

# Confidentiality and the Juvenile and Family Courts

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## A B S T R A C T

Court proceedings and court records are traditionally open to the public. The courts are public institutions, and openness serves a number of important purposes including protection of the free discussion of governmental affairs and the enhancement of the quality and integrity of the fact finding process. But court proceedings also address family matters including adoptions, juvenile delinquency, child protection, and domestic relations cases. These types of cases often involve personal issues, and many family members would prefer that they remain private. In most states, many of these proceedings have been closed to the public.

Strong policy reasons support both openness of family court proceedings and privacy considerations for family members, particularly children. This article addresses confidentiality in the context of juvenile and family court proceedings. It takes the position that the tension between these conflicting policies can be reduced if most family court proceedings are presumptively open, but judges are given the authority to place conditions on the information that can be revealed by observers outside the courtroom. Additionally, the article asserts that if the courts and the media take steps to change their practices and their relationship with one another, both the public interest and the confidentiality interest of the parties can be better served.

ance between public access and private interests. The United States Supreme Court has declared that the press and general public have a constitutional right of access to criminal trials and that a defendant has the right to a public trial.<sup>1</sup> The Court's reasons for public access include protecting the free discussion of governmental affairs and the opportunity to participate effectively in and contribute to our republican system of self-government.<sup>2</sup> Additionally, the Supreme Court has declared that "public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process."<sup>3</sup>

The reasoning in criminal cases has been extended to civil trials.<sup>4</sup> But the Supreme Court has also ruled that public access to trials is not an absolute, even in criminal trials.<sup>5</sup> Indeed, the Court has emphasized that juvenile proceedings are usually private.<sup>6</sup> Federal statutes, state constitutions, state statutes, local court

## I N T R O D U C T I O N

Our nation's courts provide the venue for resolving many of our most important conflicts. They decide whether someone is guilty of a crime, whether someone owes damages or other compensation for acts he or she committed, and endless disputes involving persons, corporations, governmental agencies, and other entities. Our courts also decide cases relating to family matters including whether a child should be adopted, whether a youth has committed delinquent acts, whether a child has been abused or neglected, and issues relating to marital dissolution including division of property, child and spousal support, and child custody.

Some of these disputes may interest the public and the media. Other disputes involve matters the parties would prefer to keep private and that, if revealed to the public, might cause embarrassment, stigmatization, or trauma to the parties. A tension exists between the public's interest and privacy considerations concerning the work of the courts. Some legal standards define the bal-

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rules, and appellate court decisions regulate the openness of other types of legal proceedings. A recurring theme in these laws and rulings is that any restrictions of access to court proceedings must be supported by an individualized trial court determination that the need for closure is necessary to uphold a privacy interest and that any restriction must be narrowly drawn.<sup>7</sup>

This article will address confidentiality in the context of family court proceedings.<sup>8</sup> The term family court has different meanings in different court systems. In this article, family court refers to a court system in which all judicial proceedings relating to family life are addressed. Even though the term family court often includes probate, domestic violence, paternity, child support, and other types of actions involving family members, this article will address only adoptions, juvenile delinquency, child protection (juvenile dependency), and marital dissolution proceedings.<sup>9</sup> The suggested analysis should prove useful in developing a framework for decisions regarding confidentiality issues in all family court proceedings.<sup>10</sup>

Questions concerning access to family court proceedings and records are complex, involving competing values and numerous fact patterns. The competing values are essentially a family's right to privacy and a child's right to be free from the stigma of being a part of court proceedings and the public's right to know what happens in our nation's courts, including the public's interest in holding parties and the courts accountable for their actions. How these values are balanced will depend, in part, on the nature of the proceedings, the facts of the particular case, and the nature of the access to or type of information sought about a particular case. Because so many factors affect the balance to be struck, the article concludes that the legislature should establish the framework for access to court proceedings and records, and that judges should make most decisions about public access to family court proceedings and family court records on a case-by-case basis after balancing the competing interests. The article concludes that most family court proceedings should be presumptively open to the public, but that conditions and restrictions should protect privacy interests in some situations. This conclusion is contrary to the current state of the law in most jurisdictions,<sup>11</sup> but I reach it partly because the confidentiality and secrecy of these proceedings has

led to a loss of public support and respect for the courts.<sup>12</sup> The article also concludes that relaxing family court confidentiality can increase public confidence in the workings of the court without a significant loss of privacy to parties. In the last sections, the article outlines several steps courts and the media can take to better inform the public about the court's workings without sacrificing the parties' legitimate privacy interests.

### Information About Court Proceedings

The public can learn about cases within the court system in a number of ways. In this article, the term "public" includes the media. Indeed, the media represent the public's eyes and ears.<sup>13</sup> First, the public might have access to the court proceedings themselves. The courtroom could be open to some or all members of the public who would like to observe the proceedings.

Second, the public might have access to court records about one or more cases. Court records include: (1) the formal papers filed in the court indicating the nature of the proceedings including pleadings and motions; (2) reports written by social workers, probation officers, evaluators, and others professionals with a duty to prepare materials for the court's consideration in a particular case; (3) mental health reports from psychologists, psychiatrists, and counselors and medical reports from physicians, including substance abuse treatment information and HIV/AIDS records; (4) court orders, decisions, findings of fact, and conclusions of law made in a case; (5) court calendars that indicate the names of individual cases to be heard in a particular courtroom on any day; (6) notes made by investigators or other professionals who have worked on the case; (7) court reporters' transcripts or video recordings of the proceedings; (8) case information recorded in appellate decisions; and (9) aggregate information about the numbers of cases heard by a judge or court system.

Various officials control access to the courtroom and to court records. The judge usually controls access to the courtroom, to reports prepared for court proceedings, and to court records, while court administrators control access to aggregate information about the work of the court. Other persons who work in and around the courts have access to court documents and could be sources of information to the public. Court

clerks control case files and the information contained therein. Attorneys, social workers, probation officers, and other court-serving agents control their reports and files as well as any information they may have learned from participating in the legal proceedings. The parties themselves, the witnesses, and observers also have information about what has happened in the courtroom. Additionally, some persons know the facts of the case because they were witnesses to the occurrences. They may include the parties, witnesses, law enforcement, and other investigating agencies.

The judge and others in the court system may have control over the dissemination of information about what has happened in the court, but they have no control over the parties or members of the community who may know what has happened outside of the courtroom and who are willing to talk about it. For this reason, in some cases a great deal of information may be available to the public from persons who do not participate in the court process. This article addresses court control of access to family court proceedings and family court records.

### **Confidentiality and the Courts: Competing Interests**

A number of conflicting policy considerations affect access to and information about court proceedings.

#### **Arguments for Open Courts and Open Access to Court Records**

First, many in the public, including the media, regard court proceedings as public proceedings. They argue that the public has a right to know the details of court cases because they are public. They point out that the Supreme Court has established the public's constitutional right of access to criminal trials, and they wish to extend this right to all cases.<sup>14</sup>

Second, it is argued that openness will encourage all participants in the family court process to comply with the law and produce better, more timely decisions for families appearing in the courts. If the courts, the attorneys, and the parties know that the public is watching, they will improve their performance.<sup>15</sup>

Third, many in the public also believe that openness in court proceedings is necessary to hold parties accountable for their actions. Public access fosters the

appearance of fairness, thereby heightening public respect for the judicial process and for the law. Many believe that accountability for one's actions must prevail even when youthful offenders who are the subject of rehabilitative efforts by the state are brought before the court.<sup>16</sup> Accountability is particularly important when public entities and agencies carrying out their mandated duties are parties to the court proceedings.<sup>17</sup>

Fourth, some argue that courts should be open because they are publicly funded and decide issues of public interest and concern. Indeed, the juvenile courts and the agencies serving them expend large amounts of public monies to provide legal due process, services, and other interventions on behalf of the families before the court. This substantial public enterprise should be open to the community to ensure that the courts are well run and that they address public issues responsibly and efficiently.<sup>18</sup>

Fifth, many believe that opening proceedings to the public will bring more public attention to these cases and also may encourage more community support for programs and resources to address the problems faced by the children and families appearing in the family court.<sup>19</sup>

Sixth, some commentators have stated that protection of our most vulnerable citizens, our children, is public business and is of great public concern. They point to the First Amendment protection of "discussion of government affairs." To deny public access and knowledge to the system charged with that protection reduces public confidence in government and increases public suspicion about those who are appointed and paid to promote the public good.<sup>20</sup>

Seventh, some claim that openness will educate the public on how the family court system handles cases. If members of the public see how well many family and juvenile courts work, they will be less likely to credit the critics of the court. Openness will also result in more balanced and accurate stories in the media—stories that will be less sensational and will not contain charges of courts hiding the truth from the public.<sup>21</sup>

Eighth, many point out that openness will not involve a significant loss of privacy to the parties since few spectators will actually come to the court even if the courtrooms are open. The experience in several states seems to confirm this observation.<sup>22</sup> Additionally, in smaller communities the names and facts of court

cases are usually well known to the public anyway because of informal information exchanges.

### Arguments for Confidentiality

Many others challenge the notion that all family court proceedings should be open to the public. They argue that some court proceedings must be confidential without exception, and that other proceedings should be confidential, perhaps giving the judge the authority to determine what information, if any, is made available to the public. First, they argue that citizens have a right of privacy that the courts should uphold.<sup>23</sup> They point out that court cases usually involve extraordinary accusations and facts potentially embarrassing to the parties. Many parties in those cases would prefer that the public not know about the sordid details of the legal actions they are involved in. They argue that there is nothing inherently newsworthy about what happens in the context of family life. They conclude that courts should not be the centers of gossip, particularly when intimate details of family life may be revealed.<sup>24</sup>

Second, some confidentiality proponents claim that opening the courts will discourage citizens from turning to the courts. This will result in fewer litigants using the court to resolve their problems and will discourage persons from reporting child abuse and neglect.<sup>25</sup> The court system seeks to provide a forum to resolve legal issues relating to the family, the argument goes, and the possible invasion of privacy will drive litigants and other participants away from the courts. To some extent this is already happening. For example, some litigants anticipate the possible disclosure of private information and resolve disputes outside the court system using private judges, arbitration, or mediation and then file the final judgment with the court without including details.<sup>26</sup> Using these dispute resolution mechanisms, litigants can prevent disclosure of information relating to the dispute. Of course, the ability to avoid the public court system is possible only for persons with the resources to pay for private services and only in cases that do not involve the juvenile court, the child protection agency, or other public agency.

