that the trial court erred in failing to grant alternative relief by either having the file placed under seal or permitting him to amend the complaint. We agree in part.

A.

HN15[⬆] Pursuant to *C.R.C.P. 121* § 1-5, a trial court may limit access to court files upon motion of any party. However, an order limiting access is not to be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest. *See In re Marriage of Purcell,*

879 P.2d 468 (Colo. App. 1994).

HN16[] A claim that a court file contains extremely personal, private, **[**14]** and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file. Likewise, prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records. Anderson v. Home Insurance Co., 924 P.2d 1123 (Colo. App. 1996).

We note initially that plaintiff's response to defendant's motion to dismiss did not clearly indicate that he intended to bring the action in his own name if the court would seal the file; rather, he stated only that he would be willing to disclose his identity to the court if required to do so, and asked to have the file sealed to protect him from further harm. HN17[] To the extent plaintiff sought sealing of the file without at the same time agreeing to bring the action in his own name, such action would not have cured the jurisdictional defect in his complaint. *See* Barker v. District Court, supra; *see also* Free Market Compensation v. Commodity Exchange, Inc., supra (*in camera* disclosure insufficient to serve public's interest in an open judicial process). **[**15]**

Moreover, even assuming plaintiff intended to bring the action in his own name if the file were sealed, he did not make the showing necessary to warrant such relief. Plaintiff supported his request to seal the file with the statement that doing so would "protect [him] from any further emotional and financial harm," and argued that his right to privacy outweighed the public interest. However, he also asserted that it was "in the interest of the public health, safety and welfare to control the practice of any physician such as [defendant]," and that the public interest outweighed her privacy interest.

We conclude that plaintiff's stated reasons for having the record sealed were insufficient to overcome the presumption in favor of access to court records. *See* Anderson v. Home Insurance Co., supra. Thus, the trial court properly declined his request to have the file placed under seal.

B.

We do, however, agree with plaintiff that the trial court erred in refusing to allow him to amend his complaint.

In a motion to reconsider or for leave to amend, filed twelve days after the trial court ordered the case dismissed, plaintiff pointed out that the statute of **[**16]** limitations had "arguably" run while defendant's motion to dismiss was pending. The trial court declined to reconsider its order and denied leave to amend, finding that "the real client of Plaintiff's counsel was never a party to this action, has never commenced an action against [defendant], and as such, has no standing to amend the Complaint in this matter."

C.R.C.P. 15(a) states, in relevant part:

HN18[] A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within twenty days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

HN19[] For purposes of *C.R.C.P. 15(a)*, a motion to dismiss does not constitute a responsive pleading. Passe v. Mitchell, 161 Colo. 501, 423 P.2d 17 (1967)(error to grant defendants' motion to dismiss without giving **[*545]** plaintiff opportunity to file an amended complaint).

Further, HN20[] a trial court should allow an **[**17]** amendment to a complaint even following its grant of a motion to dismiss. *See* Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960)(court erred in denying leave to amend after granting motion to dismiss; there are no exceptions to express language of *Rule 15(a)* allowing one amendment as a matter of right before a responsive pleading is filed); Davis v. Paolino, 21 P.3d 870, 2001 Colo. App. LEXIS 292 (Colo. App. No. 00CA1322, February 15, 2001); *but see* Wilcox v. Reconditioned Office Systems, Inc., 881 P.2d 398 (Colo. App. 1994)(if HN21[] final judgment is entered, absolute right to amend is lost, and amendment should not be allowed unless judgment is set aside or vacated under *C.R.C.P. 59* or *60*).

HN22[] Even where amendment of a complaint is no longer a matter of right, refusal to permit amendment may be an abuse of discretion if, as here, the plaintiff's claims would otherwise be barred by the applicable statute of limitations. *See* Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976)(abuse of discretion to deny leave to amend to permit plaintiff to correct deficiencies in complaint, including substituting herself for the original plaintiff, where claims would **[**18]** otherwise be barred by statute of limitations); *cf.* In re Estate of Blacher, 857 P.2d 566 (Colo. App. 1993)(no abuse of discretion to deny leave to amend after judgment of dismissal had entered where dismissal was without prejudice and did not preclude plaintiff from initiating a new action).

Defendant asserts that, notwithstanding these authorities, amendment was not appropriate here because *C.R.C.P. 15(a)* expressly permits only "a party" to amend, and the "real client of plaintiff's counsel" was never a party. Further, relying on Barker v. District Court, supra, she argues that, where there is no controversy between legal entities, there is no subject matter

to be litigated, and the court is without jurisdiction to proceed. We do not agree.

HN23[] Divisions of this court have rejected contentions that amendment should be denied where a complaint has been dismissed for lack of subject matter jurisdiction. In Stuart v. The Frederick R. Ross Investment Co., 773 P.2d 1107, 1110 (Colo. App. 1989)(emphasis in original; citation omitted), the division stated:

HN24[] We reject defendants' contention that claims dismissed for lack of subject **[**19]** matter jurisdiction cannot be amended as a matter of law and as a matter of public policy. There are *no* exceptions to the rule permitting amendments where no responsive pleadings have been filed. Moreover, we have specifically held that a defect in allegations conferring subject matter jurisdiction can be cured by amendment.

Accord Francisco v. Cascade Investment Co., 29 Colo. App. 516, 486 P.2d 447 (1971)(rejecting argument that complaint could not be amended to include allegation of notice since notice is a jurisdictional prerequisite). Further, in *Barker*, the supreme court specifically noted that the district attorney "at no time sought to amend the complaint and summons to show the name or names of the party or parties defendant." Barker v. District Court, supra, 199 Colo. at 419 n.4, 609 P.2d at 630 n.4.

Nor do we agree with defendant that leave to amend could be denied because plaintiff was never a party and thus lacked standing to amend. HN25[] Although some federal courts have refused to allow amendment of a complaint to name a different plaintiff where the original plaintiff lacked standing, *see*, *e.g.*, Federal Recovery Services, Inc. v. United States, 72 F.3d 447 (5th Cir. 1995) **[**20]** (minority shareholder not allowed to amend where original corporate plaintiff lacked standing); Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir. 1983)(denying leave to substitute plan participants for pension fund as plaintiff in ERISA action), that rule has generally not been applied where the original named plaintiff was a pseudonym for the actual plaintiff. In the latter circumstance, the courts have permitted amendment. *See* Doe v. Shakur, supra; Doe v. Hallock, supra; Doe v. Rostker, 89 F.R.D. 158 (N.D. Cal. 1981); 2 *Moore's Federal Practice*, *supra*, § 10.02[2][c][iv] at 10-14 ("HN26[] If the court does not find compelling reasons to permit a plaintiff to proceed under a pseudonym, then the **[*546]** complaint is usually dismissed with leave to file a new complaint setting forth plaintiff's true identity"). Indeed, in Doe v. Indiana Black Expo, Inc., supra, 923 F. Supp. at 143, on which defendant relies, the court denied plaintiff's request to proceed under a fictitious name, dismissed the complaint, but expressly stated that the **[**21]** dismissal "must be without prejudice and with leave to amend."

The judgment is affirmed insofar as it dismissed plaintiff's complaint and denied his request to order the file sealed. The judgment is reversed insofar as it denied plaintiff's motion to amend his complaint, and the cause is remanded with directions to permit plaintiff to file an amended complaint, in his real name, within such time as the court in its discretion may allow.

JUDGE METZGER and JUDGE DAILEY concur.

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Huspeni v. El Paso County Sheriff's Dep't (In re Freedom Colo. Info., Inc.)

Supreme Court of Colorado

November 10, 2008, Decided

Case No. 08SA151

Reporter
196 P.3d 892 *; 2008 Colo. LEXIS 1003 **

In Re: Plaintiffs: Freedom Colorado Information, Inc., a Delaware corporation doing business as The Gazette; and Dennis Huspeni, a Colorado citizen, v. Defendants: El Paso County Sheriff's Department; and Terry Maketa, in his official capacity as the El Paso County Sheriff, an elected official of El Paso County, Colorado, a political subdivision, and Intervenors: John Does I and II.

Prior History: **[**1]** Original Proceeding Pursuant to *C.A.R. 21*. El Paso County District Court Case No. 08CV1861. Honorable G. David Miller, Judge.

Huspeni v. El Paso County Sheriff's Dep't. (In re Freedom Colo. Info., Inc.), 2008 Colo. LEXIS 1033 (Colo., Nov. 10, 2008)

Disposition: RULE MADE ABSOLUTE.

Core Terms

inspection, records, Sheriff, district court, criminal justice, disclosure, redacted, balancing, arrest, internal affairs investigation, public and private, official action, privacy interest, sealing, internal affairs, sound discretion, public interest, confidential, sections, abuse of discretion standard, judicial review, legal standard, files, show cause order, tapes, adverse consequences, sheriff's department, trial court, articulate, ongoing

Case Summary

Procedural Posture

In an original proceeding, pursuant to *Colo. App. R. 21*, intervenors, John Doe arrestees, sought review of a decision of the El Paso County District Court (Colorado) allowing plaintiff newspaper to inspect the file documenting a former county sheriff's malfeasance after the sheriff's termination from his employment with defendant county sheriff's office.

Overview

The John Does, who were wrongfully arrested because of the former sheriff's malfeasance, wanted the criminal records of their arrests sealed. The local newspaper brought suit, under the Colorado Open Records Act (CORA), *Colo. Rev. Stat. §§ 24-72-202 to 24-72-206* (2008), and the Colorado Criminal Justice Records Act (CCJRA), *Colo. Rev. Stat. §§ 24-72-301 to 24-72-309* (2008), after it was refused access of the sheriff's internal affairs investigation file pertaining to the discharged sheriff. The district court ordered the release of the entire file, including the names of the John Does. The court held that the district court applied the wrong legal standard in performing the balancing of public and private interests required by the CCJRA, *Colo. Rev. Stat. § 24-72-308(1)(c)* (2008), which addressed sealing records of official action and assigned the role of balancing the public and private interests involved to the district court. Because the file was not a record of official action, public disclosure should have been subject to the discretion of the sheriff, not the district court, pursuant to *Colo. Rev. Stat. §§ 24-72-304*, *24-72-305*.

Outcome
The court made the rule absolute and ordered the district court to return the matter to the sheriff for an inspection determination that complied with the CCJRA.

LexisNexis® Headnotes

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN1[] **Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials**

Colo. Rev. Stat. § 24-72-308(1)(c) (2008), of the Colorado Criminal Justice Records Act (CCJRA), which addresses sealing records of official action, assigns the role of balancing the public and private interests involved to the district court. In contrast, where a file is not a record of official action, but remains a criminal justice record under the CCJRA, the public disclosure of which is subject to discretion of the sheriff, not the court. Pursuant to *Colo. Rev. Stat. §§ 24-72-304* and *24-72-305*, the sheriff must balance the public and private interests involved in the inspection request and determine whether to allow full disclosure, redacted disclosure, or no disclosure of the record.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2[] **Standards of Review, De Novo Review**

An appellate court reviews de novo questions of law concerning the application and construction of statutes.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Governments > Courts > Court Records

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3[] **Standards of Review, Abuse of Discretion**

When a request is made to inspect a particular criminal justice record that is not a record of an official action, the decision whether to grant the request is consigned to the exercise of the custodian's sound discretion under *Colo. Rev. Stat. §§ 24-72-304*, *24-72-305* (2008). The district court reviews the custodian's determination for abuse of discretion. In turn, an appellate court reviews de novo whether the district court applied the correct legal standard to its review of the custodian's determination.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN4[] **Standards of Review, De Novo Review**

An appellate court reviews questions of law de novo. Whether a trial court or the court of appeals has applied the correct legal standard to the case under review is a matter of law.

