

APPELLATE LAW

Media Access Appeals

THE U.S. SUPREME Court has made it clear that the public and the press have a First Amendment right of access to criminal proceedings, and that courts can restrict access only when there is a compelling governmental interest and the restriction is narrowly tailored to serve it. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 606-07 (1982). The same right of access applies in civil proceedings as well, e.g., *Publiker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1066-71 (3d Cir. 1984), though the issue arises far more frequently in criminal cases.

The press has long been the vehicle for enforcing this right. But how does the press—rarely a party to the underlying case—seek appellate review of a trial court’s interlocutory decision denying access to a hearing or sealing confidential documents? Surprisingly, the circuits are split on this question, though they uniformly try to provide a timely appeal, cognizant of the press’s need for immediate access to an ongoing, newsworthy proceeding.

Writ of mandamus can provide appellate review

Several circuits have held that the appropriate vehicle for appellate review of an order denying or limiting public access to a criminal proceeding is a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. 1651. The 9th U.S. Circuit Court of Appeals has held that

By Aaron S. Bayer



mandamus is the only remedy available to the press. In a criminal trial of the governor of Arizona, in which the press sought access to sealed transcripts, the court stated that, as a nonparty, the press “lacks standing to bring a direct appeal and must therefore rely exclusively upon a petition for a writ of mandamus to seek review of orders denying it access to judicial documents or proceedings.” *Phoenix Newspapers Inc. v. U.S. Dist. Court*, 156 F.3d 940, 952 (9th Cir. 1998).

Other circuits have followed the same approach. See, e.g., *U.S. v. McVeigh*, 119 F.3d 806, 810 (10th Cir. 1997) (media not a party to Oklahoma City bombing criminal trial, and therefore “mandamus is the proper vehicle for reviewing court orders sealing or redacting court documents”); *In re Washington Post Co.*, 807 F.2d 383, 388 (4th Cir. 1986) (“mandamus is the preferred method of review for orders restricting press activity related to criminal proceedings” and an appeal will be “treated as a petition for mandamus”); and *U.S. v. Noriega*, 917 F.2d 1543, 1546 (11th Cir. 1990) (treating CNN challenge to order prohibiting broadcast of taped conversations between

General Manuel Noriega and his counsel as petition for writ of mandamus).

Collateral order appeals

Several circuits, however, have rejected mandamus and held that media entities should intervene in the criminal proceeding and then appeal any order denying them access pursuant to the collateral order doctrine. In *In re Associated Press*, 162 F.3d 503, 509 (7th Cir. 1998), for example, the 7th Circuit instructed the district court to “grant intervention” to the press on remand and explore fully “the Press’ right of access.” This approach can pose a significant impediment to appellate review of closure orders—if the district court denies the motion to intervene, the press “may appeal only the order denying intervention,” but not the order restricting access, because “the movant never became a party and thus has no standing to appeal any order other than the denial of intervention.” *Id.* at 506.

The appellate courts, however, have generally managed to avoid such obstacles to appellate review of closure orders. In *U.S. v. Chagra*, 701 F.2d 354 (5th Cir. 1983), for example, newspapers challenged the closure of a bail-reduction hearing, without ever seeking to intervene. After cataloguing the variety of approaches among the circuits to appellate jurisdiction over this type of appeal by the press, *id.* at 359-60, the court concluded that it had jurisdiction under the collateral order doctrine, *id.* at 358, where the newspapers were not parties below but had been allowed “a full opportunity to participate.” *Id.* at 357.

Similarly, in *ABC Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004), a coalition of

Aaron S. Bayer is the chairman of the appellate practice group at Wiggin & Dana of New Haven, Conn. He can be reached at abayer@wiggin.com.

media organizations challenged an order barring them from attending voir dire examination of potential jurors in the Martha Stewart trial, but did not seek to intervene. The 2d Circuit held that by hearing their arguments on the merits, the district court had “in effect allowed the Media Coalition to intervene,” and that the coalition could therefore appeal under the collateral order doctrine. *Id.* at 97.

Even where the trial court never rules on the press’s motion to intervene, an immediate appeal may be available. In *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006), newspapers moved to intervene in a civil case seeking access to documents related to a summary judgment motion that were filed under seal. The district held the motion in abeyance—for over a year—while the summary judgment motion was pending. Recognizing that the newspapers “seek immediate right of access to the contested documents,” the court of appeals held that, notwithstanding the absence of a decision on intervention, the requirements of the collateral order doctrine were met and the newspapers had a right of immediate appeal. *Id.* at 118-19.