Third, many argue that some legal proceedings should not be public because public disclosure would harm the individuals in the case. The harm might be

inflicted on parties and witnesses, but the most important interest is the right of children not to be identified with family problems, particularly when they had nothing to do with those problems or were themselves victims. These children may be ridiculed by their peers, they may be unfairly labeled and stigmatized within the community, and their names will remain forever in the public record, all because they happened to be present when other family problems occurred.<sup>27</sup> “[I]ntense publicity surrounding the events which have brought a child into the juvenile court may psychologically harm the child, making it more difficult, if not impossible, for the child to recover from those events.”<sup>28</sup> Other non-offending members of the family might be similarly stigmatized were the case open to the public.

Harm can also result from disclosure of sensitive information about the litigants. For example, many domestic violence victims request that their addresses and other identifying information be kept confidential so they can avoid contact with their abuser. Open hearings might reveal that information and jeopardize their safety.

Fourth, confidentiality has been a hallmark of juvenile court proceedings since the first juvenile court was created in 1899.<sup>29</sup> The juvenile court creators believed that by keeping juvenile court proceedings out of the public eye, children could better be rehabilitated without the stigma of public knowledge following them into adulthood.<sup>30</sup> Abusive and neglectful parents would be more likely to change their ways if their conduct was not made public. Since a basic value of the juvenile court is to rehabilitate children and families, openness and the ensuing public knowledge would defeat the core purpose of the juvenile court.<sup>31</sup>

Fifth, some confidentiality proponents point out that confidentiality can facilitate settlement.<sup>32</sup> The family court has become a place where families can discuss their problems with professionals and resolve them in such a way that children can be safer, parents can change behaviors to become more competent adults, and family members can take on new responsibilities. These beneficial results can best be accomplished, they argue, in a confidential environment. Families are unlikely to disclose their problems to the court system if they know their statements might become known to the public.<sup>33</sup> This is one reason that the most successful mediation programs are confidential.<sup>34</sup> In a confidential

environment, family members can explain their personal concerns, thus making effective problem solving more possible. This fact finding and goal setting would be constrained and less likely to be effective in an open court setting. Additionally, open hearings may undermine any co-operation that has been built between the parents and service providers.

Sixth, several appellate courts have stressed that the public policy of confidentiality is an integral part of the informal and non-adversarial nature of juvenile court hearings and that publicity can potentially endanger the fairness of the proceeding and disrupt the adjudication process.<sup>35</sup>

Seventh, some commentators state that opening hearings will make no difference because neither the parties nor the courts will be more accountable to the public, and because more resources will not be allocated to the system.<sup>36</sup> Since opening the courts will make no difference, they argue, why subject the parties to potentially harmful public scrutiny?

Eighth, one commentator believes that by opening child protection proceedings, a party's admission to a charge of abuse would become a public record. Because there may be concurrent criminal charges, the parent will be less likely to admit to any charges in the child protection proceeding because the admission may influence the outcome of the criminal case.<sup>37</sup> The same commentator argues that opening juvenile dependency hearings would take up great amounts of court time as the court hears motions to open or close the proceedings<sup>38</sup> and would cost millions of dollars to retrain staff regarding open hearings.<sup>39</sup>

### **Resolving the Competing Interests**

This section sets forth a framework for resolving the conflicting policies regarding public access to family court hearings and records. I believe that most types of family court hearings should be presumptively open to the public, but that the judge should have the authority to place conditions regarding access to the courtroom with orders that will protect privacy interests in appropriate cases. Under this proposed formula, court records including the legal history and outcome of the case would be presumptively open to public access, but social and mental health records would be presumptively confidential. The judge would have the authority

to find these statutory presumptions rebutted on a case-by-case basis after weighing the competing interests. The proposed framework is complex and relies greatly upon the judge to whom the case is assigned, but it responds to both the privacy and openness concerns discussed in the previous section. The complexity is reflected in the type of case, the type of information sought, and the different forms of access to these cases. The framework would best be structured by the state legislature but, in the absence of legislation, could be established by state or local court rule.<sup>40</sup> Additionally, the approach outlined in this section should be considered in conjunction with the recommendations offered later in this article regarding the relationship between the courts, the public, and the media, and how each should modify attitudes and behaviors to maximize the goals that each is striving toward.<sup>41</sup>

### **Open Courtrooms**

The law should declare that legal proceedings are to be held in open court unless the privacy rights of one of the participants outweigh the public interest in the proceedings.<sup>42</sup> Thus, courtrooms should be open to the public, even in the family court. Opening courtrooms would immediately end the suspicion that the courts have something to hide, that courts are secreting something of importance from the public, or that those charged with public tasks are not discharging their duties.

In some respects this proposal is not as radical as it sounds. Family courts should already be open to those who have a legitimate interest in knowing what is happening in a particular case.<sup>43</sup> In addition to the judge, staff, attorneys/guardians *ad litem*<sup>44</sup> and biological parents and guardians, persons with a legitimate interest may include relatives, foster parents, service providers, researchers, and significant others in the child's life such as a psychological parent. These persons should be permitted to be in the courtroom since they bring information and resources to the case and may be helpful in resolving the issues before the court.<sup>45</sup> Moreover, some jurisdictions require new attorneys and CASA volunteers<sup>46</sup> to spend time observing court proceedings, and some departments of children's services require new social workers to observe child protection proceedings as a part of their training.



Additionally, with some limitations, family court proceedings should be open to the general public. The public should be able to see how these courts operate. The judge should have authority to determine the number of people who may attend so the proceeding can retain some intimacy and not be over-crowded. Further, the judge should be prepared to place conditions on public access depending on the case. For child protection or less serious juvenile delinquency cases, for example, one condition would be that any person attending the proceedings shall not reveal the parties' names or other identifying information about a particular case.<sup>47</sup> This use of judicial discretion is not new because some state statutes already authorize this balancing process.<sup>48</sup> Moreover, giving the judge flexibility to determine the proper balance between the competing policies of privacy and public access on a case-by-case basis is consistent with the language of the Supreme Court in *Globe Newspaper v. Superior Court* referred to above.<sup>49</sup>

The policy of open courtrooms is not an absolute—the law should declare that the court for good cause may close any hearing in the best interest of a particular child or family or place conditions on dissemination of information by an observer. When the court exercises its discretion to close a court proceeding, the statutory scheme should require the court to make a finding regarding the balance between the public's right to know and the parties' privacy interests. The balancing process should address the following factors: (1) the type of case; (2) the public interest in the particular case;<sup>50</sup> (3) the potential harm that might be inflicted on any party to the legal action were identifying information released to the public; (4) any negative consequences public access may have on the integrity of the legal proceedings; and (5) the amount of information the public already has obtained about the particular case through other sources.<sup>51</sup> This policy balancing analysis within the suggested presumptive statutory scheme would lead to the following conclusions in these family court case types:

1. Adoption proceedings would likely remain private in every instance.<sup>52</sup> These are private matters with little public interest other than assuring that the legal process is properly completed. This assurance can be delivered by annual court reports of cases heard and decided. The adopting family could permit others to attend the hearing, but it would be the

family's choice. Many families choose to make an adoption a well-publicized event, inviting family and friends to the legal ceremony. Some court systems hold court-wide events that include numerous adoptions all held on the same day. The choice to participate in such public events, however, must be left to the individual families.

2. Juvenile delinquency proceedings in which a youth is charged with serious delinquent behavior such as homicide would be open to the public in most cases.<sup>53</sup> The public interest in the legal decisions that must be made is great and the impact on public life is significant. The proceedings are embarrassing to the youth and the family, and some would argue that the youth's chances for rehabilitation in the community will be reduced by public knowledge of his wrongdoing,<sup>54</sup> but the embarrassment and possible loss of rehabilitation are outweighed by legitimate public concern.<sup>55</sup> The public needs to know how the accountability provided by the court system works. This balance in the weighing process will change depending on the nature of the hearing,<sup>56</sup> the seriousness of the crime, and the age and sophistication of the youth. The court ruling may include conditions concerning the release of identifying information.<sup>57</sup>
3. Child protection (juvenile dependency) cases would be open to the public, including the media,<sup>58</sup> but the court would have the authority to establish conditions of attendance.<sup>59</sup> The court would normally advise anyone attending of the conditions of attendance. The most important condition would be that no identifying information about the child or family members may be disseminated beyond the courtroom. This balance permits attendance at important legal proceedings, but protects the family and child from public embarrassment. If the judge concludes that attendance by the public might have a negative impact on the child or family members, he or she may deny access to the public in a particular case, but would have to make findings on why the proceedings must be confidential.
4. Marital dissolution proceedings would be presumptively open to the public,<sup>60</sup> but not a child custody case arising from a marital dissolution or other domestic relations legal action.<sup>61</sup>

In some of these family court cases, in addition to the court's authority to exclude the public from some or all of the proceedings, it would be useful if the court had the authority to order persons in the courtroom not to reveal certain information about what has taken place in the proceedings or to reveal the identities of some or all of the parties.<sup>62</sup> This can be done by conditioning access to a court hearing on the spectator's promise of non-revelation.<sup>63</sup>

A similar procedure is for the court to issue a gag order<sup>64</sup> commanding the parties and other persons in the courtroom not to speak to persons outside of the courtroom about some or all of the proceedings. Gag orders have been effective when imposed on the parties and attorneys in particular cases, but have been much more difficult to enforce against the media.<sup>65</sup> Judges resort to gag orders for a variety of reasons.<sup>66</sup> In family court cases, the judge should have the authority to condition access to the court and to issue gag orders when release of information about the case would likely cause harm to one of the persons involved in the proceedings, particularly a child.<sup>67</sup> Any such gag order must be narrowly drawn to avoid being a prior restraint of the media,<sup>68</sup> but violation of a properly drawn gag order could result in contempt proceedings.