Governments > Courts > Court Records

HN5[] **Courts, Court Records**

The Colorado Criminal Justice Records Act (CCJRA), *Colo. Rev. Stat. §§ 24-72-301 to 24-72-309* (2008) defines the official custodian as any officer or employee of the state or any agency, institution, or political subdivision thereof who is responsible for the maintenance, care, and keeping of criminal justice records, regardless of whether such records are in his actual personal custody and control. *Colo. Rev. Stat. § 24-72-302* (2008). A sheriff's department is a criminal justice agency under the CCJRA and that the department is the official custodian of criminal justice records that are made, maintained, or kept for use in the exercise of functions required or authorized by law or administrative rule.

Civil Procedure > Appeals > Standards of

Administrative Law > ... > Prohibition of

Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN6[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

The Colorado Criminal Justice Records Act differentiates between two categories of records: (1) records of official action, and (2) all other criminal justice records, each possessing its own regimens of public access to those records. *Colo. Rev. Stat. § 24-72-301* (2008); *Colo. Rev. Stat. §§ 24-72-301(2)*, *24-72-303(1)*, *24-72-304(1)* (2008).

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN7[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

See *Colo. Rev. Stat. § 24-72-302(4)* (2008).

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN8[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

See *Colo. Rev. Stat. § 24-72-302(7)* (2008).

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN9[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

In contrast to records of official action, which under *Colo. Rev. Stat. § 24-72-302(7)* (2008), shall be open for inspection by any person at reasonable times, except as provided in the Colorado Criminal Justice Records Act (CCJRA) or as otherwise provided by law, inspection of all other criminal justice records is consigned to the custodian's exercise of sound discretion. *Colo. Rev. Stat. § 24-72-303(1)* (2008). Grand jury indictments are records of official action. Recordings seized from private homes by virtue of search warrants and for purposes of criminal investigation are criminal justice records subject to the CCJRA, but are not records of official action, and instead are subject to the custodian's exercise of sound discretion.

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN10[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

The court performs the public and private interests balancing function in regard to the sealing of official actions pursuant to *Colo. Rev. Stat. § 24-72-308(1)(c)* (2008), whereas the custodian performs that function in regard to criminal justice records inspection requests consigned to the custodian's sound discretion under *Colo. Rev. Stat. §§ 24-72-304*, *24-72-305* (2008).

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN11[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

The public and private interests balancing function is a weighing process involving the public interest versus the harm to privacy or dangers of unwarranted adverse consequences. *Colo. Rev. Stat. § 24-72-308(1)(c)* (2008). The Colorado Criminal Justice Records Act record must be open for inspection unless the privacy interest or dangers of adverse consequences outweigh the public interest. The standard of balancing applies not only to courts when addressing official actions, but also to all custodians who have discretionary authority regarding the inspection of criminal justice records under *Colo. Rev. Stat. §§ 24-72-304*, *24-72-305* (2008), including sheriffs. Indeed, *Colo. Rev. Stat. § 24-72-305(5)* favors making the record available for inspection unless the custodian, in exercising his or her sound discretion, finds

disclosure would be contrary to the public interest.

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN12[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

In creating a class of criminal justice records, the inspection of which is subject to the custodian's exercise of sound discretion, the General Assembly intended the custodian to engage in balancing the public and private interests in the inspection request. *Colo. Rev. Stat. § 24-72-301(2)* (2008) provides for the discretionary release of criminal justice records other than records of official action. The balancing test of *Colo. Rev. Stat. § 24-72-308(1)(c)* (2008) extends for official actions to all criminal justice records requests.

Governments > Courts > Court Records

HN13[] Courts, Court Records

A custodian of criminal justice records must consider the pertinent factors, which include: the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request.

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN14[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

While Colorado's two open government laws, the Colorado Open Records Act (CORA), *Colo. Rev. Stat. §§ 24-72-202 to 24-72-206* (2008), and the Colorado Criminal Justice Records Act (CCJRA), *Colo. Rev. Stat. §§ 24-72-301 to 24-72-309* (2008), generally favor broad disclosure of records, the CCJRA favors somewhat less broad disclosure. The legislative policy regarding access to criminal justice records under the CCJRA is more limited than access to public records under CORA. Thus, the CCJRA preference for disclosure is tempered by the privacy interests and dangers of adverse consequences involved in the inspection request. Further, a custodian must properly perform his or her balancing role.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN15[] Standards of Review, Abuse of Discretion

Looking by analogy to how appellate courts apply an abuse of discretion standard to review a trial court, abuse of discretion occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair. In assessing whether a trial court's decision is manifestly unreasonable, arbitrary, or unfair, an appellate court asks not whether the appellate court would have reached a different result but, rather, whether the trial court's decision fell within a range of reasonable options. A misapplication of the law would also constitute an abuse of discretion. In ascertaining whether an abuse of discretion has occurred, a reviewing court looks to see if the agency has misconstrued or misapplied applicable law, or whether the decision under review is not reasonably supported by competent evidence in the record. Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN16[] Standards of Review, Abuse of Discretion

In ascertaining whether an abuse of discretion has occurred, a reviewing court looks to see if an agency has misconstrued or misapplied applicable law, or whether the decision under review is not reasonably supported by competent evidence in the record. Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.

Governments > Courts > Court Records

HN17[] Courts, Court Records

Under an abuse of discretion standard for reviewing the Colorado Criminal Justice Records Act custodian's determination, a district court does three things. First, the court reviews the criminal justice record at issue. Second, the court takes into account the custodian's balancing of the interests and articulation of his or her determination. Lastly, the court decides whether the custodian has properly determined to: (1) allow inspection of the entire record, (2) allow inspection of a redacted version of the record, or (3) prohibit inspection of the record. If the custodian has failed to engage in the required balancing of the interests or has not articulated his or her rationale, then the trial court should remand the case to the custodian to do so in order to enable judicial review.

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN18[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

When a record is not relevant to performance of the criminal justice agency's public function, or when premature release of the information would hinder or jeopardize an ongoing investigation, the custodian may properly refuse to release the record.

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN19[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

Internal affairs investigation files are criminal justice records under *Colo. Rev. Stat. § 24-72-302(4)* (2008), the inspection of which is subject to the agency's sound discretion under *Colo. Rev. Stat. §§ 24-72-304*, *24-72-305* (2008).

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN20[] Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials

Colo. Rev. Stat. § 24-72-302 (2008), of the Colorado Criminal Justice Records Act limits official actions to documents directly relating to and incidental to the arrest, prosecution and sentence of individuals who are defendants in the criminal justice system. The purpose of a criminal justice agency's internal affairs investigation, resulting in a document that is not the record of official action, is to assess the performance of law enforcement officers in carrying out their duties, a matter of the public interest.

Governments > Courts > Court Records

HN21[] Courts, Court Records

When a custodian denies an applicant's inspection request the district court has authority to issue an order to show cause, hold a hearing, and review the custodian's decision pursuant to *Colo. Rev. Stat. § 24-72-305(7)* (2008).

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

HN22[] Preliminary Considerations, Jurisdiction

Colo. Const. art. VI, § 9, provides that the district courts shall be trial courts of record with general jurisdiction and shall have such appellate jurisdiction as may be prescribed by law. Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Governments > Courts > Court Records

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

HN23[] Formal Adjudicatory Procedure, Hearings

The Colorado Criminal Justice Records Act, *Colo. Rev. Stat. §§ 24-72-301 to 24-72-309* (2008), confers on a district court the jurisdiction to hear appeals from the custodian's decision to deny access to records pursuant to *Colo. Rev. Stat. § 24-72-305(7)* (2008), which states that any person denied access to inspect any criminal justice record covered by this part 3 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why said custodian should not permit the inspection of such record. A hearing on such application shall be held at the earliest practical time.

Administrative Law > ... > Prohibition of Disclosure > Specific Exemptions Allowing Disclosure > Law Enforcement Investigative Materials

Governments > Courts > Court Records

HN24 **Specific Exemptions Allowing Disclosure, Law Enforcement Investigative Materials**

Colo. Rev. Stat. § 24-72-305(5) (2008), specifically authorizes the custodian to deny access to investigative records of a sheriff on the ground that disclosure would be contrary to the public interest. Upon request to the custodian by the person denied their inspection request, the statute requires a written statement of the grounds for the denial, which shall cite the law or regulation under which the access is denied or the general nature of the public interest to be protected by the denial. *Colo. Rev. Stat. § 24-72-305(6)* (2008).

Administrative Law > Judicial Review > Standards of Review > General Overview

HN25 **Judicial Review, Standards of Review**

Judicial review of agency action typically requires court examination of the basis for the agency's final determination to assure that the action was justified under applicable legal standards. An agency must articulate the grounds for its decision with enough detail to enable the reviewing court to determine whether the agency considered the relevant factors and made a reasonable choice.

Governments > Courts > Court Records

HN26 **Courts, Court Records**

A custodian should consider the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public interest to be served in allowing inspection; and any other pertinent consideration.

Governments > Courts > Court Records

HN27 **Courts, Court Records**

At a minimum, to enable judicial review as contemplated by *Colo. Rev. Stat. § 24-72-305(7)* (2008), the record of the custodian's inspection request determination before the district court should include an articulation of the custodian's balancing of the public and private interests in the record.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Appeals > Record on Appeal

HN28 **Standards of Review, Questions of Fact & Law**

As part of an appellate court's review, the appellate court ascertains whether the trial court's findings of fact and conclusions of law are adequate for purposes of appellate review, whether the court's findings of historical fact are adequately supported by competent evidence, and whether the court applied the correct legal standard to these findings. And, the appellate court reads the record and determines whether the evidence before the lower court adequately supported the district court's ultimate legal conclusion.

Headnotes/Summary

Headnotes

Access to Criminal Justice Records - *§§ 24-72-301 to -309* - Classifying Criminal Records *§ 24-72-302(7)* - Custodian's Records Inspection Decision - Balancing of Public and Private Interests - Inapplicability of *Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980)*, *§ 24-72-305* - Sealing records of "official action" - *§24-72-308* - Sound Discretion of Custodian - *§ 24-72-305* - Judicial Review.

Syllabus

In this original proceeding, John Does, the intervenors in the trial court, seek review of the trial court's decision to allow The Gazette newspaper of Colorado Springs to inspect the file documenting El Paso County Deputy Sheriff Shawn Moncalieri's malfeasance. John Does were wrongfully arrested by Moncalieri and their names are included in the requested internal affairs file that would be revealed following the trial court's order.

The Supreme Court holds that the El Paso County District Court erred as a matter of law by applying the wrong legal standard in performing the balancing of public and private interests required by the CCJRA to be performed by the Sheriff as custodian of the file. The balancing role the court described in *Harris v. Denver Post, 123 P.3d 1166 (Colo. 2005)*, entails weighing the array of interests involved in the inspection request and making an inspection determination supported by an adequate rationale. Because the Sheriff did not properly perform his role in this CCJRA inspection request case, hindering the court's **[**2]** judicial review role, the district court should have ordered him to do so. Consequently, the court makes its rule absolute and orders the El Paso County District Court to return this matter to the Sheriff for an inspection determination that complies with the CCJRA and our decision in *Harris. Id*.

