

The Why of Public Access to Judicial Records in Civil Cases

Steve Zansberg and Michael Beylkin

Steve Zansberg and Michael Beylkin are partners at Zansberg Beylkin LLC in Denver, Colorado. Zansberg is a former chair of the Forum on Communications Law.

Recently, we were called upon to file a motion to “unsuppress” (the term used in Colorado state courts, instead of “unseal”) a court file in a divorce case being litigated under a special program that allows parties to “hire”—at their own expense—a retired judge to adjudicate a civil case. Under that program, the case is an official state court proceeding: The judgment issued by the retired judge is appealable directly to the Colorado Court of Appeals. The entire trial court proceeding is carried on, and ordinarily docketed, in the State District Court of Colorado.

The retired judge presiding over this divorce proceeding had suppressed the entire case file, including the Register of Actions (docket), and even its order suppressing the case file.

To prepare the motion, we went to our brief bank and pulled out our “standard” motion asking a district court judge to unsuppress the court file. It explained that Colorado courts, like those of all states, recognize a *presumption* of public access to documents filed for the judge’s consideration, which places the burden on the party wishing to overcome that presumptive right to make a highly particularized showing of compelling need, a.k.a. “an interest of the highest order,” narrow tailoring to further that interest, and there is no “less restrictive means” to do so, including (of course) partial redaction.

Colorado is the only state in the nation to have affirmatively rejected any First Amendment right of access to judicial records.¹ However, in 2021, the Colorado Supreme Court’s Rules of Criminal Procedure Committee adopted a new rule that requires specific, on-the-record findings similar to those prescribed in *Press Enterprise Company v. Superior Court*, 464 U.S. 501 (1984), to justify the suppression of any criminal case records.² This rule does not apply, however, to *civil* cases, like this divorce proceeding. Instead, for civil case files to be “suppressed,” a “Statewide Practice Standard” adopted pursuant to a Rule of Civil Procedure requires the judge to find that the privacy interests of any party outweighs the public’s interest in gaining access to the judicial records.

The husband in the divorce case responded to our client’s motion and argued that the public has no legitimate interest in poring over the details of these private parties’ personal lives, including their finances and medical and mental health treatment records. Accordingly, he argued the retired judge had quite properly ordered the entirety of the case file suppressed, and should maintain that order.

Of course, our “standard” unsealing brief contains numerous precedents, from Colorado and elsewhere, holding that such mundane and “garden variety” privacy concerns of civil litigants are not sufficiently weighty to overcome the presumption of public access and justify sealing,³ and certainly not of *the entire case file*; redaction of truly sensitive information (including Social Security numbers, financial account numbers, medical diagnoses, and the like) in the judicial records adequately protects such legitimate countervailing interests.⁴

Because the retired judge presiding over the divorce case had spent more than a dozen years serving as a district court judge, we initially presumed that he was familiar with this body of case law and understood that what transpires in courts of law is presumptively public business. But then it dawned on us: A couple of years earlier in this case, this judge had entered an order placing *the entire case file* under wraps! We didn't know if he thought this special "rent-a-judge" state program allowed him to treat this case differently than ordinary, run-of-the-mill civil proceedings in state courts.

In preparing our reply brief, we revisited and inserted precedents that went beyond the "what" and "how" of public access to judicial records, focusing instead on the "why." Why is it, after all, that the documents filed in *all* civil cases—including those in which now-irreconcilably-separated private parties ask a judge to divide their assets, craft shared parenting plans, and so on—should be readily available to nosey reporters or neighbors, and worse yet, have those sordid private facts posted online, worldwide, in perpetuity?

We're certain that many of you (readers of *Communications Lawyer*) are already familiar with much of what follows below. Nevertheless, it is our hope for both those of you who are not, and for all of you, that you find this compilation helpful in preparing future pleadings seeking to make judicial records available to the public, even if certain portions of those records are provided in redacted form. We have come to believe that—particularly with younger, newer members of the bench—it is particularly persuasive to start your argument with the "why" before pivoting to the more frequently treaded "therefore," i.e., this is what courts in this state and elsewhere have held is the operative standard for sealing any portion of this case file.

