Sedgwick LLP

The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

There's a Reporter in the Hallway: Fifth Circuit Holds Media Has First Amendment Right to Notice and Hearing before Closing Sentencing Proceedings

Media Law Bulletin

By Joseph Larsen

July 31, 2011

It was not necessary for *Houston Chronicle* reporter Dane Schiller to camp outside the courtroom door to receive notice that the court was about to go into an unannounced closed sentencing hearing of notorious Mexican drug kingpin Oziel Cardenas-Guillen. Nor, the Fifth Circuit Court of Appeals has held, was it necessary for the *Chronicle* to have a lawyer come over in less than 20 minutes to file a handwritten motion to be heard on the issue of whether the government had met its burden to have the hearing closed. Rather, the Fifth Circuit has found that the public and the media have a First Amendment right to notice that a sentencing hearing will be closed and an opportunity to be heard on the issue prior to closure. *In re Hearst Newspapers, L.L.C.,* ____ F.3d _____, 2011 WL 1844189 (5th Cir. 2011).

In fact, despite Schiller's and the *Chronicle's* efforts, the district court declined to hear the *Chronicle's* handwritten motion at the time it was walked in during Cardenas-Guillen's sentencing hearing – just as it had declined to hear an earlier motion to intervene that the *Chronicle* had filed requesting relief regarding the numerous sealed motions and orders. The *Chronicle* had also sent a letter to the district court requesting notice and an opportunity to be heard with regard to closure of any proceedings. Nevertheless, the district court granted the government's motion to close the sentencing hearing for "security reasons" and to deprive the public of notice that the hearing was taking place. This order and the government's motion were sealed. Only Schiller's fortuitous presence in the courthouse at the very hour of the hearing tipped the *Chronicle* off to the fact that its request for notice had been denied, and that the hearing was in progress.

After the sentencing proceeding had been completed, the district court denied the *Chronicle's* handwritten motion as moot. The district court also indicated that it would docket the record of the hearing, making public the fact that a sentencing hearing had occurred, once it was advised by the U.S. Marshals Service that doing so would be safe. Notably, the *Chronicle* did not appeal the merits of the closure of the sentencing hearing itself, that is, whether the government would have met its burden of showing an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Ct.* (*Press–Enterprise II*), 478 U.S. 1, 6 (1986). Rather, Hearst appealed only the district court's refusal to follow two procedural requirements before closing the sentencing hearing: (1) to give public notice of contemplated closure of the hearing, and (2) to give interested parties an opportunity to be heard before the hearing was closed.

The *Hearst* opinion quickly disposed of the argument that, because Cardenas-Guillen's sentencing proceeding has already occurred, *Hearst's* appeal was moot. The court pointed out that the "issues that arise in this case are capable of repetition because the *Chronicle* is a prominent newspaper that seeks to cover major cases, and it is reasonable to expect that district courts will close other criminal proceedings to the *Chronicle* in future cases." The government also argued that Judge Hilda Tagle's order was correct because it would have met its burden in any case. That is, even if the district court was required to give notice and an opportunity to be heard before closing the sentencing proceeding, the district court essentially gave the *Chronicle* such an opportunity to be heard because the district court was aware of, and stated that it had considered, the *Chronicle's* earlier motion to intervene. Thus, the government argued, the district court was not required to "hold a hearing and write redundant findings of fact that merely reiterate truisms." The Fifth Circuit rejected these arguments, holding that:

"[I]t would be perverse to hold that the district court fulfilled its obligation to provide notice and an opportunity to be heard in this case because the *Chronicle's* reporter 'camped out' in the hallway and its attorneys sent the court anticipatory requests asking for notice and an opportunity to be heard if a proceeding were to be closed. The court is not relieved from its duty to adhere to due process requirements, in order to safeguard the First Amendment right of access, by the fact that a newspaper, out of an abundance of caution, took some steps to attempt to secure that right."