Counsel: Levine Sullivan Koch & Schulz, L.L.P., Steven D. Zansberg, Adam M. Platt, Denver, Colorado, Attorneys for Plaintiffs.

Charles C. Greenlee, El Paso County Sheriff's Office, Colorado Springs, Colorado, Attorney for Defendants.

James A. Reed, P.C., James A. Reed, Colorado Springs, Colorado, Attorneys for Intervenors John Does I & II.

Judges: JUSTICE HOBBS delivered the Opinion of the Court.

Opinion by: HOBBS

Opinion

[*894] EN BANC

Pursuant to *C.A.R. 21*, we accepted jurisdiction in this original proceeding to consider whether the District Court for El Paso County lacked subject matter jurisdiction or erred as a matter of law by applying the wrong legal standard in ordering the release of the El Paso County Sheriff's internal affairs investigation file ("the file") concerning former deputy sheriff Shawn Moncalieri. The petitioners are two brothers ("John Does") who were wrongfully arrested twice because of this officer's malfeasance. Following **[**3]** the internal affairs investigation, El Paso County Sheriff Terry Maketa ("Sheriff"), terminated Moncalieri's employment. The John Does obtained $ 20,000.00 each as a settlement from El Paso County for release of any claims they might have against the county for their wrongful arrests.

[*895] The John Does also sought relief from the El Paso County District Court in the form of sealing the records of "official action[s]" pertaining to their arrest, pursuant to *section 24-72-308, C.R.S.* (2008), of the Colorado Criminal Justice Records Act ("CCJRA"). In that action, which is separate from the one before us, El Paso County District Court Judge Ronald Crowder ordered the sealing of all the records in the four criminal cases involving the John Does, as well as the two civil actions in which the John Does obtained the sealing order.

Pursuant to CCJRA *sections 24-72-304* and *-305, C.R.S.* (2008), The Gazette newspaper of Colorado Springs sought to inspect the Sheriff's internal affairs investigation file pertaining to the discharged deputy sheriff. Because the file does not fall within the definition of an "official action" as defined by CCJRA *section 24-72-302(7), C.R.S.* (2008), inspection of this file **[**4]** is subject to the exercise of the Sheriff's sound discretion under *sections 24-72-304* and *-305* of the CCJRA. *Harris v. Denver Post, 123 P.3d 1166, 1175 (Colo. 2005)*. The Sheriff refused to allow inspection of the file.

Under CCJRA *section 24-72-305(7), C.R.S.* (2008), The Gazette initiated the case now before us by applying to the El Paso County District Court for an order to show cause why the file should not be made available for inspection. Judge G. David Miller heard the case and ordered the release of the entire file, including the names of the John Does, redacting only the addresses, social security numbers, and dates of birth of individuals named in the file.

Upon petition by the John Does, we issued our order to show

cause, which had the effect of prohibiting release of the file pending our review of the district court's decision. The John Does contend Judge Miller lacked jurisdiction to release the Sheriff's internal affairs file to The Gazette. We disagree.

HN1[↑] *Section 24-72-308(1)(c), C.R.S.* (2008), of the CCJRA, which addresses sealing records of "official action," assigns the role of balancing the public and private interests involved to the district court. Judge Crowder conducted **[**5]** such balancing before sealing the four criminal cases and two civil cases.

In contrast, the file is not a record of "official action," but remains a criminal justice record under the CCJRA, the public disclosure of which is subject to discretion of the Sheriff, not the court. Pursuant to *sections 24-72-304* and *-305*, the Sheriff must balance the public and private interests involved in the inspection request and determine whether to allow full disclosure, redacted disclosure, or no disclosure of the record. *Harris, 123 P.3d at 1174-75*.

We hold that the El Paso County District Court erred as a matter of law by applying the wrong legal standard in performing the balancing of public and private interests required by the CCJRA to be performed by the Sheriff as custodian of the file. The balancing role we described in *Harris* entails weighing the array of interests involved in the inspection request and making an inspection determination supported by an adequate rationale. *Id. at 1174*. Because the Sheriff did not properly perform his role in this CCJRA inspection request case, hindering the court's judicial review role, the district court should have ordered him to do so. Consequently, we make **[**6]** our rule absolute and order the El Paso County District Court to return this matter to the Sheriff for an inspection determination that complies with the CCJRA and our decision in *Harris*.

I.

Deputy Sheriff Shawn Moncalieri was the subject of six internal affairs investigations during his approximately four years of service at the Sheriff's office. He was terminated on March 6, 2007, following an internal affairs investigation of his role in a double set of wrongful arrests of two John Does, brothers, aged 18 and 20.

The internal affairs investigations file containing the details of these wrongful arrests has been submitted under seal to this court, as it was to the trial court. These documents reveal Moncalieri's malfeasance that led to the wrongful arrest of the John Does on two separate occasions. Over five-hundred pages of the nearly one-thousand page internal affairs file in this case concern Moncalieri's role in the arrests of the John Does.

[*896] On February 28, 2007, a week before Moncalieri's termination, the legal affairs reporter for The Gazette, Dennis Huspeni, filed a request with the Sheriff to inspect the internal affairs investigations file, pursuant to the Colorado Open Records **[**7]** Act ("CORA"), *sections 24-72-202 to -206, C.R.S.* (2008), and the CCJRA, *sections 24-72-301 to -309, C.R.S.* (2008). Several weeks later, Huspeni made a second request for inspection of the file. The Sheriff responded that he was awaiting Moncalieri's claim to any privacy interest before making an inspection decision.

Moncalieri described his privacy interest in an April 10, 2007, sworn affidavit. He stated he was told during the internal affairs investigation that the information he "was questioned about would be confidential and not be released to the public," and that he "made statements about [his] personal life that [he] would not have made if [he] had known that these statements were going to be published." Two days after Moncalieri submitted his affidavit, the Sheriff denied The Gazette's request for inspection of the file in a four sentence letter:

> You requested to be allowed to inspect the Internal Affairs files of former Deputy Moncalieri on February 28, 2007 and March 22, 2007. Mr. Moncalieri, through his attorney, Richard Radabaugh, sent us a letter stating his privacy interests in these files. I have briefed my client on Mr. Moncalieri's submission. My client has decided not **[**8]** to make Mr. Moncalieri's Internal Affairs files available for inspection or release.

On August 3, 2007, Judge Crowder sealed the John Does' arrest and criminal records in the four criminal cases involving their double set of arrests, as well as the John Does' two civil actions in which they each obtained the sealing relief. Judge Crowder found that "the harm to [the] privacy . . . or dangers of unwarranted adverse consequences" to each John Doe "outweigh[s] the public interest in retaining the record."

On April 15, 2008, after the denial of another Gazette reporter's request for the names of the John Does in connection with an inspection request for the county settlement records, [1] The Gazette filed its petition with the district court in this case for a show cause order seeking inspection of the file concerning Moncalieri. District Court Judge Miller issued the show cause order, set a hearing for April 23, 2008, and conducted an *in camera* review of the file. Prior to the April 23 hearing,

[1] El Paso County's records relating to the payment of settlement money is the subject of another civil action presently pending in the El Paso County District Court. That case is not before us, and we do not address it. The county has disclosed a redacted version of the settlement document, redacting the names of the John Does.

Moncalieri's attorney had filed an affidavit from the former deputy objecting to the records production on privacy grounds. Also prior to the hearing, the court granted the John Does' and the Board **[**9]** of County Commissioners' motions to intervene in this case.

The Sheriff's response to the district court's show cause order did not demonstrate that he balanced the public and private interests involved in The Gazette's inspection request. Instead, the response repeatedly referred to what the Sheriff assumed to be the court's responsibility to conduct a *Martinelli* analysis, which, as we discuss below, is inapplicable to this CCJRA case. *Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980)*.

On April 28, 2008, Judge Miller ordered the release of all "completed and closed Internal Affairs Investigation reports concerning El Paso County Sheriff's Department Deputy Shawn Moncalieri." The order required that "personal information pertaining to Moncalieri, the John Does, and all other witnesses or complainants in the investigations" be redacted. Judge Miller, **[**10]** however, did not order the redaction of the names of the John Does, Moncalieri, or any of the witnesses interviewed by the Sheriff's Internal Affairs Unit.

Under the CCJRA, the Sheriff is required to balance the public and private interests. He did not do so here. Instead, Judge Miller performed the balancing that was the responsibility of the Sheriff. To frame his analysis, Judge Miller employed the factors **[*897]** set forth in *Martinelli, 199 Colo. at 173-74, 612 P.2d at 1091*: (1) whether there was an asserted expectation of confidentiality; (2) whether the information is "highly personal and sensitive" and "its disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities;" and, (3) whether there is a "compelling state interest" in disclosure.

Judge Miller observed that, while Moncalieri and the John Does might have expected confidentiality in the internal affairs investigation, no "highly personal and sensitive" information existed in the file. Judge Miller concluded that a "compelling state interest" existed in The Gazette's inspection of the file because: 1) the public has a legitimate interest in knowing how law enforcement officers do their jobs, and **[**11]** 2) because the John Does received cash payments from El Paso County connected with their false arrests. Specifically, he declared:

> The public has a legitimate interest in knowing how law enforcement officers behave while doing their jobs, and how their superiors respond when claims of misconduct are raised and later validated by investigation. That interest becomes absolutely compelling when taxpayer dollars are spent to pay for the misdeeds of public servants . . . [and John Does' confidentiality interest] was subordinated to the public interest of full disclosure when they chose to hire an attorney and assert a claim for monetary damages out of taxpayer funds.

Judge Miller rejected a request for attorney's fees under the CCJRA because the Sheriff's refusal to release the requested documents was not arbitrary and capricious.

II.

We hold that the El Paso County District Court erred as a matter of law by applying the wrong legal standard in performing the balancing of public and private interests required by the CCJRA to be performed by the Sheriff as custodian of the file. The balancing role we described in *Harris* entails weighing the array of interests involved in the inspection request **[**12]** and making an inspection determination supported by an adequate rationale. *Id. at 1174*. Because the Sheriff did not properly perform his role in this CCJRA inspection request case, hindering the court's judicial review role, the district court should have ordered him to do so. Consequently, we make our rule absolute and order the El Paso County District Court to return this matter to the Sheriff for an inspection determination that complies with the CCJRA and our decision in *Harris*.