The 3d Circuit has even held that a district court’s denial of leave to intervene may not be deemed not to be a denial, where the press “was effectively permitted to intervene so as to assert its claims.” *U.S. v. Preate*, 91 F.3d 10, 12 n.1 (3d Cir. 1996).

Some courts have recognized that the press could always file a separate civil suit to challenge denials of public access to criminal proceedings, and that allowing the press to intervene is simply a more efficient way to hear their claims. Where the press’s public access claim “‘could have been treated by the district court as a new civil case, as opposed to an intervention in the pending criminal case, and the orders would have been final in that case[,] [n]o jurisdictional significance should attach simply because the district court chose to treat appellants as intervenors in the criminal proceeding.’” *ABC Inc.*, 360 F.3d at 97 (quoting *In re New York Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987)).

Courts may not be so accommodating of an effort to intervene in the appellate court to protect the public’s right of

access. In *Aref v. U.S.*, nos. 06-1380-op and 06-1392-op, ___ F.3d ___, 2006 WL 171957, at *2-*3 (2d Cir. June 23, 2006), the New York Civil Liberties Union (NYCLU) sought to participate in an appeal in a criminal case involving charges of terrorist-related money laundering. It moved to intervene in the court of appeals and sought mandamus to compel the district court to unseal a secret decision denying the defendant’s motion

Appellate courts generally manage to avoid obstacles to appellate review of closure orders under the collateral order doctrine.

to dismiss the prosecution on the ground that it was based on illegal National Security Agency wiretapping. *Id.* at *2.

There, the court did find it jurisdictionally significant that the NYCLU had not moved to intervene in the district court. It dismissed the mandamus petition because the NYCLU was not a party and was not appealing from a denial of leave to intervene. *Id.* at *3. Although not relied upon by the 2d Circuit, the government had also challenged the NYCLU’s standing to represent the public’s right of access, and the court perhaps might have viewed the NYCLU’s claims differently had they been pursued by the press.

At least one circuit appears to view both mandamus and collateral order appeals as acceptable alternatives. In the trial of Providence, R.I., Mayor Buddy Cianci, newspapers denied access to sealed legal memoranda filed both an appeal and a mandamus petition. The 1st Circuit found mandamus proper, and dismissed the appeal as moot. *In re Providence Journal Co.*, 293 F.3d 1, 9 & n.3 (1st Cir. 2002). The court intimated, however, that both routes might have

been permissible, noting that whether it relied upon mandamus or collateral order jurisdiction, “all roads lead to Rome.” *Id.* at 9. A year later, the court expressly held that it had jurisdiction to hear a newspaper’s challenge to an order sealing documents pursuant to a mandamus petition and as a collateral order appeal. *In re Boston Herald Inc.*, 321 F.3d 174, 177-78 (1st Cir. 2003).

Standard of review for orders for closure

While all roads may lead to appellate review of closure orders, there may be some significance to the route taken. Mandamus is an “extraordinary remedy,” *Will v. U.S.*, 389 U.S. 90, 95 (1967), subject to more stringent standards than appellate review under the collateral order doctrine. The 1st Circuit has taken the position that it acts pursuant to its “advisory mandamus” power in addressing public-access issues, and that power is exercised only to resolve recurring issues that are “novel and of great public importance.” *In re Providence Journal*, 293 F.3d at 11 (quotation omitted); *In re Boston Herald*, 321 F.3d at 177.

Other circuits have used a more comprehensive set of factors in determining whether to grant mandamus in public-access cases, including whether: 1) the press has no other adequate means of obtaining relief; 2) the press will be damaged in a way not correctable on appeal; 3) the lower court order is clearly erroneous; 4) the order is an “oft-repeated error”; and 5) the order raises new and important issues. *Phoenix Newspapers*, 156 F.3d at 951-52; *U.S. v. McVeigh*, 119 F.3d at 810.

At least theoretically, then, prevailing on a mandamus petition should be more difficult than on a direct appeal, though it is not clear from the case law that, in practice, restrictive mandamus standards cause courts to be less vigorous in protecting the rights of the press to have access criminal and civil proceedings. **NLJ**