In summary, interested members of the public, including the media, should be able to attend most types of family court proceedings. In some of the most confidential types of cases (child protection, for example) the court would set conditions for attendance. For less confidential cases (serious juvenile delinquency cases), the court would not set any conditions on attendance. The court's conditions in the most confidential cases would include the instruction that the name or other identifying information of any child or family member not be disseminated to anyone outside the courtroom. When the court determines that an otherwise open hearing should be closed or when a party requests that a hearing be closed, the court should hold a hearing to receive the arguments of all sides on the access issue.<sup>69</sup> Some courts follow this practice now and report that it works well.<sup>70</sup>

On the other hand, persons in attendance should always be encouraged to discuss the court process with others and to make suggestions for its improvement. The court must have discretion to order all non-parties

to leave the courtroom during any particular case if the court finds that their presence would not serve the interests of the child, family members, witnesses, or would disrupt the court process. This might happen, for example, when the child is so distraught that she is having difficulty paying attention to the court proceedings and is distracted by strangers. The judge may decide to remove all non-parties from the courtroom if a child is to give testimony in a child protection proceeding. Indeed, some state laws permit children to give testimony in chambers out of the presence of their parents and others in the courtroom in order to encourage truthful testimony.<sup>71</sup>

The judge should also have control over use of cameras and electronic recording equipment in the courtroom. The law should prohibit use of such equipment, but permit the judge to exercise discretion to permit it if the public interest outweighs the privacy interests.<sup>72</sup>

Open family court hearings will not result in overcrowded courtrooms. Jurisdictions that have opened their courtrooms have noticed little difference in the numbers of people who attend. As one judge noted decades ago:

...the real problem facing the juvenile court judges in this country, is not how to keep the reporters out of the courts, but the fact that there is a lack of interest in the juvenile courts by the press and, because the press does not have that interest, by the public.<sup>73</sup>

Opening hearings in family court, however, will reduce public suspicion that the court process is handling cases improperly or illegally and hiding its actions behind closed doors. Openness will go a long way toward informing the public about how the family courts work and restoring confidence in our court system.

### **Court Records**

Public access to court records should depend on the type of case and the type of record sought. The legal history, the legal documents describing the nature of the legal proceeding, and the results of court action should be open to the public. Additionally, court calendars containing the names of cases and the times for hearings

should be easily accessible by the public.<sup>74</sup> Other records including social reports, mental health evaluations, and medical records should be accessible to authorized participants in the court process, but should be kept confidential from the general public.<sup>75</sup> Statutorily protected records such as substance abuse treatment information and HIV/AIDS test results must also be protected consistent with statutory mandates.

Court records regarding adoptions should be confidential. No public interest outweighs a family and child's interest in privacy regarding a particular adoption. That is one reason that adoption calendars prepared by the courts typically do not contain the child's full name. However, the public has an interest in knowing whether the court system processes adoptions in a timely manner. Data concerning the court process for completing adoptions proceedings and aggregate numbers of adoptions finalized should be available to the public.

In juvenile delinquency cases, the public interest becomes greater in proportion to the seriousness of the allegations. In serious cases, the court should be prepared to permit access to court orders indicating the charges, whether the charges were found to be true, and the court's dispositional orders. These records, however, would not include psychological or social evaluations prepared by professionals. These are too personal in nature, and the youth's privacy interests override any public interest.<sup>76</sup> In less serious cases, the youth's privacy rights and society's interest in offering him or her a chance for rehabilitation should justify the decision not to release records to the public regarding the individual case, including the youth's name.<sup>77</sup>

In child protection cases, the public interest rarely outweighs the child and family's right to keep confidential any records revealing the names of the family members. An exception to this rule is a case involving a child's death. For too long, the public has learned of a child's death only to be told by officials (law enforcement, the courts, the Department of Children's Services) that they are forbidden to discuss the facts of the case. If there are no related criminal proceedings from which the public can learn about the facts of the case, the costs of silence are even greater. These situations have resulted in great public and media outcry and significant criticism

of all officials involved.<sup>78</sup> Moreover, it has led to public and media distrust of the actions of those charged with protecting children including the courts.

There are good reasons to keep child death cases confidential. They are tragedies not only for the child and family, but also for everyone in the child protection system. Social workers, attorneys, and judges are all seriously impacted by a child's death. Making the case public will likely increase everyone's anguish. It may also lead to finger pointing and blaming both privately and publicly.<sup>79</sup> It may end the career of a social worker, a service provider, or a juvenile court judge.<sup>80</sup>

Nevertheless, the death of a child under the court's protection is too important for it to remain exclusively a private matter. It is a community concern. The court must be prepared to inform the public of what has happened and what will happen as a result.<sup>81</sup> If mistakes were made, they need to be aired publicly and promptly.<sup>82</sup> One approach is to hold hearings regarding the events surrounding the child's death. A judge in San Mateo County, California, conducted such hearings, and the public was permitted to attend. The public interest was well served, but there was criticism that these hearings inflicted unnecessary trauma on the participants, all of whom were already grieving the child's death.<sup>83</sup> Other California judges who have permitted the media to have access to some records relating to child deaths have been upheld by the appellate courts.<sup>84</sup>

It may be wise for judges and welfare administrators to create protocols to manage proceedings in anticipation of a tragedy such as a child death.<sup>85</sup> Such preventive work can ensure that the public interest in learning the facts of the case will be addressed, and at the same time, provide some process to deal with the multiple needs of grieving family members, traumatized members of the court system, and others who must continue their daily work.

In marital dissolution cases, the public interest is questionable. What public interest is served by learning how two married persons divide their property, settle alimony (spousal support) issues, or share time with their children? Have people given up their right to have some aspects of their lives remain private simply by filing a legal action to dissolve their marriage? These should be private matters between the parties.<sup>86</sup> The



fact of marital dissolution should unquestionably be a matter of public record. Whether parties are married has social and public implications, but the details of their dissolution do not. Thus, court records regarding the filing of a marital dissolution and the entry of a final decree should be a part of the public record, accessible to the public, but the details of the property settlement and alimony need not be public.<sup>87</sup>

When the parties are well known in the community, the public has a greater interest in hearing the details of their dissolution, but what is the nature of that interest? It would seem that it has little to do with public affairs and more to do with interest in the lives of the rich and famous. Some famous people publicize their personal relationships to the media. That is their choice. The question is whether courts have an obligation to permit the public access to court records revealing the details of the marital dissolution. Except in extraordinary circumstances, the parties' privacy rights outweigh the public interest in these details.<sup>88</sup> The courts should not release such information except when evidence demonstrates that a public interest outweighs the party's privacy interest.<sup>89</sup> The burden should be on persons seeking to make public these private matters.<sup>90</sup>

The privacy interest is particularly great when marital dissolution cases involve child custody disputes.<sup>91</sup> The children's interest to be free from public stigma is much greater than the public interest in knowing the details of the dispute.<sup>92</sup> Such records should not be public though some public agencies such as schools and medical staff must know the details of any child custody court orders so they can work with the parents to comply with the orders.

In summary, family court records of legal proceedings generally should be open and accessible to the public. Personal, psychological, medical, and other personal records should be confidential. Names and other information that would reveal the identity of individuals, particularly children, should be confidential except in matters of legitimate public interest such as serious delinquency cases and serious child protection cases. Judges should have discretion to deny or permit access to records in individual cases upon application if, after balancing competing interests, they find that one interest outweighs the other.

### **Court or Agency Statements Concerning Pending Cases**

On occasion it may be appropriate for the court or governmental agency to release information to the public about what has happened in otherwise confidential court proceedings.<sup>93</sup> Disclosure might be ordered even over the objection of parties who would prefer to have the entire matter remain confidential. In a case of great public interest such as a child death or where the media has already published information about a case, it may be appropriate for the judge or someone authorized by the judge to make a statement about the status of the court case. This may be particularly important where misinformation has been spread and the court could correct the inaccuracies with little or no loss of privacy.<sup>94</sup> Sometimes child protection agencies want to respond to reports circulating in the public, but feel constrained because of confidentiality considerations.<sup>95</sup> With the court's permission, the agency should be able to make public statements concerning a particular case. Judicial or agency statements about well-known cases not only will keep the public informed; they will also demonstrate the court system's concern for accountability. It is important that the law permits judges to exercise such discretion and that judges take advantage of this opportunity in appropriate cases.<sup>96</sup>

For similar reasons, a judge may also wish to make a public statement about a case over which he or she has presided. The judge should be aware of ethical restrictions governing statements about pending proceedings,<sup>97</sup> but the Canons of Ethics do permit judges to make public statements in the course of their official duties and to explain court procedures to the public. Thus a judge or a clerk of the court might report that a petition regarding a child was filed, found to be true, and that the court made certain orders thereafter. A transcript of the judge's findings and comments at the conclusion of a trial might be released. The information would be a recitation of the legal events of the case, not a comment on the proceedings.

### **Particularized Need for Records**

On occasion, individuals seek access to confidential court records for a specific purpose. The records often relate to parallel or related court proceedings. For exam-

ple, the parties to a criminal prosecution may seek the juvenile delinquency or child protection records from the juvenile court or reports and materials that probation officers or social workers prepared when they investigated delinquency or child abuse allegations related to the criminal case.<sup>98</sup> The parties in a marital dissolution may seek child protection records relating to alleged parental abuse or neglect of children who are the subject of a child custody dispute.