Documents Tell the Story

First, why judicial *records*? Isn't it sufficient, for purposes of public scrutiny over the courts, that the actual *proceedings* be open to public attendance? No, it's not. Why? Well, for starters, "the right of access to judicial records is based upon the same justifications which support the right to open trials."⁵ And the Supreme Court has recognized openness as "an indispensable attribute" of our judicial system.⁶ "The judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions."⁷

Foremost in the justifications for openness of the judicial branch's operations, and the records that serve as the basis for its resolution of cases, is to "keep all of the players honest," allow the public to *understand* and *respect* both the process and the results, and to hold the decision-makers (judge and jury) accountable for their decisions. Openness guards against unfairness and inequity in the application of the law, as "the sure knowledge that *anyone*" may monitor the operation of the courts "gives assurance that established procedures are being followed and that deviations will become known."⁸

But, as a practical matter, very little of what transpires in courts of law these days occurs in proceedings in open court: Less than 3 percent of federal criminal cases go to trial, and less than 2 percent of civil cases do so.⁹ So, if the public is going to keep a "watchful eye" on the work of the judicial branch, it must have access to the writings that constitute that vast majority of the work of the courts. After all, the U.S. Supreme Court has held that, "[t]he operations of the courts and the judicial conduct of judges are matters of *utmost public concern*."¹⁰ In light of that recognized public interest, "[a]ccess to written documents filed in connection with . . . [a judicial proceeding] is particularly important . . . where no hearing is held and the court's ruling is based solely upon the motion papers."¹¹ "Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with *the record supporting the court's decision sealed from public view*."¹²

Published in *Communications Lawyer*: Volume 41, Number 1, ©2026 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Since documents filed in court comprise so much (and often the entirety) of what serves as the basis for the resolution of litigated disputes, “[t]ransparency is pivotal to public perception of the judiciary’s legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification.”¹³ As Seventh Circuit Judge Frank Easterbrook famously wrote: “What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records.”¹⁴

Honestly, Though, Is That True Even in *This* Case?

OK, so records filed before the court, particularly in high-profile felony cases, allow the public to monitor what is going on in the case. But what makes *all* judicial records, both criminal and civil, presumptively open to public inspection?¹⁵ Why should the public be allowed to inspect court filings in routine, mundane cases like probate, trust and estates, employment, and domestic relations cases?

The simplest, shortest answer is “because, your Honor, this court, all of its personnel, all materials you consider, or are *asked* to consider, and the decisions you render, are paid for by We the People, and this court exercises its authority in *our* name, on *our* behalf, as *our* public servants.” But don’t take my word for it.

The Supreme Court has explained that “the courts of this country recognize a general right [of the public] to inspect and copy public records and documents, including judicial records and documents.”¹⁶ The right of public access to judicial records “is not some arcane relic of ancient English law,” but, rather, “is fundamental to a democratic state.”¹⁷ Providing public access to judicial records ensures that courts “have a measure of accountability,” and it promotes “confidence in the administration of justice.”¹⁸ Just as importantly, “public disclosure of judicial records often enhances the public’s trust in the process.”¹⁹

One helpful summary of the reasons why there is a strong presumption of public access to “judicial records”²⁰ in *all* cases (civil and criminal) appears in PUBLIC ACCESS TO COURT RECORDS: GUIDELINES FOR DEVELOPMENT BY STATE COURTS,²¹ which the Conference of State Court Administrators adopted in August 2002:

The role of the judiciary is to resolve disputes, between private parties or between an individual or entity and the government, according to a set of rules. . . . [H]aving the process and result open to the public serves a societal interest in having a set of stable, predictable rules governing behavior and conduct. [Openness] furthers the goal of providing public education about the results in cases *and the evidence supporting them*. . . . [Indeed, t]he decision of the court stating what the rights and obligations of the parties is as important to the public as to the litigants.

But the most eloquent explication of why *all* judicial records are presumptively open for public inspection (and copying) came in a 2021 opinion by Judge Don R. Willett of the U.S. Court of Appeals for the Fifth Circuit:

The public’s right of access to judicial records is a fundamental element of the rule of law. Openness is also Civics 101. The Constitution’s first three words make clear that ultimate sovereignty is wielded not by government but by the governed. And because “We the People” are not meant to be bystanders, the default expectation is transparency—that what happens in the halls of government happens in public view. Americans cannot keep a watchful eye, either in capitols or in courthouses, if they are wearing blindfolds.

. . . [A]ccessibility enhances legitimacy, the assurance that things are on the level. . . . [I]t gives the . . . judiciary a measure of accountability, in turn giving the public confidence in the administration of justice. **Put simply, protecting the public's right of access is important to maintaining the integrity and legitimacy of an independent Judicial Branch.** And hopefully, more access to judicial records means more trust in judicial officers and more respect for judicial orders.

