C. Ray Drew, Executive Director * Mark Silverstein, Legal Director

November 16, 2011

VIA UNITED STATES MAIL

The Honorable John Marcucci
Presiding Judge of the Denver County Court
1437 Bannock St. Room 108
Denver, Colorado 80202

Dear Judge Marcucci:

I am writing to address recent reports received by the ACLU of Colorado that during a session of court on the morning of November 13, 2011, Magistrate Judge John Hoffman refused to allow members of the public to bring paper, notebooks or any type of writing utensils into the courtroom. The prohibition on note taking applied to general members of the public, friends and family of the defendants appearing in court, and members of the press, as reported by Westword here: http://blogs.westword.com/latestword/2011/11/occupy_denver_arrests_bond.php. Only attorneys were permitted to bring paper and/or writing utensils into the courtroom. Both Westword and the Denver Post had reporters on scene who were prohibited from taking notepads into the courtroom. The Westword reporter who had a pen in the courtroom was subsequently directed to stop writing.

The appearances on the morning of November 13 in front of Judge Hoffman were almost entirely defendants who had been arrested in association with the ongoing Occupy Denver protest movement. The Occupy movement and demonstrations which began with "Occupy Wall Street" have since grown to include Occupy protests in other cities, including Denver. Judge Hoffman's impromptu prohibition meant that both reporters in the courtroom and Occupy Denver's supporters and members of its legal committee, who attended the arraignment to determine the amount of bail set by the court, were forbidden from taking any notes in the courtroom. It is clear from the reports that individuals who attended the arraignment to assist the defendants and coordinate bail and bond for their release were hindered in their ability to document Judge Hoffman's orders. Although the Court may impose reasonable restrictions on the use of devices that are noisy or otherwise distracting in the courtroom, we cannot conceive of any reasonable basis for Judge Hoffman's prohibition of the possession of paper and pens in his courtroom.

The ACLU is very concerned that this recent development in the Denver County Courts, and Magistrate Judge Hoffman's enforcement of this prohibition, violates the First Amendment

to the United States Constitution. Although the right of access to criminal trials is not explicitly mentioned in the First Amendment, the Supreme Court has long held that the First Amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). "Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" *Id*. (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). Moreover, the Court has stressed the importance of ensuring that the "constitutionally protected discussion of governmental affairs is an informed one." *Id*. at 604-05.

A restriction on access to the courtroom "is constitutional if it is reasonable, if it promotes 'significant governmental interests,' and if the restriction does not 'unwarrantedly abridge . . . the opportunities for the communication of thought.'" *United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, n.18 (1980)). As noted above, we cannot think of any arguable reasonable basis for the recently adopted prohibition, or any legitimate governmental interest that is promoted through the denial of writing utensils to members of the public and press in the courtroom. To the contrary, "public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper Co.*, 457 U.S. at 606. Judge Hoffman's recent action has damaged the appearance of fairness in the judicial process.

The court in *Goldschmidt v. Coco*, 413 F. Supp. 2d 949 (N.D. Ill. 2006) addressed a similar circumstance. There, the court held that the judge's prohibition on note taking in the courtroom presented a "serious constitutional issue" and that a "sweeping prohibition of all note-taking by any outside party seems unlikely to withstand a challenge under the First Amendment." *Id*. at 952. In *Goldschmidt*, the court observed that a prohibition on note taking in the courtroom

> interdicts all who quietly take notes at a public trial, be they teachers, students, lawyers representing non-parties who may have similar interests, and courtroom monitors and evaluators of judicial performance representing public interest groups, or simply interested members of the public. A prohibition against note-taking is not supportive of the policy favoring informed public discussion; on the contrary it may foster errors in public perception.

Goldschmidt, 413 F. Supp. 2d at 953. Judge Hoffman's prohibition likewise contravenes the public policy which favors informed, public discussion about government action. Notably, in the case at hand, it appears that Judge Hoffman's order was not a blanket prohibition consistently enforced in his courtroom (as with the restriction addressed in *Goldschmidt*), but was instead issued specifically in relation to the court appearances on the morning of November 13, 2011. While such an order is likely unreasonable under normal circumstances, it is particularly harmful to the rights protected by the First Amendment under these circumstances, in which reporters from the Denver Post and Westword were present to report on the ongoing Occupy Denver movement. Ultimately, the court in the *Goldschmidt* case dismissed the plaintiff's First

Amendment claim as moot because Judge Coco submitted an affidavit in which she asserted that she had discontinued the prohibition on note taking, and did not "intend to establish or enact such a policy in the future." *Goldschmidt v. Coco*, 493 F. Supp. 2d 1055, 1059-1060 (N.D. Ill. 2007).

We request that you take all necessary steps to ensure that Judge Hoffman, and any other Denver County Court judge who has adopted a similar prohibition, immediately cease such unconstitutional restrictions on public access to the courtroom. In addition, we respectfully request that you respond to our concerns on or before December 2, 2011, and describe what actions you have taken to ensure compliance with the First Amendment protected right of access to criminal trials in Denver County courtrooms.

Sincerely,

Sara J. Rich
Staff Attorney, ACLU of Colorado

PO Box 18986 * Denver, CO 80218-0986 * 720.402.3107 * FAX 303.777.1773 * www.aclu-co.org *
srich@aclu-co.org