In these situations, the law should require the party seeking the records to petition the family court for access to the records, giving notice to all affected parties. The petition should state the reasons for the request including the relevance to the petitioner and the proposed use of the records. The court would hear arguments from all sides, examine the records and balance the probative value of any juvenile court records reviewed against the confidentiality interest of the parties involved in the records. If the probative value is greater, the court would release the records to the parties with a protective order outlining the permissible uses of the records and how the parties must dispose of the records when the related matter is resolved.<sup>99</sup> This process will ensure that relevant but confidential records are potentially available in related proceedings and that confidentiality interests are protected as much as possible.<sup>100</sup>

Additionally, court-serving agencies have a legitimate interest in obtaining information and records concerning family members who may have related court proceedings. Thus, a probation officer may be investigating a parent who has a pending child protection case, or a social worker may be supervising a parent charged with criminal conduct. These officers and workers should be able to exchange case-related information for court-related purposes without the necessity of a particularized court order. Some courts have created court rules that address this exchange of information situation.<sup>101</sup>

### Improving Court/Media/Public Relations

Additional steps can be taken to address the legitimate interests of the courts, the parties, the public, and the media. The first step is that the courts should develop better working relations with the media and the public.<sup>102</sup> Judges have an obligation to educate the public

about the workings of the family court and the needs of children and families who appear in this court.<sup>103</sup> How can that be accomplished? One approach I have used is to invite the media to attend court proceedings to learn more about what was happening in the juvenile court. I met a newspaper reporter who was interested in the workings of the juvenile court and wanted to find out more about the juvenile justice system. After we became acquainted, the reporter proposed that he and his wife write a book about the child protection court. I agreed and set into motion a process whereby the two reporters, over a two-year period, had full access to the child protection court and anyone within the child protection system who was willing to talk to them, including the families and children themselves. The only condition I established was that the court would review any proposed text before it was published, solely to address the issue of improper identification of children or families portrayed in the book.

Several court hearings were held on the confidentiality issues raised during this process.<sup>104</sup> At the conclusion of the reporters' investigation, the court's review process turned out to be very easy. The reporters had either secured a full release from all family members or had changed the names and facts such that the children and families could not be identified. The result was a book, *Somebody Else's Children*, that was both informative and useful. It was well received even by those who were initially concerned about possible harm resulting from a loss of confidentiality for their clients. The book marked a turning point for court-media relations in Santa Clara County. On a broader scale, many people who had never understood the child protection process have had the opportunity to read about actual case histories and how the courts work with distressed families in the child protection court system.<sup>105</sup>

I also regularly meet with members of the press to talk about the administration of the juvenile court and the difficult issues faced by judges and members of the child protection and juvenile justice system. The issues discussed at these meetings include the lack of foster homes in the community, the plight of foster children who cannot find a permanent home, improvements in the quality of services offered to parents attempting to reunify with their children, court innovations such as drug treatment and mental health courts, the coordina-

tion of law enforcement and child protective services when the decision to remove a child is being made, the length of time children remain in the child protection system before they are placed in permanent homes, the placement of children in congregate care, the capacity of the child protection system to provide sufficient visitation for separated families, the conditions that delinquent youth live in when they are placed in county or state facilities, the educational needs of children in foster or state care, and many more. These are issues critical to the administration of justice in the family courts and are of great public interest. Moreover, they can be discussed without jeopardizing the privacy of children and their families.

Developing better relations between the media and the courts can take other forms. In Los Angeles and Santa Clara counties, members of the bench, the bar, and the media regularly meet for dinner. One or more speakers will talk on a subject of interest to the assembled gathering. The idea is to get to know one another and to exchange ideas about the relationship among the judges, bar, and media. In Los Angeles County, the Media-Courts Committee includes judges, media representatives, and lawyers. The committee meets regularly and discusses issues of mutual concern.<sup>106</sup> Additionally, the Superior Court in Los Angeles has created a Public Information Office to provide information to the media and to the public about court affairs. This office can be of great assistance to anyone wishing to learn about court operations and access to court proceedings and records.<sup>107</sup>

The second step is that the media should take a different posture toward the courts and should make internal adjustments to reflect the changes. The media should start with a commitment that they will become educated about how the family court works. They should learn about the roles and responsibilities of each of the participants in the family court process. With that knowledge, the media will be in a position to educate the public about how the family court works. The media should build a trusting relationship with the bench and bar. That does not mean any abdication of journalistic independence or sacrifice of objectivity. It does mean that the media will endeavor to understand the context of family court proceedings when a news story breaks. This approach will also result in opportunities for stories that the media is not currently aware of.

Representatives from the media need to get to know the judges. Reporters should write profiles of the judges, their careers, and their work on the bench. They should follow a day in the life of a judge. In that context the media might, for example, research and write about a significant problem that is rarely reported on: judicial stress.<sup>108</sup> Few people realize the constant stress that judges, particularly family court judges, are subjected to every day. The media can tell that story. Additionally, the media needs to take a more sensitive position regarding the legitimate privacy interests of individuals and families caught in the family court. Some in the media do not know what harm can be done to an individual or to a family by publishing details about a particular case. It would be preferable to take the high road—resist the temptation to gossip or to name a victim or a child—even though it sells papers.<sup>109, 110</sup> The truly interested public wants to know about issues that serve public interests.

To take this new posture, the media may have to restructure their organization. The authors of *Somebody Else's Children* were able to persuade the *San Jose Mercury News* to establish a reporting/investigative division dedicated to children's issues including family court matters. The results have been higher quality reporting, better relationships with the court system, and some significant awards for reporting. Just as judges and attorneys serve the court system well when they remain in family court for significant periods of time,<sup>111</sup> so should the media recognize the advantages of maintaining specialists to report on the family court.

The third step is that the courts should develop a better relationship with the public, including those persons using the court system and those interested in the court system. Santa Clara County is a good example of what can be done to improve relations between the courts and the public.<sup>112</sup> The Santa Clara County Superior Court has developed several Web sites designed to assist the public. In addition to a Public Web site, there is a Self Help Web site, a Complex Civil Litigation Web site and a Public Access Case Information Web site.<sup>113</sup> These Web sites contain substantial information about the court system, the location of the courts, hours the courts are open, the different types of legal actions, substantive and procedural highlights of all types of cases, and much more. The

public can also track the progress of individual cases. The Web site informs persons called for jury duty when and where to appear.<sup>114</sup>

In addition to the Web sites, the Superior Court established a Self Help Center. The center is a Superior Court-run office that offers hands-on legal assistance for any litigant who needs help getting legal business completed in the court system. The Self Help Center serves more than 1,500 persons a month.<sup>115</sup> Additionally, the Courtmobile, a large trailer containing a lawyer, paralegals and legal materials, offers similar services to more remote areas of the county each day of the week.

These innovations have been supplemented by programs to invite students to visit the courts, for judges to speak at schools and at service clubs, and by bench-bar programs to inform the public about court proceedings. Annually, the county-wide moot court competition brings more than 40 high school teams to the court for two weeks of competition all staffed by volunteer attorney coaches with volunteer judges and attorneys hearing the cases. These and other efforts by the court educate the public about the court system.

The fourth step is that the courts should enable the public to become more involved in the workings of the court. Many members of the public are willing to serve in court-based programs, but the court must create the opportunities and then encourage participation. One of the best examples of public involvement in court activities is the Court Appointed Special Advocate (CASA) Program, which assigns court-appointed, trained volunteers to individual children in the child protection system to speak on their behalf throughout the life of the juvenile court case. There are currently more than 978 CASA programs in the United States today with more than 70,000 volunteers. Each year these volunteers provide more than 10,000,000 hours of service to the children in the juvenile and family courts of the United States.<sup>116</sup> Santa Clara County, California, has approximately 1,000 of these volunteers. Each knows the child welfare system well from their training, their courtroom observations, and their work with individual children. Since the creation of the Child Advocacy program in Santa Clara County in 1987, more than 2,000 volunteers have participated in the program. Each has participated in court proceedings, written reports, and become familiar with the lives of our community's most vulnerable

children. One result of this community participation is that information about the otherwise confidential court system is informally spread by the advocates to other members of the community. Their families and friends learn about the child protection system and have an understanding of the context in which these cases arise, how the court system works, and how the lives of children are affected. This type of community involvement can be possible only through the proactive work of the family court and the family court judge.<sup>117</sup> The court system has an obligation to make it possible for interested citizens to participate in similar court-based programs. In that way, the community will be truly informed about the workings of the court.

### Conclusion

There are competing interests regarding confidentiality and the family court. These interests will be better served if changes are made in the ways that court systems open their courtrooms and release records, in the ways that the media approaches these matters and structures their organization, and in the ways the courts interact with the public. This article outlines a framework for making access decisions and for specific changes that will serve all interests more effectively.<sup>118</sup>

The courts, the bar, the media, and the public have important roles to play to ensure that legitimate privacy rights are protected and that the public is informed and educated about the work of the courts. The public has a legitimate interest in the workings of the court system.<sup>119</sup> They have a right to know that the court system is efficient, fair, and makes sense. In some cases they have a right to know the details of the case. They also need to know how to use the court system for their own legal needs. Public confidence in and support for the legal system is at stake. Public understanding of the court system may lead to public support of court efforts to improve outcomes for some of our community's most needy persons and will likely diminish any suspicion about courts that has been fostered by confidentiality.

For the court system to have the necessary tools to maximize public understanding while protecting legitimate privacy rights, legislators must establish a framework outlining policies that define how much the public can learn about particular cases. Judges should decide the details of access to the courtroom and to records in

each type of case. Judges must be prepared to engage in an analysis of each case to determine who should be in the courtroom and under what conditions, and what records can be released. This is not a matter of simply drawing a bright line for all cases—it involves a consideration of competing interests in the context of different types of cases and various fact patterns. No one is better suited to address these issues than judges. No other public officials have all the facts at hand in each case.

Judges must also be ready to develop a different attitude toward both the media and the public. Judges have a role to play in educating the media and the public and in making the legal system more understandable. The

media can greatly assist in this process by approaching their coverage of the family court in a different manner. It will take a different attitude from both the judiciary and the media for better results to be achieved.

The tension between the courts and the media will not end. Each has an important function to perform in our society. With better legislation and a better working relationship between the two, the tension can be minimized and the goals of each attained. The steps outlined in this article will involve more work for both court personnel and members of the media. The better results that will follow will be worth the effort.

**A U T H O R ' S  
A D D R E S S :**

**Judge Leonard P. Edwards  
Santa Clara County Superior Court  
191 North First Street  
San Jose, CA 95113**

**AUTHOR'S NOTE:** The author wishes to thank Robert Masterson, Sharon Bashan, Joey Binard, Linda Szymanski, Jennie Winter, Michael Clark, Judge William Jones (Ret.), Carol Chodroff, Cheryl Romo, Tom Morton, and John Hubner for assistance in the preparation of this article.