Judicial records belong to the American people; they are *public*, not *private*, documents. . . .

Judge Willett also expounded on why judges are duty-bound to protect the public's right of access, even (and especially) when the litigants would prefer otherwise:

[J]udges must protect public accessibility for three mutually reinforcing reasons: (1) the public has a right to monitor the exercise of judicial authority; (2) judges are the primary representative[s] of the public interest in the judicial process; and (3) the judiciary's institutional legitimacy depends on public trust. . . .

. . . But most litigants have no incentive to protect the public's right of access. That's why judges, not litigants must undertake a case-by-case, document-by-document, line-by-line balancing of the public's . . . right of access against the interests favoring nondisclosure.

. . . The Judicial Branch belongs to the American people. And our processes should facilitate public scrutiny rather than frustrate it. Excessive secrecy . . . undermines the public's faith in our justice system.

American courts are not private tribunals summoned to resolve disputes confidentially at taxpayer expense. When it comes to protecting the right of access, the judge is the public interest's principal champion. And when the parties are mutually interested in secrecy, the judge is its only champion.

. . . [W]e urge litigants and our judicial colleagues to zealously guard the public's right of access to judicial records—their judicial records—so that justice may not be done in a corner.²²

Lead with “the Why”

So, the next time you are called upon to convince a judge to unseal judicial records that he or she has previously determined should be kept “under wraps,” we recommend that you frontload your motion with an explanation of *why* your client (on behalf of the public) is seeking that relief.²³ Don't assume the judge is nearly as familiar as you with the underlying rationale for the public access mandate. The “why” helps lay the foundation for the “what” and “how” judicial records belong to We the People and not to the litigants or the court.

Endnotes

1. Roberts, Jeffrey A., *How a Colorado Supreme Court ruling affects the public's right to inspect judicial records - Colorado Freedom of Information Coalition*, COLORADO FREEDOM OF INFORMATION COALITION (June 19, 2018), available at <http://coloradofaic.org/how-a-colorado-supreme-court-ruling-affects-the-publics-right-to-inspect-judicial-records/>.

2. *Colorado judicial branch sets new standard for sealing, suppressing criminal court records*, NATIONAL FREEDOM OF INFORMATION COALITION, available at <http://www.nfoic.org/blogs/colorado-judicial-branch-sets-new-standard-sealing-suppressing-criminal-court-records/>.

3. *Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1127 (Colo. App. 1996) (“[I]t 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. . . . 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.” (citing *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) & *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983)); *Parson v. Farley*, 352 F. Supp. 3d 1141, 1155 (N.D. Okla. 2018) (“Courts have held that injury to one’s reputation and potential embarrassment generally do not outweigh the strong presumption of public access attaching to judicial documents.” (collecting cases)).

4. See, e.g., *Anderson*, 924 P.2d at 1127 (holding that “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”); *In re Providence Journal Co.*, 293 F.3d 1, 15 (1st Cir. 2002) (“Redaction constitutes a time-tested means of minimizing any intrusion on” the right of access; “The First Amendment requires consideration of the feasibility of redaction on a document-by-document basis.”); *U.S. v. Arel*, 533 F.3d 72, 82 (2d Cir. 2008) (“[I]t is the responsibility of the . . . court to ensure that sealing documents to which the public has a First Amendment right is no broader than necessary.”); *Kanza v. Whitman*, 325 F.3d 1178, 1181 (9th Cir. 2003) (where release of court records poses risk to national security, “[p]ublic release of redacted material is an appropriate response”); *In re Nat’l Prescription Opiate Lit.*, 927 F.3d 919, 939 (6th Cir. 2019) (reversing district court’s sealing order and requiring district court, before sealing documents, to “explain . . . why the seal itself is no broader than necessary”) (internal quotation marks and citations omitted); *Phoenix Newspapers, Inc v. U.S. Dist. Ct.*, 156 F.3d at 947, 951 (9th Cir. 1998) (reversing the district court’s blanket sealing of hearing transcript because “[e]ven where denial of access is appropriate, it must be no greater than necessary to protect the interest justifying it” and “redaction would have safeguarded the jurors’ anonymity”); *In re N.Y. Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) (approving of requirement “to minimize redaction in view of First Amendment considerations”); *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (holding, in a criminal case, that “wholesale sealing of motion papers was more extensive than necessary to protect defendants’ fair trial rights, their privacy interests, and the privacy interests of third persons”).