A. Standard of Review

HN2[↑] We review de novo questions of law concerning the application and construction of statutes. *Harris, 123 P.3d at 1170*; *People v. Thompson, 181 P.3d 1143, 1145 (Colo. 2008)*, *reh'g denied* (Apr. 28, 2008). ***HN3***[↑] When a request is made to inspect a particular criminal justice record that is not a record of an "official action," the decision whether to grant the request is consigned to the exercise of the custodian's sound discretion under *sections 24-72-304* and *-305, C.R.S.* (2008). The district court reviews the custodian's determination for abuse of discretion. *Harris, 123 P.3d at 1175*; *see People v. Bushu, 876 P.2d 106, 107 (Colo. App. 1994)*. In turn, we review de novo whether the district court **[**13]** applied the correct legal standard to its review of the custodian's determination. [2] *Id.*

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[2] The El Paso County Sheriff's Office is a criminal justice agency and the Sheriff, as agency-head, is the custodian of that agency's records. ***HN5***[↑] The CCJRA defines the "official custodian" as "any officer or employee of the state or any agency, institution, or political subdivision thereof who is responsible for the maintenance, care, and keeping of criminal justice records, regardless of whether such records are in his actual personal custody and control." ***§ 24-72-302, C.R.S.*** (2008). In *Harris v. Denver Post*, we decided that "a sheriff's department is a 'criminal justice agency' under the CCJRA" and that the department is "the 'official custodian' of 'criminal justice records' that 'are made, maintained, or kept . . . for use in the exercise of

HN4[] We review questions of law de novo. *Colo. Dep't of Revenue v. Garner*, 66 P.3d 106, 109 (Colo. 2003). Whether a trial court or the court of appeals has applied the correct legal **[*898]** standard to the case under review is a matter of law.

HN6[] The CCJRA differentiates between two categories of records: 1) records of "official action," and 2) all other criminal justice records, each possessing its own "regimens of public access to those records." *§ 24-72-301, C.R.S.* (2008); Thompson, 181 P.3d at 1145; *see §§ 24-72-301(2), -303(1), -304(1), C.R.S.* (2008); Office of State Court Adm'r v. Background Info. Servs., Inc., 994 P.2d 420, 427 (Colo. 1999).

Section 24-72-302(4), C.R.S. (2008), defines criminal justice records as:

> HN7[] all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, *that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule*, including but not limited to the results of chemical biological substance testing to determine genetic markers conducted pursuant to sections 16-11-102.4, 16-11-104, 16-11-204.3, 16-11-308(4.5), *17-2-201(5)(h)*, and *17-22.5-202(3)(b.5)(II)* and *(3.5), C.R.S.*

(Emphasis added).

Section 24-72-302(7), C.R.S. (2008), defines **[**15]** records of "official action" as:

> HN8[] an arrest; indictment; charging by information; disposition; pretrial or posttrial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole, or participation in correctional or rehabilitative programs; and any decision to formally discipline, reclassify, or relocate any person under criminal sentence.

HN9[] In contrast to records of "official action," which under *section 24-72-302(7), C.R.S.* (2008), "shall be open for inspection by any person at reasonable times, except as provided in [the CCJRA] or as otherwise provided by law," inspection of all other criminal justice records is consigned to the custodian's exercise of sound discretion. *§ 24-72-303(1), C.R.S.* (2008); *see* Thompson, 181 P.3d at 1145-46 (concluding that grand jury indictments are records of "official action"); Harris, 123 P.3d at 1168, 1171 (concluding that recordings seized from private homes by virtue of search warrants and for purposes of criminal investigation are "criminal justice records" subject to the CCJRA, but are not records of "official action," and instead are subject to the custodian's exercise of sound **[**16]** discretion); Background Info. Servs., 994 P.2d at 427 & n.6 (noting that "the General Assembly has clearly made certain portions of criminal case files available to the public, has reserved to the official custodian discretion as to other portions of criminal case files, and has barred the release of other portions" such as the names of sexual assault victims).

HN10[] The court performs the public and private interests balancing function in regard to the sealing of "official action[s]" pursuant to *section 24-72-308(1)(c), C.R.S.* (2008), whereas the custodian performs that function in regard to criminal justice records inspection requests consigned to the custodian's sound discretion under *sections 24-72-304* and *-305, C.R.S.* (2008).

HN11[] The General Assembly has described this public and private interests balancing function as a weighing process involving the "public interest" versus the "harm to . . . privacy . . . or dangers of unwarranted adverse consequences." *§ 24-72-308(1)(c), C.R.S.* (2008). The CCJRA record must be open for inspection unless the privacy interest or dangers of adverse consequences "outweigh" the public interest. *See id*. In *Harris*, we determined that the General Assembly intended **[**17]** for this standard of balancing to apply not only to courts when addressing "official actions," but also to all custodians who have discretionary authority regarding the inspection of criminal justice records under *sections 24-72-304* and *-305, C.R.S.* (2008), including sheriffs. 123 P.3d at 1174-75. Indeed, *section 24-72-305(5)* favors making the record available for inspection unless the custodian, in exercising his or her sound discretion, finds "disclosure would be contrary to the public interest."

B. Duty to Balance Public and Private Interests When Inspection Is Consigned to the Custodian's Discretion

HN12[] In creating a class of criminal justice records, the inspection of which is subject to the **[*899]** custodian's exercise of sound discretion, the General Assembly intended the custodian to engage in balancing the public and private interests in the inspection request. *See § 24-72-301(2), C.R.S.* (2008) (providing for the discretionary release of criminal justice records other than records of "official action"); Harris, 123 P.3d at 1175 (construing the legislature's intent to extend the balancing test of *section 24-72-308(1)(c), C.R.S.* (2008), for "official action[s]" to all criminal justice records **[**18]** requests).

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functions required or authorized by law or administrative rule'" (internal citations omitted). 123 P.3d 1166, 1173 (Colo. 2005) (citing **[**14]** ***§ 24-72-302(4) & (8), C.R.S.*** (2005)); Johnson v. Colo. Dep't of Corr., 972 P.2d 692, 694 (Colo. App. 1998).

HN13[] The custodian must consider the pertinent factors, which include: the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request. Harris, 123 P.3d at 1174.

HN14[] While Colorado's two open government laws, CORA and the CCJRA, generally favor broad disclosure of records, we have construed the CCJRA to favor somewhat less broad disclosure. The legislative policy regarding access to criminal justice records under the CCJRA is more limited than access to public records under CORA. Harris, 123 P.3d at 1171; *see* Wick Commc'ns Co. v. Montrose County Bd. of County Comm'rs., 81 P.3d 360, 364 (Colo. 2003) (describing the General Assembly's preference for broad disclosure of public records favored under CORA). Thus, the CCJRA preference for disclosure is tempered by the privacy interests and dangers of adverse consequences involved in the inspection request. Harris, 123 P.3d at 1175. **[**19]** Further, the custodian must properly perform his or her balancing role. *Id.*

The General Assembly has underscored its preference for disclosure of criminal justice records subject to the sound discretion of the custodian by providing that a district court, on review of the custodian's determination, "shall order the custodian to permit such inspection" unless the court "finds that the denial of the inspection was *proper*." *§ 24-72-305(7), C.R.S.* (2008) (emphasis added). While this provision might suggest that the district court has the authority to redo the custodian's balancing of the interests, the General Assembly utilized the word "proper" to underscore that the district court's role primarily consists of holding the custodian accountable for performing his or her role.

Applying an abuse of discretion standard to the custodian's criminal justice records request determination accords the proper deference to the custodian, while maintaining the reviewing court's authority to order inspection if the custodian does not properly discharge his or her duty. This standard of review preserves the separation of powers between the judicial and executive branches. Under a de novo review standard, **[**20]** the court would replace the custodian's role of gatekeeper in regard to the agency's criminal justice records. The General Assembly does not intend for the courts to do this in place of the custodian.

HN15[] Looking by analogy to how appellate courts apply an abuse of discretion standard to review a trial court, we observe that abuse of discretion occurs when the trial court's decision is manifestly arbitrary, unreasonable, or unfair. Hock v. New York Life Ins. Co., 876 P.2d 1242, 1251 (Colo. 1994); *see* E-470 Public Highway Auth. v. Revenig, 140 P.3d 227, 230-31 (Colo. App. 2006) (noting that "[i]n assessing whether a trial court's decision is manifestly unreasonable, arbitrary, or unfair, we ask not whether we would have reached a different result but, rather, whether the trial court's decision fell within a range of reasonable options"). A misapplication of the law would also constitute an abuse of discretion. Clark v. Farmers Ins. Exch., 117 P.3d 26, 29 (Colo. App. 2004) (citing Kuhn v. State Dep't of Revenue, 817 P.2d 101 (Colo. 1991)).

Our cases applying the *C.R.C.P. 106(a)(4)* standard are also instructive in their application of the abuse of discretion standard applicable when a court **[**21]** reviews agency action. HN16[] In ascertaining whether an abuse of discretion has occurred, a reviewing court looks to see if the agency has misconstrued or misapplied applicable law, DeLong v. Trujillo, 25 P.3d 1194, 1197 (Colo. 2001), **[*900]** or whether the decision under review is not reasonably supported by competent evidence in the record. Van Sickle v. Boyes, 797 P.2d 1267, 1272 (Colo. 1990). Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304, 1308-09 (Colo. 1986).

The reviewing court should not substitute its judgment for that of the agency's when the General Assembly by statute has consigned the matter to the exercise of the agency's sound discretion. *E.g.*, News & Film Serv., Inc. v. Pub. Utils. Comm'n of State of Colo., 787 P.2d 169 (Colo. 1990). On appeal from a custodian's decision, the district court should not redo the custodian's balancing of the interests. *Cf.* In re Haines, 177 P.3d 1239, 1248 (Colo. 2008) (noting that the hearing board in an attorney regulation proceeding "weighs the evidence; we do **[**22]** not do so").

HN17[] Accordingly, under an abuse of discretion standard for reviewing the CCJRA custodian's determination, the district court does three things. First, the court reviews the criminal justice record at issue. Second, the court takes into account the custodian's balancing of the interests and articulation of his or her determination. Lastly, the court decides whether the custodian has properly determined to: (1) allow inspection of the entire record, (2) allow inspection of a redacted version of the record, [3] or (3) prohibit inspection of

[3] Redaction, as an alternative, may often be a proper choice to carry out the General Assembly's intent because the CCJRA favors disclosure tempered by protection of privacy interests and dangers of adverse consequences at stake in the record's release. By providing the

the record. If the custodian has failed to engage in the required balancing of the interests or has not articulated his or her rationale, then the trial court should remand the case to the custodian to do so in order to enable judicial review.

C. Application to this Case

1. Classifying Criminal Justice Records

Here, the criminal justice record **[**24]** under review by the district court constituted a completed and closed file of a deputy sheriff who was discharged following the investigation. The records at issue are not records of "official action" under the CCJRA. Instead, the Sheriff must exercise his sound discretion in regard to the inspection request. Investigations by the El Paso County Internal Affairs Unit are authorized by the Sheriff's Policy and Procedure Manual. [4] As part of the Sheriff's department, a criminal justice agency, the records of the Internal Affairs Unit are used "in the exercise of functions . . . authorized by law," thus making these records "criminal justice records" pursuant to *section 24-72-302(7), C.R.S.* (2008).

[*901] In *Johnson v. Colorado Department of Corrections, 972 P.2d 692, 694-95 (Colo. App. 1998)*, the court of appeals concluded that ***HN19***[↑] internal affairs investigation files are criminal justice records under *section 24-72-302(4), C.R.S.* (2008), the inspection of which is subject to the agency's sound discretion under *sections 24-72-304* and *-305, C.R.S.* (2008). *See Harris, 123 P.3d at 1166*.

Judge Miller correctly observed that ***HN20***[↑] *section 24-72-302, C.R.S.* (2008), of the CCJRA limits "official action[s]" to documents directly relating to and incidental to the arrest, prosecution and sentence of individuals who are defendants in the criminal justice system. The purpose of a criminal justice agency's internal affairs investigation, resulting in a document that is not the record of "official action," is to assess the performance of law enforcement officers in carrying out their duties, a matter of the public interest.