APPENDIX A

CONDITIONS OF ENTRY TO JUVENILE COURT

The court finds that \_\_\_\_\_  
PRINT LEGAL NAME HERE

has an interest in the pending proceeding(s) in the Santa Clara County Juvenile Dependency Court. Moreover, the court finds that the public interest would be served by permitting the above-named person to observe court proceedings on this date.

This person is permitted to observe court proceedings on the condition that he/she not disclose to persons outside of the court any identifying information about particular children whose cases or whose families are before the court. The purpose of these conditions is to protect the privacy rights of the child or children and other family members involved in the cases heard in the juvenile court so that they will not suffer further stigma or trauma.

These conditions in no way prohibit this person from discussing issues relating to the administration of the court, the actions of the judge or other matters concerning the operations of the juvenile court. These latter matters are of public interest and should be discussed openly in the community.

Date: \_\_\_\_\_

\_\_\_\_\_  
Leonard Edwards  
Judge of the Superior Court

I agree to the conditions stated above.

Date: \_\_\_\_\_

\_\_\_\_\_

APPENDIX B

PETITION TO RELEASE RECORDS/INFORMATION TO THE PUBLIC

NAME OF CASE \_\_\_\_\_

PETITIONER \_\_\_\_\_

Petitioner hereby requests permission from the court to release the following information to the public about the above-named case:

- 1. The nature of the allegations in the legal petition that brought the child before the court.
- 2. The fact that the allegations in the petition were found to be true by the court and the date of that action.
- 3. The disposition orders made by the court.
- 4. Other orders made by the court.

OTHER \_\_\_\_\_

The Petitioner believes that the public interest will be served if this petition is granted and that these public interests outweigh any loss of privacy by the parties based on the following facts:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The Court grants/denies this Petition.

The Court makes the following order: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

The Court sets this matter for hearing on \_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_

JUDGE

END NOTES

- 1 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 558, 100 S. Ct. 2818 (1979); Sixth Amendment, United States Constitution.
- 2 *Id.* at 587-588.
- 3 *Globe Newspaper Company v. Superior Court*, 457 U.S. 596, 606, 102 S.Ct. 2613 (1982).
- 4 *Westmoreland v. Columbia Broadcasting System*, 752 F.2d 16, 22-23; *Publicker v. Cohen*, 733 F.2d 1059, 1067-71. "The history of civil jurisprudence, like that of criminal law, reveals a tradition of public access." *Publicker* at 1068-70; *NBC Subsidiary v. Superior Court*, 20 Cal.4th 1178, 86 Cal.Rptr.2d 778 (1999); See generally, Carol A. Crocca, *Propriety of Exclusion of Press or Other Media Representatives from Civil Trial*, 39 American Law Reports 5th 103 (1996).
- 5 *Globe Newspaper*, *supra* note 3 at 611 (at footnote 27).
- 6 *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105, 99 S.Ct. 2667, 2671, 61 L. Ed. 399 (1979). The court wrote at 105 that "all 50 states have statutes that provide in some way for confidentiality" in juvenile proceedings. For example, "In addition, the provisions of this chapter ensuring the confidentiality of proceedings and records are intended to protect the privacy rights of the child." CALIFORNIA WELFARE AND INSTITUTIONS CODE section 300.2, West Publishing, St. Paul (2004); The privacy of juvenile delinquency matters has eroded over the past 20 years. The laws of 42 states now allow media access to the identity, and in some situations to the physical images, of some youth involved in delinquency proceedings. Further, the trend is for state statutes to open juvenile delinquency proceedings either entirely or for serious cases. Howard N. Snyder & Melissa Sickmund, *JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT* 101 (1999) [hereinafter NATIONAL REPORT]. Washington DC: Office of Juvenile Justice and Delinquency Prevention.
- 7 *Globe Newspaper*, *supra* note 3 at 608-9.
- 8 This article will not discuss some of the most publicized issues surrounding confidentiality and the courts including secret settlements in cases involving sexually abusive priests, defective products, trade secrets, and incompetent professionals. These and other types of cases have resulted in criticisms from many quarters. See *Experts Blast Secret Settlements by Judges*, THE SUN NEWS, posted on Oct. 25, 2003 at <http://www.myrtlebeachonline.com/mld/sunnews/news/local/7102501.htm>; Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation are Illegal and Unethical*, 31-1 HOFSTRA LAW REVIEW (Fall 2000), at 1.
- 9 On the structure of family court systems and the value of family courts, see generally Judge Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44-1 JUVENILE AND FAMILY COURT JOURNAL (1993) at 1-60.
- 10 The analyses for the remaining types of cases heard in the family court are as follows: Criminal domestic violence cases should be analyzed the same as criminal cases. Restraining orders, probate, and child support cases should be analyzed as civil matters, while paternity and probate guardianship cases should be approached similarly to child protection cases (open, but with the court having the discretion to close the hearings when the privacy interests of a child or family members outweigh public interests).
- 11 See generally 39 A.L.R.5th 103, *supra* note 4, at 74-116.
- 12 "Traditional notions of secrecy and confidentiality should be re-examined and relaxed to promote public confidence in the court's work. The public has a right to know how courts deal with children and families. The court should be open to the media, interested professionals and students and, when appropriate, the public, in order to hold itself accountable, educate others, and encourage greater community participation." *Children and Families First: A Mandate for America's Courts*, National Council of Juvenile and Family Court Judges, Reno, NV, at 3.
- 13 Many in the public sector rely upon the media to inform them about the workings of government and the courts. "[T]he media acts as the public's surrogate in attending such proceedings and reporting to the public, thus educating the public." *Richmond Newspapers*, *supra* note 1 at 573; See also 75 AM. JURISPRUDENCE 2d, Trial, section 212.
- 14 "... [T]he unmistakable force of *Richmond Newspapers, Inc. v. Virginia* ... virtually compels the greatest if not governing effect in all court trials. Together, *Richmond Newspapers v. Virginia*...[and other cases] confirm the presumptive openness of juvenile trials as a public and press right of the highest magnitude." *In re Chase*, 446 N.Y.S.2d 1000, 1006, 112 Misc. 2d 436, 450-451 (1982); see also the discussion, *supra*, at 1-2.
- 15 *Globe Newspaper*, *supra* note 3 at 2619; Harry Todd: *The Right of Access and Juvenile Delinquency Hearings: The Future of Confidentiality*, 16 INDIANA LAW REVIEW 911 (1983); "All of a sudden, everyone is more cautious, more careful. They pay more attention." Bruce Boyer, Director, Loyola University, Chicago Child Law Clinic about bringing law students to observe child protection proceedings, in Molly McDonough, *Opening Doors to Juvenile Justice*, 2-45 ABA JOURNAL E-REPORT (Nov. 14, 2003); "To the extent public proceedings serve the twin goals of assuring fairness and giving the appearance of fairness, the societal values of public access first recognized in the criminal context can be beneficial to the juvenile court

## END NOTES

- proceedings as well.” *San Bernardino County Dept. of Public Social Services v. Superior Court*, 232 Cal.App.3d 188, 283 Cal. Rptr. 332 (1991) at 201.
- 16 “The desire to shield juveniles from publicity to enhance chances of rehabilitation in many cases should not outweigh the public’s right to know about juvenile crime.” *The Juvenile Crime Challenge: Making Prevention A Priority*, Little Hoover Commission, Sacramento, CA, (Sept. 1994), at 91; Mark Fisher, *D.C. Should Let The Sunshine Into Juvenile Court*, WASHINGTON POST, (Jan. 15, 2004), at B01; “...the press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile processes, procedures, and unmet needs.” *Brian W. v. Superior Court*, 20 Cal.3d 618, 623.
- 17 “[I]t is important that governmental entities be held accountable for their actions not only to prevent further tragedies like the case of Faheem Williams, but to answer to its citizenry, whose taxpaying dollars support DYFS.” *Charlie and Nadine H. v. Whitman*, Civil Action No. 99-3678(SRC) (U.S.D.C., New Jersey, 2003) at 16; “All courts should welcome constructive criticism arising from the press’s actual observations. Certainly, the court process itself is as well as the delivery of auxiliary services involving these matters are or have become cumbersome and are in need of meaningful change. The perception of outside observers may provide some valuable insight.” *In re “S” Children*, 140 Misc.2d 980,993, 532 N.Y.S.2d 192,200 (1988); “If the public cannot reconstruct the biography of the young victim from all governmental records created to document his or her short life—if secrets continue to be kept to protect the survivors, adults or children, then there will be no true accountability, no informed corrective action and nothing to prevent further deaths.” Terry Franke, in Cheryl Romo, *Barriers, Not Access, Could Result from Law—Bill Would Shed Light on Deaths of Children in the Juvenile System*, LOS ANGELES DAILY JOURNAL, (May 13, 1999); “Public access does serve as a check against judicial and governmental abuse or misuse of power which might result in unnecessary and unjust interference with these important liberties.” *San Bernardino County*, *supra* note 15 at 203; “Criticism of government is at the very center of the constitutionally protected area of free discussion.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1986).
- 18 “The right of access enables the public, through the media, to monitor proceedings in order to help ensure that the system as a whole is functioning properly.” *Albuquerque Journal v. Jewell*, 130 N.M. 64, 66, 17 P.3d 437, 439 (2001); “It is vital that we are allowed to review court decisions and public agency actions in child abuse and neglect cases heard in our dependency courts...If a public agency is ‘hiding’ behind a wall of confidentiality, the safety of our children demands that the wall be torn down.” Los Angeles Supervisor Michael Antonovich in Cheryl Romo, *Secrecy Battle Over Dead Kids File Escalates—Ocer Mothers Protest, County Seeks Closure*, LOS ANGELES DAILY JOURNAL, (Nov. 24, 1999); “Compared to civil cases, in which the government supplies no attorneys, the juvenile court is an expensive operation.” Judge Leonard Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43-2 JUVENILE AND FAMILY COURT JOURNAL (1992), at 26.
- 19 “Although the purpose of a closed system is to provide a protective rehabilitative environment for both parents and children by shielding them from public scrutiny and stigmatization, a closed system allows abuses to exist uncorrected and lack of funding for children’s services to go unnoticed by the public. In effect, the very confidentiality that was meant to protect children ends up harming them by keeping abuses in the system and the effects of lack of funding a secret.” Minnesota Supreme Court Foster Care and Adoption Task Force, Final Report, 4, St. Paul, (1997) [hereinafter FINAL REPORT]; “The Court must add to the above salutary effect of press coverage the particular need for the public as well as the State Legislature to be informed of the crisis in our society involving child abuse and neglect and the inherent inadequacies of the systems established to protect children including foster care programs.” *In re “S” Children*, *supra* note 17; “[T]he press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures, and unmet needs.” *Brian W. v. Superior Court*, 20 Cal. 3d, 618, 623, cited favorably in *San Bernardino County*, *supra* note 15 at 207.
- 20 “Plaintiffs argue that in light of the ongoing institutional deficiencies, it is their hope that informing the public would place DYFS under public scrutiny and thereby encourage or facilitate an overhaul of the child welfare system to improve the lives of the state’s most vulnerable children.” *Charlie and Nadine H. v. Whitman*, *supra* note 17, at 5; “The push to have the hearings open has been based on the perception that something secretive, perhaps nefarious, perhaps incompetent has been going on behind closed doors.” Judge Patricia Clark, Chief Juvenile Judge of King County (Seattle) Superior Court in Jonathan Martin, *Court Door Opening on Child-Abuse Proceedings*, SEATTLE TIMES, (July 28, 2003); “Confidentiality prevents the public from knowing that the child welfare system does not function properly, foster children are killed, abused and neglected and do not receive basic services.” Linda Pate, in Romo, *Barriers, Not Access, Could Result From Law*, *supra* note 17.
- 21 Mark D. McIntyre, *Juvenile Court Proceedings: The Conflict Between Juvenile Anonymity and Freedom of the Press*, 23 S.TEXAS LAW JOURNAL 383 (1982); “[C]onfidentiality virtually guarantees that misinformation gets to the public.” Gary Trimarchi in Cheryl Romo, *Law to Lift Juvenile Courts Secrecy Gets Mixed Response—No Silent*