The *Hearst* opinion is momentous in several respects. In a question of first impression, the Fifth Circuit addressed whether the First Amendment right of access applies to a sentencing hearing. In holding that it does, the Fifth Circuit joins the Second, Fourth, Seventh and Ninth Circuits. Significantly, the *Hearst* court cites to a number of cases from other circuits that "have also recognized a First Amendment right of access to *documents filed* for use in sentencing hearings." (emphasis added). This suggests that the Fifth Circuit will also apply the First Amendment qualified right to access to court records. Previous Fifth Circuit opinions have been determined based solely on the common-law right of access, such as in *United States v. Holy Land Found. for Relief and Development*, 624 F.3d 685 (5th Cir. 2010). These opinions under the common law have generally been favorable to access. However, a qualified First Amendment right of access sets a much higher presumption of access by which the court's exercise of discretion will be measured. That is, instead of the "balancing of interests" under the common law right of access, sealing court records to which there is a qualified First Amendment right of access requires a "compelling" governmental interest with an order narrowly tailored to serve that interest.

Whether the government actually met its burden to close Cardenas-Guillen's sentencing hearing under the First Amendment right of access was not an issue on appeal and therefore not addressed in the *Hearst* opinion. The newspaper's decision to limit the appeal to the notice and hearing issue appears to have been quite canny. The government also argued that the need for security was a basis for not giving notice of the sentencing hearing and an opportunity to be heard. This was also the argument that the government used to justify closing the sentencing hearing itself. The argument in this case carries much less water by virtue of the fact that Cardenas-Guillen's wife and daughter were out in the hallway with Schiller and the *Chronicle's* lawyer, but *were* allowed into the hearing. Apparently, the government had established a comfort level of some kind with Cardenas-Guillen's family members that would distinguish them as a lesser security concern than a *Houston Chronicle* reporter. The Fifth Circuit rejected the argument that security concerns trumped the right of the media and public to notice and a hearing. However, the *Hearst* opinion does leave some room for the district court to address security concerns that may attend notice and hearing on closure of certain high-profile criminal or national security trials. *Hearst* holds that the district court may give notice by docketing the motion, but it may also decline to reveal what kind of proceeding is going to be heard and simply place a notice on the docket that there is a motion to close a proceeding. The trial court may decide to disclose all, some or none of what is contained in the motion to close. Similarly, on the right to be heard, at a minimum the court must permit the interested party to submit briefs on whether a proceeding should be closed, but the court may also hold a hearing to hear argument. *Hearst* even allows the district court to files its statement of reasons under seal if it deems doing so is necessary, which could be reviewed on appeal. However, because the due process rights of the press and public are at issue, the district court must be sensitive to the risk of an erroneous deprivation of due process rights, and probable value of such additional or substitute safeguards. These suggest procedures for compliance with the First Amendment were given in terms of guidance for future cases in that the district in this case had given "the press and public no notice, and no opportunity to be heard, whatsoever."

The *Hearst* opinion has other far-reaching implications for First Amendment practice in the Fifth Circuit. Even if the district follows the very minimum required for due process and simply places a notice on the docket that there is a motion to close a proceeding, leaving the parties to submit argument regarding the various proceedings that could hypothetically be closed, this is likely to be of little comfort to the government as a docket entry on any prominent case that sets a hearing will likely draw attention in any event. Indeed, omitting a description of the

type of hearing is almost guaranteed to draw even greater media scrutiny. While the opinion regards sentencing hearings, it can readily be used to argue requirement for notice and hearing to other hearings where the circuits joined by the Fifth Circuit in *Hearst* have found the First Amendment right of access to apply. Further, the ruling in *Hearst* is likely to produce more case law addressing whether the government has met its burden on closure simply by virtue of the fact that more of these cases are likely to be argued.

It may be that the *Hearst* panel was persuaded in part by the extreme procedural facts of the case. The opinion even quotes from the hearing transcript where Judge Tagle says on the record that “in spite of all the efforts to ensure this hearing not be noticed by the media, I am told that there is a reporter from the *Houston Chronicle* who is, as I speak, drafting a motion regarding his request to be heard.” For district court judges in the Fifth Circuit, the *Hearst* opinion is a caution to open their proceedings and a mandate to give notice when it is contemplating closing them, whether there is a reporter in the hallway and whether his lawyer has time to scratch out a motion for access before the hearing has concluded.

Related Practices:

Commercial Practices

Media, Entertainment & Sports Law