2. Jurisdiction

We reject the John Does' contention that Judge Crowder's sealing of their criminal actions deprived Judge Miller of jurisdiction over The Gazette's petition challenging the Sheriff's decision not to allow inspection of the file. ***HN21***[↑] When the custodian **[**26]** denies an applicant's inspection request the district court has authority to issue an order to show cause, hold a hearing, and review the custodian's decision pursuant to *section 24-72-305(7), C.R.S.* (2008). This section provided Judge Miller with subject matter jurisdiction over this case pursuant to the CCJRA. [5] For the district court to

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custodian of records with the power to redact names, addresses, social security numbers, and other personal information, disclosure of which **[**23]** may be outweighed by the need for privacy, the legislature has given the custodian an effective tool to provide the public with as much information as possible, while still protecting privacy interests when deemed necessary. *Office of State Court Adm'r v. Background Info. Servs., Inc., 994 P.2d 420, 427 n.6 (Colo. 1999)*; *see* ***§ 24-72-304(4)(a), C.R.S.*** (2008); *People v. Thompson, 181 P.3d 1143, 1143-45 (Colo. 2008)*, *reh'g denied* (Apr. 28, 2008) (holding that the CCJRA requires that a grand jury indictment be "released for public inspection in its entirety, subject only to the deletion of identifying information of any alleged sexual assault victims"). Redaction may also protect identities of informants or undercover police officers. A custodian should redact sparingly to promote the CCJRA's preference for public disclosure.

HN18[↑] When the record is not relevant to performance of the criminal justice agency's public function, or when premature release of the information would hinder or jeopardize an ongoing investigation, the custodian may properly refuse to release the record. *Harris, 123 P.3d at 1175*.

[4] The El Paso County Sheriff's Department's Internal Affairs Unit is "responsible for conducting internal affairs investigations" and is part of the Internal Affairs Section which reports directly to the Chief of the Support Services Bureau, "a non-law enforcement bureau" within the El Paso County Sheriff's Department. EL PASO COUNTY SHERIFF'S DEPARTMENT, *EL PASO COUNTY SHERIFF'S OFFICE POLICE AND PROCEDURE MANUAL - ORGANIZATION* (10/17/07), *available at http://shr.elpasoco.com/NR/rdonlyres/0C4771C5-49BF-41D2-B8B6-B879B63EE59B/0/101POLICY101707.pdf* **[**25]** (last visited on Oct. 16, 2008).

[5] ***HN22***[↑] ***Article VI, section 9 of the Colorado Constitution*** provides that: "The district courts shall be trial courts of record with general jurisdiction . . . and shall have such appellate jurisdiction as may be prescribed by law." "Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment." *In re Marriage of Stroud, 631 P.2d 168, 170 (Colo. 1981)*.

HN23[↑] The CCJRA confers on the district court the jurisdiction to hear appeals from the custodian's decision to deny access to records pursuant to ***section 24-72-305(7), C.R.S.*** (2008), which states:

> Any person denied access to inspect any criminal justice record covered by this **[**27]** part 3 may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why said custodian should not permit the inspection of such record. A hearing on

effectively conduct judicial review of the custodian's determination, the custodian must balance the interests involved and provide an adequate rationale for his or her determination.

3. District Court's Role

In rejecting the John Does' jurisdictional challenge to Judge Miller's order for inspection of the file, we nevertheless agree that the district court's judgment in this case releasing the entire file, save a few redactions, cannot stand. We conclude that both the Sheriff and the district court failed to comply with either the CCJRA or our decision in *Harris*. 123 P.3d 1166.

Instead of applying an abuse of discretion standard to the Sheriff's determination, the district court erred as a matter of law in applying the wrong legal standard when it independently engaged in balancing the public and private interests involved in The Gazette's inspection request. Utilizing the *Martinelli* factors, the district court reached its decision as though it were conducting de novo review. The district court's order even directed the disclosure of the names of the John Does who were falsely **[**28]** arrested. In doing so, the district court overrode the John Does' interest in protecting their identities from recognition as persons who had been falsely arrested by the police. Thus, the district court negated a basic protection the General Assembly designed for the falsely accused.

The district court failed to identify and apply the proper legal standard upon which its review of the Sheriff's decision must proceed. Proper application of an abuse of discretion standard primarily entails the court holding the custodian to its balancing role, which includes adequately explaining the reasons for the custodian's inspection determination. Instead of holding the Sheriff responsible for failing to properly perform his custodial role, the district court usurped the Sheriff's role by applying the inapplicable *Martinelli* analysis.

[*902] *Martinelli* concerned a discovery dispute in a lawsuit for monetary recovery against the City and County of Denver. *199 Colo. 163, 612 P.2d 1083*. Police officers who gave statements in an internal affairs investigation asserted a confidentiality interest in their personnel files and the police department's internal affairs files. *Id*. In that context, we directed the **[**29]** district court, *in camera*, to analyze confidentiality claims. *See Id. at 173-75, 612 P.2d at 1091-92*.

Here, the matter before the district court was not a discovery dispute arising during litigation. Instead, it arose from the custodian's denial of a CCJRA inspection request. Initially, The Gazette sought the file while the investigation was still ongoing. The Sheriff could properly deny inspection at this stage to prevent hampering the investigation. The Gazette renewed its request after the investigation was complete and the Sheriff had discharged the officer for malfeasance in office, a matter of public interest.

In *Johnson*, the custodian denied plaintiff's request for interim investigatory reports pertaining to the plaintiff. *972 P.2d at 693*. The trial court affirmed this decision concluding that ongoing internal affairs investigations could be "' substantially hampered' by the disclosure of such interim materials." *Johnson, 972 P.2d at 695*. Here, in contrast, the internal affairs file pertaining to Moncalieri was completed and closed, so there was no risk of intimidating or harassing witnesses or otherwise hampering an ongoing investigation.

4. Custodian's Role

HN24[↑] *Section 24-72-305(5), C.R.S.* **[**30]** (2008), specifically authorizes the custodian to deny access to investigative records of the Sheriff on the ground that disclosure would be "contrary to the public interest . . . ." *See Johnson, 972 P.2d at 695*. Upon request to the custodian by the person denied their inspection request, the statute requires "a written statement of the grounds for the denial," which "shall cite the law or regulation under which the access is denied or the general nature of the public interest to be protected by the denial . . . ." *§ 24-72-305(6), C.R.S.* (2008).

In his response to the **[*903]** district court's show cause order, the Sheriff incorrectly assumed that the district court's role was to balance the interests utilizing the *Martinelli* analysis. Neither in his response to The Gazette's request for a written statement of the grounds for denial of inspection, nor in his response to the court's show cause order, did the Sheriff: (1) articulate and consider the public's interest in the investigation and discharge of a police officer who abused his public responsibilities and who cost the county $ 40,000.00 in settlement payments; (2) weigh the private interest or danger of adverse consequences to the John **[**31]** Does; or (3) consider release of a redacted file that would satisfy the CCJRA objectives of disclosure while also addressing privacy concerns involved in the inspection request.

Indeed, the John Does point out that their primary interest is in protecting their names and other personal information connected with an arrest by the Sheriff's office that was subsequently determined to be wrongful. In their petition for relief to us, the John Does state that "the least intrusive manner of releasing this information might have been to redact all

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such application shall be held at the earliest practical time.

identifying information completely [of John Does], including the names of the innocent brothers." [6] In his response to the district court's show cause order, the Sheriff acknowledges John Does' privacy interest in not having their names disclosed. He suggests to the court that appropriate redaction would protect the John Does' privacy interest. The Sheriff, however, incorrectly took the position that this was within the court's authority, not his: "If the Court orders any materials to be disclosed, care must be taken to remove all identifying references to the two suspects . . . ."

In a case such as this, the custodian's redaction of the names of those falsely arrested is particularly important. The record of an internal affairs investigation of a police officer is likely to include the names and other identifying information unavailable to the public because it is contained in sealed records of "official action." The General Assembly did not intend that the names of falsely arrested persons be revealed by the police when shielded by the court in another context. In *Harris*, we observed that privacy interests in non-disclosure of the criminal justice record are particularly strong when private property has been seized illegally. *123 P.3d at 1173*. Here, the criminal justice record resulted from the illegal seizure of the John Does. Their identities, contained in the record, are the most precious of their private property.

5. Preserving Judicial Review

The district court in this case had authority to review the Sheriff's records request determination under an abuse of discretion standard. ***HN25***[ ] Judicial **[**34]** review of agency action typically requires court examination of the basis for the agency's final determination to assure that the action was justified under applicable legal standards. *Forbes v. Poudre Sch. Dist. R-1, 791 P.2d 675, 680 (Colo. 1990)*; *see also Bd. of County Comm'rs of County of Adams v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994)* (noting that "an agency must articulate the grounds for its decision with enough detail to enable the reviewing court to determine whether the agency considered the relevant factors and made a reasonable choice").

Here, the Sheriff failed to balance the public and private interests involved in the inspection request, either in his written response to The Gazette or in his response to the district court's show cause order. In *Harris*, we described the balancing of public and private interests to include the consideration of any factors pertinent to the particular request. *123 P.3d at 1174*. Specifically, ***HN26***[ ] a custodian should consider the privacy interests of individuals who may be impacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations **[**35]** without compromising them; the public interest to be served in allowing inspection; and any other pertinent consideration. *Id*.

The Sheriff's lack of analysis in this case stands in contrast to the Jefferson County Sheriff's inspection decision that followed *Harris*. [7] The Jefferson County, after **[*904]** thoroughly

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[6] In *Harris*, we provided examples of what information is privileged from **[**32]** disclosure:

> Subsections *24-72-305(1)(a)* and *(b)* prevent disclosure of the record if inspection is contrary to any state statute or is prohibited by rules of this court or by the order of any court. The rape shield statute is an example of a statute prohibiting disclosure during certain phases of the investigation and criminal justice proceedings, or at all. *See People v. Bryant, 94 P.3d 624, 630-31 (Colo. 2004)*. An order suppressing documentary evidence of criminal activity, prohibiting its use, and requiring its return to the person from whom it was seized, because of an unconstitutional search and seizure, is an example of a court order that would not permit inspection of the record. *See People v. Mason, 989 P.2d 757, 759 (Colo. 1999)* (concerning reasonable expectation of privacy in personal banking records). In addition, the legislature has regulated the release of information related to sexual assault cases, *§ 24-72-304(4), C.R.S.* (2005), criminal history records of volunteers and employees of charitable organizations, id. *§ 24-72-305.3*, criminal history records of applicants in regulated professions or occupations, *id. § 24-72-305.4*, and the results of chemical biological substance **[**33]** testing to determine the genetic markers, *id. § 24-72-305(1.5)*. Also, the General Assembly has provided a means in the CCJRA to seal records. *Id. § 24-72-308*.
>
> *123 P.3d at 1174*.