## END NOTES

- Treatment Over Bid to Unshroud Juvenile Courts*, LOS ANGELES DAILY JOURNAL, (May 25, 1999).
- 22 “It is nice to have a system where other people can show up and have an understanding of this process...I can’t think of any bad experiences with open courts.” Judge Dale Koch commenting on the open courts in Oregon, in Cheryl Romo, *Benefiting from Open Courts—Making Juvenile Proceedings Public Will Balance Perspective*, LOS ANGELES DAILY JOURNAL, Dec. 30, 1999; and see FINAL REPORT, *supra* note 19.
- 23 On the right of privacy generally, see William Bennett Turner, *Privacy and Newsgathering Torts*, in THE COURTS AND THE NEWS MEDIA, California Judges Association, 7th ed., 2001 at 201-244. Turner’s article makes reference to the classic statement of the right of privacy, Louis D. Brandeis and Samuel D. Warren, *The Right of Privacy*, 4 HARVARD LAW REVIEW 193 (1890); 39 A.L.R.5th 103, *supra* note 4, section 12.
- 24 39 A.L.R.5th 103, *supra* note 4, sections 12-16; Orange County Presiding Judge Kim Dunning opposed open courtrooms in child protection cases because it would bring in nosy neighbors, Immigration and Naturalization officials, and people with agendas that have nothing to do with the welfare of kids. Romo, *supra* note 21.
- 25 FINAL REPORT, *supra* note 19 at D-1; *Charlie and Nadine H. v. Whitman*, *supra* note 17 at 22-23.
- 26 Utilizing private judges, private mediation, and arbitration are popular in civil disputes and marital dissolutions. W. Stolberg, & K. Pence, *Sealing the File—Closure in Dissolution Proceedings*, 59 FLORIDA BAR JOURNAL 99, (June 1995), at 1-6.
- 27 “Children who must face their peers in school might be subjected to special pressures if the matter is publicized.” *San Bernardino County*, *supra* note 15 at 200, citing *Div. of Youth & Family Services v. J.B.*, 120 N.J. 112, 576 A.2d 261, 269 (1990); CALIFORNIA WELFARE AND INSTITUTIONS CODE section 300.2, West Publishing (2004); “While the public’s interest in access is important and deserving of protection, the state also has a compelling interest in the protection of children.” *In re T.R.*, 556 N. E. 2d. 439, 449 (Ohio, 1990); *In re M.B.*, 819 A. 2d 69 (2003).
- 28 *In re T.R.*, *id.* at 451.
- 29 *An act to regulate the treatment and control of dependent, neglected and delinquent children*, State of Illinois General Assembly, April 21, 1899. Cited in Thomas Bearrows, Jeffrey Bleich & Michael Oshima, *Contemporary Mandate in FROM CHILDREN TO CITIZENS 1: THE MANDATE FOR JUVENILE JUSTICE*, edited by Mark Harrison Moore, New York: Springer-Verlag (1987) 52-53.
- 30 “The inventors of the juvenile court designed this ‘new piece of social machinery’ not only to remove children from the harsh criminal justice system, but also to shield them from stigmatizing publicity. In the juvenile court, its inventors envisioned hearings would be closed to spectators and the press, a juvenile’s record would remain confidential, no private lawyers or juries would be part of the legal process. This vision of the juvenile court as a sheltered place to protect a child, especially during the storm of adolescence, would eventually become law in most states.” David Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: The Myth of Immaculate Construction*, Chapter 2, A CENTURY OF JUVENILE JUSTICE, ed. by Margaret Rosenheim, Franklin Zimring, David Tanenhaus, & Bernardine Dohrn, University of Chicago Press, Chicago, (2001), at 43.
- 31 Danielle Oddo, *Removing Confidentiality Protections and the “Get Tough” Rhetoric: What Has Gone Wrong With the Juvenile Justice System?*, 18 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 130, (Winter 1998); Kathleen Laubenstein, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMPLE LAW REVIEW 1897 (1995).
- 32 See 39 A.L.R.5th 103, *supra* note 4, section 17.
- 33 Presiding Juvenile Court Judge Kim Dunning stated in testimony before a legislative hearing on confidentiality and juvenile court proceedings that parents of allegedly abused and neglected children might be less forthcoming about their problems if they knew they were in the public eye. See Romo, *supra* note 21.
- 34 Judge Leonard Edwards et al., *Mediation in Juvenile Dependency Court: Multiple Perspectives*, 53-4 JUVENILE AND FAMILY COURT JOURNAL (Fall 2002), at 49-65, 49; Research Update: Court-Based Juvenile Dependency Mediation in California, Judicial Council of California, Administrative Office of the Courts, San Francisco, (March 2003), at 1.
- 35 *San Bernardino County Dept.*, *supra* note 15 at 199, 283 Cal. Reporter 332; *In re T.R.*, *supra* note 27 at 451; *In re M.B.*, 819 A. 2d 59 (Pa. Super.) (2003).
- 36 “Other than the high profile cases, the media just does not show up. [The cases are] just not sexy enough for them,” Judge Dale Koch cited in Romo, *supra* note 22; “[T]here is not a shred of evidence to support assumptions that the press and public access will improve the quality of judging, advocacy, child welfare work, or reduce the overloaded system.” Esther Wattenberg, Minnesota Supreme Court Task Force, quoted in William Patton, *Pandora’s Box: Opening Child Protection Cases to the Press and Public*, WESTERN STATE UNIVERSITY LAW REVIEW 181, 194 (2000).



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- 37 Patton, *id.* This argument is weak on four grounds: (1) The overlap between cases in child protection court that are also in criminal court is quite small; (2) The standard of proof is higher in criminal cases than in child protection cases; (3) There are several procedures that can permit a party to participate fully in a child protection case yet not create any evidence that could be used in parallel criminal proceedings; and (4) There is a statutory prohibition in some states against using any findings or testimony in a child protection case in a criminal case. CALIFORNIA WELFARE AND INSTITUTIONS CODE section 355.1(f), West Publishing (2004).
- 38 The author has been conducting such hearings for more than 15 years, and has never spent more than five minutes on such a motion. Moreover, such hearings occur rarely, less than once a month.
- 39 The author's Superior Court has not had to retrain anyone on these issues over the past 15 years, much less spend any money. Moreover, most state courts have thousands, not millions, to spend on training.
- 40 This was the approach taken by the State of Minnesota in a pilot project initiated in 1998 in 12 counties. By Court Rule child protection proceedings were declared presumptively open. See Appendix B, MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON OPEN HEARINGS IN JUVENILE PROTECTION MATTERS, Minnesota Supreme Court, (2001). After the pilot project was completed and an evaluation completed by the National Center for State Courts, the Minnesota Court Rules were modified pursuant to Supreme Court Order effective July 1, 2002, to make hearings open and records accessible to the public; STATE OF MINNESOTA IN SUPREME COURT, C2-95-1477; Rule 8, Rule 27, Rule 44 and Rule 63, MINNESOTA RULES OF JUVENILE PROTECTION PROCEDURE, (2004); "According to the National Center for State Courts, the pilot project led to a slight increase in attendance at hearings by extended family members; showed no harm to children; enhanced professional accountability; and showed that media were responsible in their coverage of these cases. The Court's action has since led to local and national media coverage of child protection issues." *2001-2002 Annual Report*, MINNESOTA STATE COURTS, (2002), at 3; Also see *Recommendations From The Field, Balancing Accountability and Confidentiality in Child Welfare* found in EVERY CHILD MATTERS, Legacy Family Institute, Washington, DC (2003), at 14.
- 41 39 A.L.R.5th 103, *supra* note 4, section 41.
- 42 Open courtrooms in family court have been the law for years in several states including Oregon and Michigan (and more recently, Minnesota) with no reported negative consequences. See Romo, *supra* note 22; THE JANICULUM PROJECT RECOMMENDATIONS, National Council of Juvenile and Family Court Judges, Reno, NV (1998).
- 43 In California, the statute that permits such persons to attend reads as follows: "Unless requested by a parent or guardian and consented to or requested by the minor concerning whom the petition has been filed, the public shall not be admitted to a juvenile court hearing. The judge or referee may nevertheless admit such persons as he deems to have a direct and legitimate interest in the particular case or the work of the court." CALIFORNIA WELFARE AND INSTITUTIONS CODE sections 346 and 676, West Publishing (2004).
- 44 Attorneys and guardians *ad litem* have their own ethical constraints concerning the release of information about confidential matters. See Jennifer Renne, *Protecting Client Confidences in Child Welfare Cases*, 22-9 ABA CHILD LAW PRACTICE, (Nov. 2003), at 137.
- 45 This openness should not result in parties and attorneys from other cases on the court calendar on the same day being present when a particular case is heard by the court. These "cattle call" courtrooms where multiple cases are in the courtroom at the same time demean the family court process. They provide no sense of privacy or intimacy for the individual family before the court and they inevitably create distractions for the case before the court. These other persons have no legitimate interest in the cases of other families who happen to be on the court calendar on that day. The better practice is for the court to insist on cases being heard one at a time, with parties from other cases waiting outside the courtroom.
- 46 CASA stands for Court Appointed Special Advocates, trained volunteers appointed by the court to speak on behalf of abused and neglected children in the child protection system.
- 47 See *San Bernardino County*, *supra* note 15 at 207; *In re Keisha T.*, 44 Cal. Rptr.822 (1995) where conditional access was not permitted because the information was lawfully obtained. The California law resembles many state statutes when it bans public attendance, but empowers access to persons deemed to "have a direct and legitimate interest in the particular case or work of the court." CALIFORNIA WELFARE AND INSTITUTIONS CODE sections 346 and 676, West Publishing (2003); Such conditional access has been authorized in some courts: *In re "S" Children*, *supra* note 17; *Mayer v. State*, 523 So.2d 1171, 13 FLW 602, 15 Media L.R.2254 (Fla. 1988); *In re Minor*, 149 Ill.2d 247, 172 Ill Dec 382, 595 N.E.2d 1052, 20 Media L.R. 1372 (1992); *In re Welfare of K.*, 269 N.W.2d 367, 4 Media L.R. 1539 (1978, Minn.); *In re Ulster County Department of Social Services ex rel. Jane*, 163 Misc. 2d 373, 621 NYS2d 428 (1993, Family Ct). Refer to Appendix A. This approach has been recommended by some commentators. *Making Good Decisions About Confidentiality 2003*, EVERY CHILD MATTERS, Legacy Family Institute, Washington, DC at 58, available online at <http://www.legacyfamilyinstitute.org> under Confidentiality: Laws and Policies.