5. David Marburger, *In Defense of Broadcaster Access to Evidentiary Video and Audio Tapes*, 44 PITT. L. REV. 647, 651 (1983) (citing Stuart Wilder, Comment, *All Courts Shall Be Open: The Public’s Right to View Judicial Proceedings and Records*, 52 TEMP. L. Q. 311, 339 (1979)).

6. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

7. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445–46 (2015); see also *California ex rel. Lockyer v. Safeway, Inc.*, 355 F. Supp. 2d 1111, 1124 (C.D. Cal. 2005) (“The courts’ legitimacy in our system of government derives in large measure from our historical commitment to offering reasoned decisions publicly setting forth our rationale not only to litigants, but to the people in whose name we administer justice.”).

8. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (italics in original).

9. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (“[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas” (citations omitted)); Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?* 101:4 JUDICATURE 27, 28 (2017) (“Today, approximately 1 percent of all civil cases filed in federal court are resolved by trial—the jury trial disposition rate is approximately 0.7 percent, and the bench trial disposition rate is even lower” (citations omitted)).

10. *Landmark Commc’ns v. Virginia*, 435 U.S. 829, 839 (1978) (emphasis added).

11. *In re N.Y. Times Co.*, 828 F.2d 1152, 1154 (2d Cir. 1987).

12. *Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J. concurring in part and dissenting in part) (emphasis added) (citation omitted).

13. *U.S. v. Arel*, 533 F.3d 72, 83 (2d Cir. 2008) (internal marks and citation omitted).

14. *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

15. Numerous courts have concluded that “the justifications for access to the criminal courtroom apply as well to the civil trial.” *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983); see also *Westmoreland v. Columbia Broad. Sys. Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (“The First Amendment does secure to the public and to the press a right of access to civil proceedings.”); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir.

1984); *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 20 Cal. 4th 1178, 1208 (1999) (“[E]very lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as criminal trials.”); *id.* at 1210 (“We believe that the public has an interest, in all civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases.”).

16. *Nixon v. Warner Commc’ns*, 435 U.S. 589, 597 (1978). The right of access is premised either upon the First Amendment, as recognized by federal circuit courts extending to even civil proceedings, *Courthouse News Serv. v. N.M. Admin. Office of the Courts*, 53 F.4th 1245, 1263 (10th Cir. 2022); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006); *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Publicker Industries, Inc. v. Coehn*, 733 F.2d 1059, 1070 (7th Cir. 1984); *Brown & Williamson Tobacco Corp.*, 710 F.2d 1165, 1177 (6th Cir. 1983), or under the common law.

17. *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev’d on other grounds sub nom. Nixon*, 435 U.S. 589.

18. *U.S. v. Amodeo*, 11 F.3d 1044, 1048 (2d Cir. 1995); *accord U.S. v. Hubbard*, 650 F.2d 293, 314–15 (D.C. Cir. 1980).

19. *U.S. v. Index Newspapers LLC*, 766 F.3d 1072, 1088 (9th Cir. 2014).

20. Because the primary purpose of providing such access is to permit public oversight of the judicial branch, courts have defined what is a “judicial record” accordingly: “[A] document counts as a judicial record, for purposes of the presumption of access, when it is filed with the objective of obtaining judicial action or relief or otherwise plays a role in the adjudicative process. . . . When filed for that purpose, the entire document, and not just the parts cited by the parties or the court, becomes a judicial record.” *Grae v. Corr. Corp. of Am.*, 134 F.4th 927, 933 (6th Cir. 2025) (internal quotations and citations omitted).

21. *Position Paper on Court Leadership in Justice Information Sharing*, CONFERENCE OF STATE COURT ADMINISTRATORS (August 2002), available at <http://cosca.ncsc.org/sites/default/files/media/document/courtleadershipjusticeinfossharing.pdf>.

22. *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417–21 (5th Cir. 2021) (cleaned up).

23. This is a well-recognized and ancient tactic in the art of persuasion, a.k.a. persuasion theory. *See, e.g.*, Simon Sinek, *START WITH WHY: HOW GREAT LEADERS INSPIRE EVERYONE TO TAKE ACTION* (2009), <https://simonsinek.com/books/start-with-why/>; Aristotle, *RHETORIC* (350 B.C.E.).