[7] *See Notice of Sheriff's Decision Regarding Request for Release of Certain Criminal Justice Records, Fleming v. Stone*, No. 00-CV-884 (June 19, 2006). In his filing with the district court, the Jefferson County Sheriff lays out his in-depth balancing process that led to his decision to release the redacted written records of Eric Harris and Dylan Klebold, but not the video and audiotapes (referred to collectively as "the tapes") made by the two Columbine High School killers. Sheriff Mink, as official custodian of the records, chose not to release the tapes because he feared copycat crimes would intensify with the release of propaganda such as the tapes. The Sheriff notes how the tapes "provide a virtual 'how-to' step-by-step guide on the means and methods necessary for implementing **[**36]** similar crimes." *Id*. at 7. The Sheriff's fear was in part justified by at least one other attempted school shooting modeled after the Columbine tragedy and additional consultation with the FBI's Behavorial Analysis Unit that echoed these concerns. Further, the Sheriff described the tapes as "a manifesto" seeking to "reach out to other adolescents by having a dialogue . . . with the individuals watching the [t]apes." *Id*. Klebold's and Harris' "dying wish was that these [t]apes would be distributed

articulating his reasons including preventing copycat murders, decided against releasing the videotape.

The Jefferson County Sheriff distinguished the videos from the writings, for which he allowed inspection based on the rationale that they did not pose the same risk because "video and audio images provide a more powerful medium for communicating with troubled adolescents than the written word." *Notice of Sheriff's* ***[**37]*** *Decision Regarding Request for Release of Certain Criminal Justice Records* at 10, *Fleming v. Stone*, No. 00-CV-884 (June 19, 2006). In addition to the differences between the mediums of communication, the writings are "of a different nature . . . The [t]apes were directed towards a specific audience and were prepared with that in mind" while "[t]he [w]ritings consist of personal journal entries written to themselves, which lack the dialogue component of the [t]apes." *Id*. at 10. The Jefferson County Sheriff released the writings in redacted form.

We do not suggest that the rationale for every CCJRA custodian inspection decision must exhibit a commensurate focus or as detailed an analysis as the Jefferson County Sheriff's in the Columbine case. Nevertheless, ***HN27***[⬆] at a minimum, to enable judicial review as contemplated by *section 24-72-305(7), C.R.S.* (2008), the record of the custodian's inspection request determination before the district court should include an articulation of the custodian's balancing of the public and private interests in the record. *Cf.* *People v. D.F., 933 P.2d 9, 14 (Colo. 1997)* ***HN28***[⬆] ("[A]s part of our review we ascertain 'whether the trial court's findings of fact and conclusions **[**38]** of law are adequate for purposes of appellate review . . . .' [W]hether the court's ' findings of historical fact are adequately supported by competent evidence and whether the court applied the correct legal standard to these findings.'" And, "[w]e read the record and determine whether the evidence before the lower court 'adequately supported the district court's ultimate legal conclusion'" (internal citations omitted)); *accord* *People v. Gothard, 185 P.3d 180, 183 (Colo. 2008)*.

The General Assembly's ultimate purpose in providing for judicial review of discretionary inspection determinations and authorizing the courts in appropriate circumstances to order the release or redacted release of the record, *section 24-72-305(7), C.R.S.* (2008), is to prevent the custodian from utilizing surreptitious reasons for denying inspection of law enforcement records or reasons which, though explained, do not withstand examination under an abuse of discretion standard.

III.

Accordingly, we make our rule absolute and remand this case to the district court to return this case to the Sheriff for a proper CCJRA inspection request determination consistent with this opinion.

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and spread across the Internet." *Id*. The Sheriff decided he was "unwilling to be an accomplice in Harris' and Klebold's final act by releasing these recordings."

The Jefferson County Sheriff's department has released over 12,000 pages of documents along with video and audio tapes relating to the incident. For a disclosure list see *http://www.co.jefferson.co.us/sheriff/sheriff_T62_R27.htm*.

In re Marriage of Purcell

Court of Appeals of Colorado, Division Five

July 28, 1994, Decided

No. 93CA2025

Reporter
879 P.2d 468 *; 1994 Colo. App. LEXIS 216 **; 22 Media L. Rep. 2287; 18 BTR 1352

In re the Marriage of Robert Emmet Purcell, Appellant, and Heather Dee Purcell, Appellee.

Subsequent History: [1]** THIS OPINION IS NOT THE FINAL VERSION AND IS SUBJECT .
Released For Publication September 15, 1994.

Prior History: Appeal from the District Court of the City and County of Denver. Honorable Herbert L. Stern, III, Judge. No. 93DR1860.

Disposition: ORDER AFFIRMED AND CAUSE REMANDED WITH DIRECTIONS

Core Terms

seal, trial court, attorney's fees, parties, motion for attorney fees, separate agreement, public interest, award of fees, court file, outweighed, contends, motions, privacy

Case Summary

Procedural Posture

In a dissolution of marriage proceeding, appellant husband appealed an order of the District Court of the City and County of Denver (Colorado), which denied the husband's motions to seal the record and for attorney fees. Appellee wife requested for an award of her attorney fees incurred in responding to the husband's appeal of the denial of his motion for attorney fees.

Overview

The husband appealed the trial court's denial of his motions to seal the record and for attorney fees. The court affirmed the denial and remanded to the trial court for an award of attorney fees to the wife. It found that the trial court's denial of the motion to seal the record was proper because the trial court did not abuse it discretion in denying the motion as the harm to the parties' privacy did not outweigh the public interest. Also, its review of the documents sought to be sealed lead the court to conclude that they contained nothing unusual or that would mandate that they be sealed. The court also found that the denial of the motion for attorney fees was proper because the husband cited no authority suggesting that the trial court abused its discretion in denying such motion. Because the court found that the husband's appeal of the denial of his motion for attorney fees was frivolous, the court granted the wife's request for an award of her attorney fees incurred in responding to this appeal.

Outcome

The court affirmed the trial court's denial of the husband's motions to seal the record and for attorney fees and remanded to the trial court for an award of attorney fees to the wife.

LexisNexis® Headnotes

Governments > Courts > Court Records

HN1[] **Courts, Court Records**

Pursuant to *C.R.C.P. 121* § 1-5, a trial court may limit access to court files upon motion of any party. However, an order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

Civil Procedure > Remedies > Costs & Attorney Fees > Costs

Legal Ethics > Professional Conduct > Frivolous Claims & Conduct

HN2[] **Costs & Attorney Fees, Costs**

If a husband's appeal of the denial of his motion for attorney fees is frivolous, then an award of fees to the wife is appropriate. *Colo. App. R. 38(d)*.

Counsel: Robert Emmet Purcell, Pro Se.

Zupkus & Ayd, P.C., Susan B. Price, Stefan Kazmierski, Greenwood Village, Colorado, for Appellee.

Judges: Opinion by JUDGE NEY, Rothenberg and Casebolt, JJ., concur.

Opinion by: NEY

Opinion

[*469] In this dissolution of marriage proceeding, Robert Emmet Purcell (husband) appeals the order denying his motions to seal the record and for attorney fees. We affirm and remand for an award of attorney fees to Heather Dee Purcell (wife).

I.

The husband first contends that the trial court improperly denied the stipulated motion to seal the record. We disagree.

HN1[] Pursuant to *C.R.C.P. 121* § 1-5, the trial court may limit access to court files upon motion of any party. However, an order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.

Here, the parties moved to seal the court file, asserting that the action was "likely to reveal . . . extremely personal, private, **[**2]** and confidential matters" and that "there is no legitimate interest of the public in having access to the Court records in this action, and therefore . . . the public will not be harmed by the requested order." The court determined that "inadequate cause" had been shown and denied that motion. After the parties filed their financial affidavits and separation agreement, they filed a renewed motion to seal. The court denied that motion as "legally insufficient."

Hence, we perceive no abuse of discretion in the court's ruling. On the motions at issue, although both parties requested sealing of the record, the court was not obligated to find that harm to the parties' privacy outweighed the public interest, and under *C.R.C.P. 121* § 1-5, it was not required to seal the record. Moreover, our review of the documents sought to be sealed leads us to conclude that they contain nothing unusual or that would mandate that they be sealed.

II.

The husband also contends that the trial court erred in denying his motion for attorney fees. We find no merit in this contention.

The husband, an attorney appearing pro se, sought an award of fees for his response to the wife's motion for temporary orders. **[**3]** He asserted that mediation or arbitration was required by the parties' separation agreement, so that the wife's motion was improper. However, the husband admits that he would not have appealed this matter, except for his desire to have the record sealed. Further, he cites no authority suggesting that the court abused its discretion in denying his request for fees, and we are not persuaded by his unsupported argument

and allusions to facts not in the record. Therefore, we will not reverse the order denying his motion for fees.

III.

The wife requests an award of her attorney fees incurred in responding to this appeal. We agree that ***HN2***[↑] the husband's appeal of the denial of his motion for attorney fees is frivolous, so that an award of fees to the wife is appropriate. See *C.A.R. 38(d)*; *Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984)*. On remand the trial court is directed to determine the wife's reasonable fees incurred for that part of the appeal and enter judgment accordingly.

The order is affirmed, and the cause is remanded to the trial court for further proceedings consistent **[**4]** with this opinion.

JUDGE ROTHENBERG and JUDGE CASEBOLT concur.

Neutral
As of: January 17, 2020 12:26 AM Z

In re R.C.

Court of Appeals of Colorado, Division One

May 23, 2013, Decided

Court of Appeals No. 11CA1940

Reporter
2013 COA 77 *; 2013 Colo. App. LEXIS 2059 **

In re Petition of R.C., Petitioner-Appellant.

Notice: THIS OPINION IS NOT THE FINAL VERSION AND SUBJECT TO REVISION UPON FINAL PUBLICATION

Subsequent History: Writ of certiorari denied *People v. R.C., 2014 Colo. LEXIS 147 (Colo., Mar. 3, 2014)*

Prior History: [1]** Douglas County District Court No. 11CV1445. Honorable Richard B. Caschette, Judge. Prior Opinion Announced May 9, 2013, WITHDRAWN on Court's Own Motion.

Cox v. People, 309 P.3d 954, 2013 Colo. App. LEXIS 695, 2013 COA 70 (2013)

Disposition: ORDER REVERSED AND CASE REMANDED WITH DIRECTIONS.

Core Terms

sealed, records, offenses, traffic offense, criminal record, charges, misdemeanor, pertaining, traffic, arrest, non-traffic

Case Summary

Overview
HOLDINGS: [1]-Contrary to the holding in Clark v. People, criminal justice records of an arrest and charges, which included both traffic and non-traffic drug offenses, could be sealed under *Colo. Rev. Stat. § 24-72-308* (2012) as to the non-traffic drug offenses under *Colo. Rev. Stat. § 18-18-406(1)* (2012) and *Colo. Rev. Stat. § 18-18-428(2)*; *[2]*-Because the statute did not appear to contemplate petitions to seal records for cases that included both traffic offenses and non-traffic offenses, the court ordered the district court to determine whether the harm to the privacy of the petitioner seeking sealing of the records or the dangers of unwarranted adverse consequences to the petitioner outweighed the public interest in retaining the record, as to the drug offenses, and if so, it should seal the criminal records as to those charges pursuant to *§ 24-72-308(1)(c)*.