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- 48 CALIFORNIA WELFARE AND INSTITUTIONS CODE sections 346 and 827 and CALIFORNIA RULE OF COURT 1423, West Publishing (2003). See Appendix A for an example of a court order that can be used in both child protection and juvenile delinquency cases.
- 49 *Globe Newspaper, supra* note 3; The reasoning in *Globe* was followed in the case of *New Jersey Division of Youth and Family Services v. J.B.*, 120 N.J. 112, 576 A.2d 261 (1990). In the New Jersey case, the trial court permitted the press to attend a juvenile dependency hearing and the New Jersey Supreme Court affirmed the trial court stating, "This case involved the rare situation in which the public's right to attend judicial proceedings is not outweighed by the state's compelling interest in conducting a private hearing." 576 A.2d at 270.
- 50 "It is clear that the involvement of a public entity in the litigation is a factor weighing greatly in favor of disclosure." *Charlie and Nadine H., supra* note 17, at 12-13, citing *Pansy v. Borough of Stroudsburg*, 223 F.3d 772 93d Cir. (1994).
- 51 This factor has been decisive in some cases. "However, given the fact that the underlying matter has already been widely publicized, the Respondent has pled guilty to a manslaughter charge on the related matter in the County Court...the Court believes that the basis for Respondent's objections is essentially negated." *In re "S" Children, supra* note 17 at 987.
- 52 A Florida statute declares adoption proceedings confidential. Citing the best interests of the child, the statute was upheld against a challenge by the media in the case of *In re Adoption of H.Y.T.*, 458 So.2d 1127, 9 FLW 459 (Fla. 1984). The California statute is similar; CALIFORNIA CIVIL CODE 227, West Publishing (2003).
- 53 "The desire to shield juveniles from publicity to enhance the chances of rehabilitation in many cases should not outweigh the public's right to know about juvenile crime." Little Hoover Commission, *supra* note 16 at 91; Judge Gordon Martin, Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 NEW ENGLAND JOURNAL ON CRIMINAL LAW & CIVIL CONFINEMENT 393 (1995); Stephan Oestreicher, Jr., *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VANDERBILT LAW REVIEW 1751 (2001). This is consistent with the national trend to open juvenile delinquency proceedings. See NATIONAL REPORT, *supra* note 6.
- 54 Indeed, the confidentiality of delinquency proceedings in order to enhance the possibility of rehabilitation was one of the cornerstones of the juvenile court law. See Oddo, *supra* note 31; See Laubenstein, *supra* note 31; Some appellate courts uphold this confidentiality right: *Florida Pub. Co. v. Morgan*, 253 Ga. 467, 322 S. E. 2d 2233, 11 Media L. R. 1021 (1984); *In re M.*, 109 Misc. 2d. 427, 439 N.Y. S. 2d. 986, 7 Media L. R. 1773 (1981); *In re Gillespie*, 150 Ohio App. 3d 502, 782 N. E. 2d 140 (10th Dist. Franklin County 2002); *In re J.S.*, 140 Vt. 458, 438 A 2d 1125, 7 Media L. R. 2401 (1981).
- 55 THE JUVENILE COURT AND SERIOUS OFFENDERS: 38 RECOMMENDATIONS, NCJFCJ, (1984), Chapter V. This publication recommended that in addition to the public, others had a legitimate need to know about juvenile delinquency proceedings including law enforcement, adult courts, and parties to related legal proceedings. The California legislature, like many others, has taken this approach. CALIFORNIA WELFARE AND INSTITUTIONS CODE section 676 permits the public to attend juvenile delinquency proceedings on the same basis they would be admitted to adult criminal trials if the youth is charged with one of a long list of serious crimes. CALIFORNIA WELFARE AND INSTITUTIONS CODE section 676, West Publishing, (2004). For other offenses the statute excludes the public except where the judge determines that a person has "a direct and legitimate interest in the particular case or the work of the court." CALIFORNIA WELFARE AND INSTITUTIONS CODE Section 676, West Publishing, (2004). In this article, I take the position that all such hearings should be presumptively open, but that the judge should have the discretion to close a part or all of the hearing if the privacy interests of the child or other party or witness outweigh the public interest in viewing the hearing. Using this analysis, the more serious the case, the less reason for closing any part of the hearing.
- 56 *In the Matter of N.H.B.*, 769 P.2d 844 (1989), the juvenile court heard a motion to recall jurisdiction from the circuit court to the juvenile court. The juvenile court closed the proceedings and the media challenged the ruling. The court denied the challenge and the media appealed. The Utah Court of Appeals held that the media had the right to challenge the judge's decision to close the hearing, but held that the media did not have a right to attend the hearing and that the juvenile court properly considered the relevant factors in denying the motion.
- 57 Even where the charge is serious and the public is admitted, one appellate court cautioned the court staff "not to use the respondents' or witnesses' names within the hearing of the reporter. The corporation counsel and the law guardian agree to make every effort to ensure that no names will be used during the proceeding." *In re Chase, supra* note 14 at 450-451; "Although not constitutionally required, the court should consider whether it would be feasible to allow press access to portions of the proceedings and excluding the press from other portions." *San Bernardino County, supra* note 15 at 207-8. These approaches support the principle that public access can

