

Court rule, rulings differ on openness of warrants

No statute exists to overrule procedure

Sometimes finding out the answer to a legal question is an extremely difficult process — you can check case law and the statutes. You think you know the answer, and then you can get caught by surprise by something you had no idea existed. That happened to me a few weeks ago.

Many times over the years I've been asked about access to search warrants. My answer has always been the same — warrants are open, but the returns are closed. There were good reasons for that answer, but I now know it's wrong.

The only statute that deals with this issue is Section 542.276, which sets out the standard law enforcement uses to request a search warrant. It sets out what needs to go in the application, including the affidavit that must accompany it.

The application has to identify what law enforcement is searching for and where it intends to search. It must be filed in court, signed by the prosecutor. The judge decides whether it contains sufficient facts to justify issuing a search warrant.

All of this is "retained in the records of the court..." In short, it's a court record, which you know is generally an open record unless the court has specifically closed the record or the file.

After the warrant is issued and the search done, there must be a "return" filed, which identifies what was seized and an itemized receipt. The return is "delivered to the judge who issued the warrant."

I've always heard that explained as until the judge delivers the return to the court, the return is not considered

a "court record" and therefore is not an open record.

And there have been a couple of cases that Missouri media lawyers cited in this area. One, a federal case (called "In re Search Warrant," a 1988 case from the 8th Circuit Court of Appeals), involved an appeal by the *St. Louis Post-Dispatch* over a judge's order refusing to unseal an affidavit and other materials attached to two search warrants.

The government attorneys in that case argued that the process of issuing such documents involved an "ex parte" request from the government and an out-of-court consideration and ruling by the judge. Also, they argued, revealing the object of the search would frustrate the very seizure of the evidence.

But the court recognized the long-standing

First Amendment right of access to court documents and held that this right does extend to documents filed in support of search warrant applications. The court also noted that public access to such documents is important to the public's understanding of the function and operation of the judicial process and the criminal justice system, and it also acted as a curb on potential prosecutorial or judicial misconduct.

However, after giving us this strong holding, that particular Court went on to find that in the facts before it, keeping those records under seal was necessary due to the importance of the ongoing investigation by the government.

Another case supporting this decision was a holding out of the Circuit Court of Buchanan County from 1991. In that, *The Kansas City Star*

wanted access to numerous search warrants, affidavits and returns in a criminal case.

One division of the court denied that application, but *The Star* took it up in subsequent proceedings in another division. That court, citing the federal decision above, held that there was a qualified First Amendment right of public access to search warrants and supporting documents, just as there is a right of public access to court proceedings. (This case also contained language supporting the author's understanding that the original request was public but the return was non-public until filed with the court file.)

Well, that all seemed well and good. But that, unfortunately, is not the end.

As I worked with some MPA members this month on a case involving a search warrant, first we got a variety of excuses from various folks about why the search warrant and affidavit were closed. None of those reasons made sense.

Finally, a court clerk pointed out to us a provision contained in Supreme Court Operating Rule 4.24, which contains a list of "Confidential Records" in the court system. Item "p" on that list is "Search warrant applications until the warrant is returned or expires." That rule was adopted in 2004.

There's not been a court decision on what takes precedence, the operating rule or the court opinions.

I can tell you that the Missouri Constitution, in Article V, Section 5, gives the Supreme Court in the state the power to establish rules relating to "practice, procedure and pleading..." That same provision says that "rules shall not change substantive rights or the law relating to evidence..."

So is this a rule relating to "substantive rights?" Or is this a rule relating to "procedure and pleading?"

And to make this more confusing, there is case law that says where the legislature has enacted a statute pertaining to a procedural matter that is inconsistent with a Supreme Court rule, the statute must be enforced. And another

Search warrants

(continued on next page)



Jean Maneke, MPA's Legal Hotline attorney, can be reached at (816) 753-9000, jmaneke@manekelaw.com.

Missouri Newspaper Organizations

NORTHWEST MISSOURI PRESS ASSOCIATION: President, Matt Daugherty, Smithville/Kearney/Liberty; Vice President, Phil Cobb, Maryville; Secretary, Kathy Conger, Bethany; Treasurer, W.C. Farmer, Rock Port. Directors: Past President Jim Fall, Maryville; Dennis Ellsworth, St. Joseph; Jim McPherson, Weston; Chuck Haney, Chillicothe; Adam Johnson, Mound City; Steve Tinnen, Plattsburg; Kay Wilson, Maryville; Steve Booher, St. Joseph; D'Anna Balliett, Cameron.

SHOW-ME PRESS ASSOCIATION: President, David Eales, Paris; Vice President, Jeff Grimes, Centralia; Secretary-Treasurer, Sandy Nelson, News-Press & Gazette Co. Directors: Dennis Warden, Owensville; Stacy Rice, Drexel; Past President/Director, Linda Geist, Monroe City.

OZARK PRESS ASSOCIATION: President, Keith Moore, Ava; Vice President, Whitney Anderson, Crane; Secretary-Treasurer, Dala Whittaker, Cabool. Directors: Roger Dillon, Eminence; Brad Gentry, Houston; Jeff Schrag, Springfield; Chris Case, Cuba; Tianna Brooks, Mountain View; Sharon Vaughn, Summersville.

SOUTHEAST MISSOURI PRESS ASSOCIATION: President, Betty Watkins, Dexter; First Vice President, Amanda Layton, Perryville; Second Vice President, Donna Denson, Cape Girardeau; Secretary-Treasurer, Michelle Friedrich, Poplar Bluff; Executive Secretary, Ann Hayes, Southeast Missouri State University; Historian, Peggy Scott, Festus. Directors: Gera LeGrand, Cape Girardeau; Kim Combs, Piedmont; H. Scott Seal, Portageville; Kate Martin, Perryville; Deanna Nelson, Sikeston; Ed Thomason, New Madrid.