Outcome
Reversed and remanded for further proceedings.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Fines

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Infractions & Minor Offenses

Criminal Law & Procedure > ... > Possession > Simple Possession > Penalties

HN1 **Sentencing, Fines**

A class 2 petty offense for possession of less than two ounces of marijuana is punishable by a fine as provided in the statute defining the offense, not more than $100, *Colo. Rev. Stat. § 18-18-406(1)* (2012); and for possession of drug paraphernalia, not more than $100, *Colo. Rev. Stat. § 18-18-428(2)*; a class B traffic infraction is punishable by a fine of not less than $15 nor more than $100.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Governments > Legislation > Interpretation

HN2 **De Novo Review, Conclusions of Law**

Statutory interpretation presents a question of law that an appellate court reviews de novo.

Governments > Legislation > Interpretation

HN3 **Legislation, Interpretation**

When interpreting a statute, the court's primary purpose is to ascertain and give effect to the legislature's intent. To this end, the court looks first to the statute's plain language, giving words and phrases their plain and ordinary meanings. In addition, the court must interpret a statute in a way that best effectuates the legislative intent and purpose. Thus, the court must interpret relevant statutory provisions as a whole, giving consistent, harmonious, and sensible effect to their parts.

Governments > Legislation > Interpretation

HN4 **Legislation, Interpretation**

A remedial statute is to be liberally construed to accomplish its object. *Colo. Rev. Stat. § 2-4-212* (2012); Furthermore, exceptions to a remedial statute are to be strictly construed.

Criminal Law & Procedure > Postconviction Proceedings > Expungement of Convictions

HN5 **Postconviction Proceedings, Expungement of Convictions**

See *Colo. Rev. Stat. § 24-72-308* (2012).

Governments > Legislation > Interpretation

HN6 **Legislation, Interpretation**

Where a statute establishes a general rule subject to exceptions, courts should interpret the exceptions narrowly to preserve the general rule's primary operation.

Criminal Law & Procedure > Postconviction Proceedings > Expungement of Convictions

HN7 **Postconviction Proceedings, Expungement of Convictions**

The purpose of *Colo. Rev. Stat. § 24-72-308* (2012), which is to relieve a very limited number of persons charged with criminal offenses from the stigma that comes with having been arrested for, or charged with, but ultimately not convicted of, an offense or offenses, is clearly discernible from subsections (1)(d) and (f)(I). *§ 24-72-308(1)(d), (f)(I)*. In those subsections, after an order sealing a record is entered: (1) a criminal justice agency may reply that no record exists as to the matters contained in the sealed record; (2) a potential employer, educational institution, and certain public officials shall not compel an applicant to disclose information contained in a sealed record; (3) an applicant need not answer questions concerning matters in the sealed record; (4) an applicant may say that the matters contained in the sealed record did not occur; and (5) an application may not be denied solely because of the applicant's refusal to disclose information contained in the sealed record. The fourth may be accurately characterized as a license to prevaricate.

Criminal Law & Procedure > Postconviction Proceedings > Expungement of Convictions

Governments > Legislation > Interpretation

HN8 **Postconviction Proceedings, Expungement of**

Convictions

The synonymous terms "pertaining to" and "relating to" in *Colo. Rev. Stat. § 24-72-308(3)* (2012) may be read narrowly in a multi-count case to exclude from sealing only the charges enumerated. In our view, the phrase can be read as "of" and certainly cannot be read to mean "containing," which is the practical effect of the Clark v. People. A narrow reading is compelled by the admonition that exceptions to remedial statutes are to be read strictly.

Counsel: Law Office of Brian K. McHugh, Brian K. McHugh, Littleton, Colorado for Petitioner-Appellant.

John W. Suthers, Attorney General, John T. Lee, Assistant Attorney General, Denver, Colorado, for Respondent-Appellee.

Judges: Opinion by JUDGE ROY[*]. Taubman and Graham, JJ., concur.

Opinion by: ROY

Opinion

[*P1] Petitioner, R.C., appeals a district court's order denying his petition to seal records of non-traffic offense charges brought against him that were subsequently dismissed. We reverse and remand with directions.

I. Issue Presented

[*P2] The issue presented here is whether criminal justice records of an arrest and charges, which include both traffic and non-traffic offenses, can be sealed under *section 24-72-308, C.R.S. 2012* (the statute), as to the non-traffic offenses. We decline to follow the majority opinion of a division of this court in *Clark v. People, 221 P.3d 447 (Colo. App. 2009)*, and we answer in the affirmative.

II. Background

[*P3] Petitioner was charged in the Douglas County Court **[**2]** with possession of marijuana in violation of *section 18-18-406(3)(a)(I), C.R.S. 2012* (a class 2 petty offense); possession of drug paraphernalia in violation of *section 18-18-428(2), C.R.S. 2012* (a class 2 petty offense); and unsafe lane change in violation of *section 42-4-1007, C.R.S. 2012* (a class A traffic offense).[1] After his successful completion of a juvenile diversion program, all of the charges were dismissed with prejudice.

[*P4] Subsequently, petitioner commenced these proceedings by filing a verified petition in the Douglas County District Court pursuant to the statute, requesting that the records of the case be sealed. In his petition, he alleged, among other things: "[He had] lost a job and been declined for employment at one other job due to the existence of records relating to this **[**3]** dismissed case. Other employment opportunities may have been lost due to the existence of the records."[2] The prosecution, relying on *Clark*, objected to the sealing of the records. At the hearing, both parties agreed that *Clark* was controlling. However, petitioner argued that the *Clark* dissent provided the better-reasoned approach to interpreting *section 24-72-308(3)(a)(I), C.R.S. 2012*, and he urged the court to grant his petition.

[*P5] The court denied the petition, and this appeal follows.

III. Standard of Review

[*P6] *HN2*[↑] Statutory interpretation presents a question of law that we review de novo. *People v. Vecellio, 2012 COA 40, ¶ 13, 292 P.3d 1004, 1010*.

IV. Statutory Construction

[*P7] *HN3*[↑] When interpreting a statute, our primary

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[*] Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

[1] *HN1*[↑] A class 2 petty offense for possession of less than two ounces of marijuana is punishable by a fine as provided in the statute defining the offense, here not more than $100, ***section 18-18-406(1), C.R.S. 2012***; and for possession of drug paraphernalia, not more than$100, ***section 18-18-428(2)***; a class B traffic infraction is punishable by a fine of not less than $15 nor more than $100. It is noted that the various driving under the influence of alcohol offenses are misdemeanors, not traffic misdemeanors, and are arguably sealable under the provisions of ***section 24-72-308***.

[2] The prosecution did not challenge petitioner's allegation in its response to the petition, and the parties have submitted a court-approved "Stipulated Statement in Lieu of [a] Transcript," which contains no indication that the prosecution challenged petitioner's allegation in this regard.

purpose is to ascertain and give effect to the legislature's intent. *People v. Kovacs, 2012 COA 111, ¶ 9, 284 P.3d 186, 188*. To this end, we look first to the statute's plain language, giving words and phrases their plain and ordinary meanings. *Id*. In addition, we must interpret a statute in a way that best effectuates the legislative intent and **[**4]** purpose. *Id. at ¶ 10, 284 P.3d at 188*. Thus, we must interpret relevant statutory provisions as a whole, giving consistent, harmonious, and sensible effect to their parts. *Id*.

[*P8] *HN4*[↑] A remedial statute is to be liberally construed to accomplish its object. *§ 2-4-212, C.R.S. 2012*; *Colorado & S. Ry. v. State R.R. Commission, 54 Colo. 64, 77, 129 P. 506, 512 (1912)*; *cf. Flood v. Mercantile Adjustment Bureau, LLC, 176 P.3d 769, 773 (Colo.2008)*; *Mishkin v. Young, 198 P.3d 1269, 1273 (Colo. App. 2008)*.

[*P9] Furthermore, exceptions to a remedial statute are to be strictly construed. 3 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 60.1, at 263 (7th ed. 2012) (*Sutherland*) (citing *Golf Channel v. Jenkins, 752 So. 2d 561, 565 (Fla. 2000)*; *State Admin. Bd. of Election Laws v. Billhimer, 314 Md. 46, 64, 548 A.2d 819, 828 (1988)*; *Hubner v. Spring Valley Equestrian Center, 203 N.J. 184, 195, 1 A.3d 618, 624 (2010)*; *Las Campanas Ltd. Partnership v. Pribble, 1997- NMCA 055, 123 N.M. 520, 525, 943 P.2d 554, 559 (Ct. App. 1997)*; and *Hulse v. Job Service North Dakota, 492 N.W.2d 604, 607 (N.D. 1992)*).

V. The Statute

[*P10] *Section 24-72-308* states, as pertinent here:

> *HN5*[↑] (1)(a)(I) . . . [A]ny person in interest may petition the district court of the district in which any arrest and criminal records information pertaining to said person in interest is located for the sealing of all of said records, except basic identification information, if the records are a record of official actions involving a criminal offense for which said person in interest was not charged, in any case which was completely dismissed, or in any case in which said person in interest was acquitted.
> . . . .
>
> (d) Upon the entry of an order to seal the records, the petitioner and all criminal justice agencies may properly reply, upon any inquiry in the matter, that no such records exist with respect **[**5]** to such person.
> . . . .
> (f)(I) Employers, educational institutions, state and local government agencies, officials, and employees shall not, in any application or interview or in any other way, require an applicant to disclose any information contained in sealed records. An applicant need not, in answer to any question concerning arrest and criminal records information that has been sealed, include a reference to or information concerning such sealed information and may state that no such action has ever occurred. Such an application may not be denied solely because of the applicant's refusal to disclose arrest and criminal records information that has been sealed.
> . . . .
>
> (3) Exceptions. (a) This section shall not apply to records *pertaining to*:
> (I) A class 1 or class 2 misdemeanor traffic offense;
> (II) A class A or class B traffic infraction;
> (III) A conviction for a [misdemeanor DUI] violation of section 42-4-1301(1), C.R.S. [2012]. . . .

(Emphasis added.)

VI. *Clark v. People*

[*P11] In *Clark*, the defendant's son was involved in a one-vehicle accident. *Clark, 221 P.3d at 448*. A passing motorist called the defendant at his son's request. *Id*. The defendant arrived at the scene, where he remained while his son took the defendant's vehicle to contact **[**6]** a tow truck. *Id*. A passing officer stopped, and the defendant stated that he was the driver of the vehicle involved in the accident. *Id*. Ultimately, the officer issued a citation charging the defendant with failure to notify the police of the automobile accident, a class 2 misdemeanor *traffic* offense. *Id*. The defendant pled guilty to false reporting, a class 3 misdemeanor. *Id*. When the defendant's securities license was placed in jeopardy because of the plea, the court allowed the defendant, with the prosecution's consent, to withdraw his plea, and the false reporting charge was dismissed. *Id*.

[*P12] The majority in *Clark* recognized a general rule of construction, which is that *HN6*[↑] "where a statute establishes a general rule subject to exceptions, we should interpret the exceptions narrowly to preserve the general rule's primary operation." *Id. at 450* (citing *Brodak v. Visconti, 165 P.3d 896, 898 (Colo. App. 2007)* (medical treatment exception to the driver's right to select test to determine alcohol content of his or her blood), which in turn cited *City of Edwards v. Oxford House, Inc., 514 U.S. 725, 731-32, 115 S.Ct. 1776, 1780, 131 L. Ed. 2d 801 (1995)* (exemption to FHA occupancy restrictions), and *Commissioner of Internal Revenue v. Clark, 489 U.S. 726, 739, 109 S. Ct. 1455, 1463, 103 L. Ed. 2d 753 (1989)* (exception in internal revenue code)). The statutes at issue in these cases do not appear to be remedial. Furthermore, the majority noted that the parties had reasonably **[**7]** assumed that the purpose of the exception was to avoid inundating the courts with petitions to seal records

of minor traffic offenses.[3] Clark, 221 P.3d at 449. We also agree that the assumption is reasonable.

