Supreme Court of Colorado

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SUPREME COURT OF COLORADO

OFFICE OF THE CHIEF JUSTICE

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Memorandum to Justice Samour and Judge Dailey, Supreme Court Liaison and Chair of the Supreme Court Criminal Rules Committee

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Justice Samour and Judge Dailey,

1. I am aware that over the last several years, the Supreme Court Criminal Rules Committee has considered at length a proposal from representatives of the Fourth Estate to adopt as a rule governing criminal procedure in this jurisdiction the American Bar Association's Standard of Criminal Justice 8-5.2, Regarding Closure of Proceedings or Sealing of Judicial Records; and last year the committee notified the supreme court that it would not be recommending the adoption of the proposed rule. The court did not request that the committee reconsider that recommendation at the time, and I do not do so now.

2. Since then, however, it has become apparent that various trial courts throughout the state have granted motions limiting public access to the records of a substantial number of criminal cases, at times in their entirety and for indefinite periods, without suggesting any justification for doing so, other than simply responding to an unopposed motion or stipulation by the parties. Although those orders broadly limiting public access have now been identified, reviewed, and either lifted, or narrowed and continued only for specified purposes, the circumstances giving rise to such restrictive orders and the capacity for them to continue in effect in perpetuity, without challenge or even awareness of their existence, remains a concern.

3. To the extent the promulgation and indefinite nature of general orders broadly restricting public access to criminal records without cause is a matter implicating judicial education, that matter has been and will continue to be addressed by the department. To the extent it is a function of, or has been exacerbated by, technological advances in the way court records are maintained, stored, and disseminated, or is a function of administrative directives designed to ensure compliance by court staff, as nearly as practicable, with the plethora of external, and often

complex if not competing, policy choices requiring the excision or restriction of access to various personal information likely to appear in records of judicial proceedings, I will be attempting to address those concerns, simultaneously with the work of this committee, through use of the Chief Justice Directive, in consultation with the Public Access Committee. There remains, however, the question (which I consider inappropriate for unilateral resolution by Chief Justice Directive) whether the jurisdiction would benefit from a rule of criminal procedure imposing limitations within which judicial discretion to restrict public access to criminal records may be exercised, and some kind of procedural obligations accompanying the exercise of that discretion. *Cf.* C.R.C.P. 121, § 1-5. It is with regard to these last questions that I believe the wisdom and expertise of the committee would be beneficial to the court and with regard to which I therefore request the committee's immediate attention.

4. As noted by the proposal already considered and rejected, at least one district court has apparently interpreted this court's opinion in *Star Journal Publishing Corp. v. County Court*, 591 P.2d 1028 (Colo. 1979), as adopting a predecessor ABA Standard, to govern not only the closure of proceedings at issue in that case but also to govern orders restricting access to records in criminal cases generally. *See People v. Holmes*, No. 12CR1522, 2013 WL 3982191, at *2 (Arapahoe Cty. Dist. Ct. April 4, 2013) (order regarding media petitioners' motion to unseal affidavits of probable cause in support of arrest and search warrants and requests for orders for production of documents) (citing *Star Journal*, 591 P.2d at 1030). The questions whether our "see" cite to the extant ABA Standard in *Star Journal*, 591 P.2d at 1030, in the course of disapproving of an order closing a preliminary hearing to the media alone, but not the non-media general public, could fairly be considered an adoption of that Standard in its entirety, the repeal of that Standard and adoption of a different ABA Standard, following subsequent Supreme Court jurisprudence, *see, e.g.*, *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 13–15 (1986) (rejecting the closure of a preliminary hearing and sealing of the transcript of that hearing without a finding of substantial probability of prejudice and a lack of adequate alternatives); *cf. People v. Owens*, 2018 CO 55, ¶ 8, 420 P.3d 257, 259 (finding no First Amendment right of access to criminal court records), *cert denied*, 2019 WL 660187 (18-404), and whether that ABA Standard purported to govern sealing the kinds of records at issue in *Holmes* at all, now appear less meaningful than simply the question whether uniform standards and procedures would be in the interests of both public access and the operation of the criminal justice system in this jurisdiction.

5. In a number of related contexts, we, and courts across the county, have taken note of the obligation of the judiciary not only to protect the right of criminal defendants to a fair trial, free of prejudicial publicity, but also to protect the privacy interests of defendants, victims, and third parties, like witnesses, informants, unindicted co-conspirators, and the like, as well as to protect these same individuals from physical danger and preserve the integrity of ongoing investigations, public confidence in criminal proceedings, and the judgments of trial courts from reversal on appeal. By the same token, we and the Supreme Court have both made clear the importance of public access to criminal proceedings and transcriptions of those proceedings, and it is clearly the public policy of this jurisdiction, as articulated by the General Assembly, that

the records of criminal justice agencies remain open to the public, at the discretion of the custodian, unless otherwise provided by law, including the rules and orders of the courts.

6. Particularly in light of the different perspectives and experience of the membership of the committee, I believe it would be of great assistance to the supreme court, in exercising its constitutional rule-making powers as a separate branch of government, to have the committee's recommendation concerning the advisability, and feasibility, of using the criminal rules as a device to limit, or regulate, the exercise of trial court discretion in restricting public access to various records in ongoing criminal proceedings. In this regard, it could be helpful to know whether, and if so how, other jurisdictions have attempted to strike a balance among these competing interests by rulemaking; and whether specific findings should be required before restricting public access to particular classes of information or records, whether particular durational or review requirements should be imposed, and because representatives of the public media will not normally be parties to the criminal proceedings on which they seek to report, whether particular notice or hearing requirements involving the media, either before or after restricting access, should be included. With regard to this last consideration, whether notice would be sufficient if the order restricting access or the order containing redactions is, itself, made public. On the other hand, if more direct notice should be required, precisely how should appropriate representatives of the public media be identified, designated, and notified in light of the current technological and social media environment. And, regardless of the type of notice required, if a hearing requirement should also be included, how, in what timeframe, and under what circumstances the media should be allowed to request an opportunity to be heard with respect to an order restricting access to information.

7. As an integral piece of the ongoing attempt by the judiciary of this state to facilitate public access to court records as widely and expeditiously as can be managed, consistent with the countervailing obligations of the courts, the immediate attention of the Criminal Rules Committee to this matter would be greatly appreciated.

Sincerely,

Nathan B. Coats
Chief Justice, Colorado Supreme Court