DEMOCRATIC EDITORS OF MISSOURI: President, Richard Fredrick, Paris; First Vice President, Bob Cunningham, Moberly; Secretary, Beth McPherson, Weston; Treasurer, Linda Geist, Monroe City.

MISSOURI CIRCULATION MANAGEMENT ASSOCIATION: President, Brenda Carney, Harrisonville; First Vice President, Jack Kaminsky, Joplin; Second Vice President, Steve Edwards, St. Joseph; Secretary, David Pine, Kansas City; Treasurer, Doug Crews, Columbia. Directors: Jim Kennedy, Bolivar; Ken Carpenter, Kansas City; Rob Siebeneck, Jefferson City.

MISSOURI ADVERTISING MANAGERS' ASSOCIATION: President, Dennis Warden, Owensville; First Vice President, Jane Haslag, Jefferson City; Second Vice President, Jana Todd, Warrenton; Secretary, Jeanine York, Washington; Treasurer, Kristie Williams, Columbia. Directors: Suzie Wilson, Milan; Bruce Wallace, Ashland; Brian Rice, Excelsior Springs; Lisa Miller, Camdenton; Kevin Jones, St. Louis. Past President, Stacy Rice, Drexel.

MISSOURI ASSOCIATED DAILIES: President, Joe May, Mexico; Vice President, vacant; Secretary, Shelly Arth, Marshall; Treasurer, Doug Crews, Columbia; Past President, Larry Freels, Kirksville. Directors: Jack Whitaker, Hannibal; Arnie Robbins, St. Louis; Dan Potter, Columbia.

MISSOURI PROFESSIONAL COMMUNICATORS: President, Colene McEntee, St. Charles; President-Elect, vacant; Secretary, Peggy Koch, Barnhart; Treasurer, Roxanne Miller, Ballwin; Public Relations Officer, Suzanne Corbett, St. Louis; Membership Officer, Linda Briggs-Harty, St. Louis; Contest Director, Janice Denham, Kirkwood; Quest Awards Directors, Susan Fadem, St. Louis, and Marge Polcyn, St. Louis; Conference Director, vacant; Archivist, Dee Rabey, Granite City, Ill.; Past President, Fran Mannino, Kirkwood.

MISSOURI PRESS SERVICE: President, Vicki Russell, Columbia; Vice President, Jack Whitaker, Hannibal; Secretary-Treasurer, Dave Bradley, St. Joseph. Directors: Steve Oldfield, Adrian, John Spaar, Odessa.

MISSOURI PRESS FOUNDATION, INC.: President, Mrs. Betty Spaar, Odessa; First Vice President, Wendell Lenhart, Trenton; Second Vice President, Kirk Powell, Pleasant Hill; Secretary-Treasurer, Doug Crews, Columbia. Directors: R.B. Smith III, Lebanon; Rogers Hewitt, Shelbyville; James Sterling, Columbia; Edward Steele, Columbia; Robert Wilson, Milan; Dane Vernon, Eldon; Vicki Russell, Columbia; Bill James, Harrisonville; Bill Miller Sr., Washington, Tom Miller, Washington; Chuck Haney, Chillicothe. Directors Emeritus: Mrs. Wanda Brown, Harrisonville; Wallace Vernon, Eldon.

MISSOURI-KANSAS AP PUBLISHERS AND EDITORS: Chairman, Susan Lynn, Iola, Kan. Missouri AP Managing Editors: Chairman, vacant; Past Chairman, Carol Stark, Joplin.

MISSOURI COLLEGE MEDIA ASSOCIATION: President, Dave Hon, Missouri Western State University; Vice President, Andrea Sisney, Webster University; Secretary, Janaca Scherer, University of Missouri, St. Louis; MPA Liaison, Jack Dimond, Missouri State University; Adviser, Dr. Robert Bergland, Missouri Western State University.

CALENDAR

November

- 3 — Missouri Press Ad Workshop, Columbia, MPA office
- 17 — MPA Legislative Committee, 3 p.m., MPA office, Columbia
- 19 — Mizzou v. Texas Tech Football, Columbia; MPA Tailgate two hours before kickoff, Hearnese Fieldhouse

December

- 2 — Newspaper In Education workshop, 10:30-2:30, MPA Office, Columbia

January

- 11 — Missouri Press Ad Workshop, Troy

April

- 19-20 — Missouri Advertising Managers' annual meeting, Courtyard by Marriott, Columbia

September

- 20-22 — Missouri Press Association 146th Annual Convention, Holiday Inn Executive Center, Columbia

Search warrants

(continued from previous page)

case says procedural rules promulgated by the Court supersede inconsistent statutes unless there has been a statute enacted that annuls or amends the rule. In order to supersede the procedural rule, the statute must specifically refer to the rule it is superseding.

In short, since I don't know of a statute that specifically states that it supercedes Rule 4.24, I'd suggest that at this moment, someone seeking access to a request for a subpoena and the underlying affidavit will have a hard time finding a court that would rule to allow access.

But I'm also wondering if this is an issue the Supreme Court has ever fully considered, in light of the case law and the underlying First Amendment constitutional rights that apply to criminal proceedings. And I'm hoping that at some time in the future, the Court thinks about taking a further look at this, perhaps considering if an absolute rule is appropriate or whether some provision would be better allowing there to be case-by-case or similar consideration when such a request is presented.