[*P13] The majority concluded that the phrase "pertaining to," as used in *section 24-72-308(3)(a)*, was synonymous with "relating to" and should be given broad application, stating:

> [The exception] should be applied to the full reach of its clear terms, even if those terms call for a broad application. . . . [And] we will not reduce the scope of the exception by adding exceptions, limitations, or qualifiers thereto that are not suggested by the plain language of the statute.

Id. at 449. Therefore, the petitioner was not permitted to seal the record of the charge of false reporting because the record also contained the dismissed charge of failure to notify, a traffic offense. Id. at 449-50.

[*P14] Judge Russel, in dissent, agreed that the court cannot seal "records pertaining to" traffic infractions and that the exception encompasses documents of all types; however, he did not agree that that foreclosed relief. Id. at 450-51 (Russel, J., dissenting). He disagreed **[**8]** because (1) he saw no practical impediment to offense-specific sealing; (2) he believed that offense-specific sealing would further the legislative policy because it gives broad effect to the general rule; and (3) he concluded that the statute does not prohibit offense-specific sealing. Id. at 449.

VII. Analysis

[*P15] Our supreme court in People v. D.K.B., 843 P.2d 1326, 1331-32 (Colo. 1993), held that a predecessor and broader version of the statute was remedial in nature because it did not create or destroy substantive rights, and its repeal, which accompanied the adoption of the present version of the statute, had retroactive application to pending proceedings. *See also* E.J.R. v. District Court, 892 P.2d 222, 224 (Colo. 1995); 3 *Sutherland* § 60:2, at 265-66. Therefore, as previously noted, the statute is to be liberally construed to further its objectives, and exceptions are to be strictly construed.[4]

[*P16] HN7[↑] The purpose of the statute, which is to relieve a very limited number of persons charged with criminal offenses from the stigma that comes with having been arrested for, or charged with, but ultimately not convicted of, an offense or offenses, is clearly **[**9]** discernible from *subsections (1)(d)* and *(f)(I)*. *See § 24-72-308(1)(d), (f)(I)*. In those subsections, after an order sealing a record is entered: (1) a criminal justice agency may reply that no record exists as to the matters contained in the sealed record; (2) a potential employer, educational institution, and certain public officials shall not compel an applicant to disclose information contained in a sealed record; (3) an applicant need not answer questions concerning matters in the sealed record; (4) an applicant may say that the matters contained in the sealed record did not occur; and (5) an application may not be denied solely because of the applicant's refusal to disclose information contained in the sealed record. *See id*. The fourth may be accurately characterized as a license to prevaricate.

[*P17] We do not read "pertaining to" as broadly as the majority in Clark. HN8[↑] The synonymous terms "pertaining to" and "relating to" may also be read narrowly in a multi-count case to exclude from sealing only the charges enumerated. In our view, the phrase can be read as "of" and certainly cannot be read to mean "containing," which is the practical effect of the *Clark*. Our reading is compelled by the admonition that exceptions to remedial statutes **[**10]** are to be read strictly.

[*P18] This conclusion is consistent with the assumed, and apparent, purpose of the traffic offense exception, which is to prevent courts from being inundated with petitions to seal records of arrests for, or charges of, traffic offenses, particularly routine traffic offenses. While the petition here seeks to seal the entire criminal record, the statutory purpose can be satisfied by sealing records of non-traffic offenses in a criminal record that includes both. It would require the suspension of disbelief to conclude that petitioner lost one job, and was denied another, because of a routine traffic offense. There is no indication in the statute that the General Assembly intended that the tail should wag the dog.

[*P19] Moreover, we reject the prosecution's assertion that other divisions of this court have "repeatedly found that the legislative intent was not to allow for offense-specific sealing." The two cases cited by the prosecution concern petitioners who were charged with offenses that were not "completely dismissed," as *section 24-72-308(1)(a)(I)* expressly requires. *See* Warren v. People, 192 P.3d 477 (Colo. App. 2008); People v. Chamberlin, 74 P.3d 489 (Colo. App. 2003). Thus, under the clear language of the statute, those petitioners were not eligible to have their criminal records sealed **[**11]** for any purpose. *See* Warren, 192 P.3d at 478-80; Chamberlin, 74 P.3d at 489-91. In contrast, here, the case against petitioner was "completely dismissed," as the statute requires. *§ 24-72-308(1)(a)(I)*.

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[3] We have reviewed the legislative history, and it does not contain any indication of the purpose for the exception.

[4] We are not going to attempt to parse the distinction between "narrowly" and "strictly" as, in our view, any distinction is not determinative of the issue before us.

[*P20] In terms of the remedy, we agree with Judge Russel. The statute does not appear to contemplate petitions to seal records for cases that include both traffic offenses and non-traffic offenses. The statute does not speak to how such cases should be handled. Therefore, if the district court "finds that the harm to the privacy of the petitioner or dangers of unwarranted adverse consequences to the petitioner outweigh the public interest in retaining the record," as to the drug offenses, it should seal the criminal records as to those charges. *§ 24-72-308(1)(c)*.

[*P21] The order is reversed, and the case is remanded for further proceedings consistent with the views expressed in this opinion.

JUDGE TAUBMAN and JUDGE GRAHAM concur.

West's Colorado Revised Statutes Annotated West's Colorado Court Rules Annotated Rules of County Court Civil Procedure Chapter 25. Colorado Rules of County Court Civil Procedure

C.R.C.P. Rule 305.5

RULE 305.5. ELECTRONIC FILING AND SERVING

Currentness

(a) Definitions:

(1) *Document:* A pleading, motion, writing or other paper filed or served under the E-System.

(2) *E-Filing/Service System:* The E-Filing/service system ("**E-System**") approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(3) *Electronic Filing:* Electronic filing ("**E-Filing**") is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(4) *Electronic Service:* Electronic service ("**E-Service**") is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service, other than service of a summons, via the E-System.

(5) *E-System Provider:* The E-Service/E-Filing system provider authorized by the Colorado Supreme Court.

(6) *Signatures:*

I. Electronic Signature: an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

II. Scanned Signature: A graphic image of a handwritten signature.

(b) Types of Cases Applicable: E-Filing and E-Service may be used for all cases filed in county court as the service becomes available. The availability of the E-System will be determined by the Colorado Supreme Court and announced through its website: http:www.courts.state.co.us and through published directives. E-Filing and E-Service may be mandated pursuant to Section (o) of this Rule 305.5.

(c) To Whom Applicable:

(1) Attorneys licensed or certified to practice law in Colorado, or admitted pro hac vice under C.R.C.P. 205.3 or 205.5 may register to use the E-System. The E-System provider will provide an attorney permitted to appear pursuant to C.R.C.P. 205.3 or 205.5 with a special user account for purposes of E-Filing and E-Serving only in the case identified by a court order approving pro hac vice admission. The E-System provider will provide an attorney certified as pro bono counsel pursuant to C.R.C.P. 204.6 with a special user account for purposes of E-Filing and E-Serving in pro bono cases as contemplated by that rule. An attorney may enter an appearance pursuant to C.R.C.P. 121, Section 1-1, through E-Filing. Where E-Filing is mandated pursuant to Section (o) of this Rule 305.5, attorneys must register and use the E-System.

(2) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(d) Commencement of Action--Service of Summons: Cases may be commenced under C.R.C.P. 303 through an E-Filing. Cases commenced under C.R.C.P. 303 through an E-Filing must be E-Filed to the court no later than seven (7) days before the set return date, if any. Service of a summons shall be made in accordance with C.R.C.P. 304

(e) E-Filing, Date and Time of Filing: Documents filed in cases on the E-System may be filed under C.R.C.P. 305 through an E-Filing. A document transmitted to the E-System provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(f) E-Service--When Required--Date and Time of Service: Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(g) Filing Party To Maintain the Signed Copy, Paper Document Not To Be Filed, Duration of Maintaining of Document: A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

(h) Default Judgments and Original Documents:

(1) If the action is on a promissory note or where an original document is by law required to be filed, that original document shall be scanned and submitted electronically with the e-filed motion for default. The original document shall be presented to the court in order that the court may make a notation of the judgment on the face of the document.

(2) Following compliance with sub-paragraph (1) of this paragraph (h) the document may then be returned to the filing party; retained by the court for a specified period of time to be determined by the court; or destroyed by the court.

(3) When the return of service is required for entry of default, the return of service may be scanned and E-Filed. In accordance with paragraph (i) of this Rule, signatures of attorneys, parties, witnesses, notaries and notary stamps may be electronically affixed or documents with signatures obtained on a paper form may be scanned into the system to satisfy signature requirements.

(i) Documents Requiring E-Filed Signatures: E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be electronically affixed or documents with signatures obtained on a paper form may be scanned into the system to satisfy signature requirements.

(j) C.R.C.P. 311 Compliance: Use of the E-System by an attorney constitutes compliance with the signature requirement of C.R.C.P. 311. An attorney using the E-System shall be subject to all other requirements of Rule 311.

(k) Documents Under Seal: A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the discretion of the court; however, the filing party may object to this procedure.

(l) Transmitting of Orders, Notices, and Other Court Entries: Courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

(m) Form of E-Filed Documents: C.R.C.P. 310 shall apply to E-Filed documents. A document shall not be transmitted to the clerk of the court by any other means unless the court at any later time requests a printed copy.

(n) Repealed.

(o) E-Filing May Be Mandated: With the permission of the Chief Justice, a chief judge may mandate E-filing within a county or judicial district for specific case classes or types of cases. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory, the Chief Judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

(p) Relief in the Event of Technical Difficulties:

(1) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of: (1) an error in the transmission of the document to the E-System provider which was unknown to the sending party, (2) a failure of the E-System provider to process the E-Filing when received, or (3) other technical problems experienced by the filer or E-System provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(2) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(q) Form of Electronic Documents:

(1) *Electronic Document Format, Size, and Density:* Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01.

(2) *Multiple Documents:* Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(3) *Proposed Orders:* Proposed orders shall be E-Filed in an editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the Court Clerk’s office and must be resubmitted.

Credits

Adopted eff. Sept. 10, 2009. Amended eff. June 21, 2012; May 9, 2013; Dec. 31, 2013; Sept. 9, 2015; Jan. 12, 2017.

Editors' Notes

COMMENTS

2009

[1] The Court authorized service provider for the program is the Integrated Colorado Courts E-Filing System (www.jbits.courts.state.co.us/icces/).

[2] "Editable Format" is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

[3] C.R.C.P. 377 provides that courts are always open for business. This Rule 305.5 is intended to comport with that rule.

2017

[4] Effective November 1, 2016, the name of the court authorized service provider changed from the "Integrated Colorado Courts E-Filing System" to "Colorado Courts E-Filing" (www.jbits.courts.state.co.us/efiling/).

Rules Civ. Proc., County Court Rule 305.5, CO ST CTY CT RCP Rule 305.5
Current with amendments received through November 1, 2019.