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- be combined with restrictions on the release of information about individuals in the case. A related technique adopted by many appellate courts is to refer to any child in appellate proceedings by his or her initials. Many of the cases cited in this article exemplify this technique.
- 58 The media would be advised that they must comply with the conditions of admission unless they obtained their information from a public source. See *infra* note 65. If the judge believes that even with “conditional access” there would be a detrimental effect upon the child or parties, he or she should consider closing the hearing. Federal law now grants states the discretion to establish their own policies on public access to child abuse and neglect courts as long as they “at a minimum, ensure the safety and well-being of the child, parents, and families.” THE CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA), 42 U.S.C. section 5106(b)(2)(A)(v) and 42 U.S.C. section 6781(a)(8); *Public Access to Child Abuse and Neglect Proceedings*, National Center for State Courts, 4-5 ISSUE BRIEF, (July 2003).
- 59 The Pennsylvania law seems to have adopted this approach. In the case of *In re M.B.*, *supra* note 35, one of the parties to a juvenile dependency proceeding sought to close the proceedings by rebutting the presumption of openness. That party demonstrated that closure served a compelling governmental interest and that no less restrictive means exists to serve that interest. (The interest in this case was protecting children from further embarrassment, psychological harm, and trauma). *Accord*, *In re R.L.K., Jr. and T.L.K. v. Minnesota*, 269 N.W.2d 367 (Minn. 1978); See Appendix A of this article for an example of a conditional attendance agreement.
- 60 The law in the United States is in conflict in this area. See W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer’s Perspective*, 17 J. AM. ACAD. MATRIMONIAL LAWYER 29 (2001). The Pennsylvania courts have held that the trial court has the discretion to permit the public in an equitable distribution hearing in a divorce action. *Katz v. Katz*, 356 Pa Super 461, 514 A. 2d 1374, *allocator denied*, 527 A.2d 542 (Pa. 1986); 13 Media L.R. 1296, app den 515 Pa 581, 527 A2d 542. Even with privacy interests at stake, the appellate courts in Connecticut have held that the public cannot be excluded from divorce proceedings. *Wendt v. Wendt*, 45 Conn. Supp. 208, 706 A. 2d 1021 (Super.Ct., 1996). *Accord*, *State ex rel. Gore Newspapers Co. v. Tyson* (1975, Fla App D4) 313 So.2d 777; *Merrick v. Merrick* (1992, Sup) 154 Misc.2d 559, 585 NYS2d 989, *affd* (1st Dept) 190 App Div 2d 5416, 593 NYS2d 192 and *supp op* (Sup) 165 Misc 2d 180, 627 NYS2d 884, *affd* (NY App Div 1st Dept) 636 NYS2d 1006; 103 A.L.R.5th 103, *supra* note 4, section 15.
- 61 *Firestone v. Time, Inc.*, 271 So.2d 745 (Fla. 1972); *Whitney v. Whitney*, 14 Cal. App. 2d 577, 330 P. 2d 947 (1958); 39 A.L.R.5th, *supra* note 4 at sections 12, 13, and 15.
- 62 *United States v. Davis*, 902 F Supp 98, 102 (ED La, 1995); See generally, Tijani Cole, *The Courts & the Media Bench Book*, 35 NEW ENGLAND LAW REVIEW 853, (Summer 2001).
- 63 The conditional access of the press to child protection proceedings has worked well in other courts. *In re “S” Children*, *supra* note 17, at 992.
- 64 A gag order in a consolidated dependency and child custody cases was upheld in *In re T.R.*, *supra* note 27. A gag order is similar to a “non-dissemination order.” See *In re Tiffany G.*, 29 Cal.App. 4th 443 (1994).
- 65 The media cannot be sanctioned for the publication of truthful information obtained in official court records open to public inspection or from sources outside of the court. *Smith v. Daily Mail Publishing*, *supra* note 6; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed.2d 328 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S. Ct. 1045, 51 L.Ed2d 355 (1977); However, in one state the media was sanctioned for violating a gag order in an otherwise confidential court proceeding. *In re “S” Children*, *supra* note 17. In some cases, the judge may conclude that the release of a youth’s name could result in harm because of possible retribution from others in the community, such as rival gang members. The law should permit the judge to restrict release of a youth’s name in these and similar circumstances.
- 66 Gag orders have been used to protect the criminal defendant’s right to a fair trial: *Nebraska Press Assn v. Stuart*, 427 U.S. 539, 564, 96 S. Ct. 2791, 2805, 49 L.Ed.2d 683 (1976), to protect a litigant’s confidentiality interest in information subject to civil discovery: *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984), and to protect trade secrets: *Triangle Ink & Color Co., Inc v. Sherwin-Williams Co.* (N.D.Ill.1974), 61 F.R.D. 634.
- 67 That is why the trial court issued a gag order in the case of *In re T.R.*, *supra* note 27. The Appellate Court in this case relied, in part, on the Code of Professional Responsibility adopted by the Ohio Supreme Court. DR 7-107(G) cited at 556 N.E.2d 439, 455.
- 68 *Arkansas Democrat-Gazette v. Zimmerman*, 341 Ark. 771, 20 S.W.3d 301, 28 Media L. Rep. 2321 (2000).
- 69 “[T]he court must in an expeditious manner give the public or press an opportunity to present evidence and argument to show that the state’s or juveniles’ interest in a closed hearing is overridden by the public’s interest in a public hearing.” *Florida Pub. Co. v. Morgan*, (1984) 253 G. 467, 322 S.E. 2d 233, 238; See also *State ex rel. Dispatch Printing Co. v. Lias*, 68 Ohio St.3d 497, 628 N.E.2d 1368 (1994); *In re M.B.*, *supra* note 35.
- 70 For an example of a form describing the terms and con-



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- ditions of news media participation in juvenile court cases, see Judge Terry B. Friedman, *Access to Juvenile Court*, in THE COURTS AND THE NEWS MEDIA, *supra* note 23 at 82, and Appendix A of this article.
- 71 CALIFORNIA WELFARE AND INSTITUTIONS CODE, Section 350(b), West Publishing (2003).
- 72 For examples of court regulations regarding the use of cameras and other electronic equipment in court proceedings, see Rule 5.1 and 5.2, RULES OF THE SUPREME COURT OF THE STATE OF HAWAII and CALIFORNIA RULE OF COURT 980, *Photographing, Recording and Broadcasting in Court*, California Judicial Council, West Publishing (2003).
- 73 Judge Byron B. Conway, *Publicizing the Juvenile Court*, 16-1 JUVENILE COURT JUDGES JOURNAL (1964), at 21-22.
- 74 The media and public complain that court calendars are often posted in obscure places and thus do not give sufficient notice to those interested in attending hearings. Courts should have a central location for the posting of all calendars for the court system and should consider posting calendars on the Internet.
- 75 This approach is consistent with the RULE ON PUBLIC ACCESS TO RECORDS RELATING TO OPEN JUVENILE PROTECTION PROCEEDINGS, Minnesota Supreme Court Advisory Committee On Open Hearings in Juvenile Protection Matters, Minnesota Supreme Court, 2001. Subdivision 4 of that RULE specifies those records that shall not be accessible to the public. See also JANICULUM PROJECT, *supra* note 42.
- 76 However, some family court records may have relevance in other court proceedings. Parties to those proceedings should have the right to petition the family court for access to those records. The family court judge would then make the decision whether to release the records, to whom they would be released and how those records could and could not be utilized. This is the procedure followed by several states. See CALIFORNIA WELFARE AND INSTITUTIONS CODE section 827, and CALIFORNIA RULE OF COURT 1423, West Publishing (2004).
- 77 “We imagine a juvenile justice system that is informal and private in handling minor affairs, but that becomes quite formal and accountable when deciding matters of importance.” Moore, *supra* note 29.
- 78 R. Berezny & J. Levine, *State Scapegoats Parents, Workers in New Jersey Child Welfare Scandal*, (article on file with author); M. Gougis, *Child-welfare blunders led to boy’s death*, LOS ANGELES DAILY NEWS, (Nov. 5, 2003).
- 79 R. Berezny & J. Levine, *id.*
- 80 Craig Schneider, *DFCS Workers Fired, Disciplined After Child Deaths*, ATLANTA JOURNAL-CONSTITUTION, (Aug. 28, 2003); N. Badertscher & J. Galloway, *Perdue Ousts DHR Commissioner Jim Martin*, ATLANTA JOURNAL-CONSTITUTION, (Aug. 20, 2003); Craig Schneider, *Dead Boy’s Mom: I Saw No Danger*; ATLANTA JOURNAL-CONSTITUTION, (Aug. 27, 2003); D. Kocieniewski, *New Jersey Child Welfare Commissioner to Step Down*, NEW YORK TIMES, (Dec. 6, 2003); R. Johnson & B. de la Cruz, *Plaintiffs Want DCS Held in Contempt*, TENNESSEAN, (Dec. 8, 2003).
- 81 “And if the child died, I don’t think you need anyone’s permission to see the file.” Virginia Weisz in Cheryl Romo, *Despite Law, Paper Maze Slows Access to Dependency Records*, LOS ANGELES DAILY JOURNAL, (July 8, 2002); see also *Charlie and Nadine H. v. Whitman*, *supra* note 17 at 19.
- 82 Cheryl Romo, *Facts Behind Fatalities Lie On Hard Path—When Kids Die in Custody, Answers Come Slowly*, LOS ANGELES DAILY JOURNAL, (July 9, 2001); Cheryl Romo, *Freeing “Confidential” Records*, LOS ANGELES DAILY JOURNAL, (Sept. 10, 1998).
- 83 *Courageous Judge Pushes for Reform*, PALO ALTO DAILY NEWS, (April 11, 2003); The Department of Human Services appealed the some of the judge’s orders in the case and the Court of Appeal reversed the judge’s order appointing a particular social worker to supervise the case; *In re Ashley M.*, 2003 Cal.App. LEXIS 1815.
- 84 *In re Keisha T.*, *supra* note 47; *Bee Wins Access to Juvenile Court Records to Scrutinize System*, SACRAMENTO BEE, (Sept. 9, 1995), at B3; *Records Reveal Failure to Assist Abused Kids*, SACRAMENTO BEE, (July 3, 1998), at A1; Cheryl Romo, *Quest Yields a Look at Failed System*, LOS ANGELES DAILY JOURNAL, (May 25, 1999).
- 85 Annie E. Casey Foundation, *Strategic Communications for Child Welfare*, Family to Family Tools for Rebuilding Foster Care, Baltimore, MD, March 2002; *Making Good Decisions About Confidentiality in Child Welfare*, *supra* note 47 at 42-45.
- 86 “...divorce files should be presumptively private.” Laura Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Records On Line*, 17 J. AM. ACAD. MATRIMONIAL LAWYER, 45 (2001). *Accord, Katz v. Katz*, *supra* note 60.
- 87 See *Merrick v. Merrick* (1992, Sup) 154 Misc.2d 559, 585 NYS2d 989, *affd* (1st Dept) 190 App Div 2d 516, 593 NYS2d 192 and *supp op* (Sup) 165 Misc 2d 180, 627 NYS2d 884, *affd* (NY App Div 1st Dept) 636 NYS2d 1006, a case in which the court prohibited court personnel from distributing or showing any matters relating to the dissolution except for court decisions or orders.
- 88 There are many who disagree with this position. R. Perez, *Isle divorces can be kept hush hush—for a price*, HONOLULU STAR-BULLETIN, (Aug. 25, 2002), (<http://starbulletin.com/2002/08/25/news/perez.html>)

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- 89 On the issue of public figures and their privacy rights in divorce proceedings, see 39 A.L.R. 103, *supra* note 4, at section 13.
- 90 Appellate cases have found that the details of litigation involving famous people may be made public. See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 56 Cal. Rptr.2d 645 (1996) (involving a palimony suit by Sandra Locke against Clint Eastwood) and *In re the Marriage of Lechowick*, 64 Cal.App.4th 1406 (1998) (involving divorce proceedings of a local judge and his wife).
- 91 *Barron v. Florida Freedom Newspapers, Inc.*, (Fla. 1988) 531 So. 2d 113, 13 F.L.W. 497, 15 Media L. R. 1901.
- 92 “Custody proceedings in the juvenile court would benefit little from public access. Custody disputes generally delve into the private relations of parents and children. While curiosity may be incited by custody cases involving bizarre facts or famous persons, this does not necessarily translate into a significant positive public role. ‘[W]e perceive a clear distinction between mere curiosity, or in undeniably morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand and real public or general concern on the other.’” *In re T.R.*, *supra* note 27 at 16, citing *Firestone v. Time, Inc.*, 271 So. 2d 745, 748 (Fla. 1972). But some courts have permitted access to custody proceedings. *In re Anonymous v. Anonymous* (1190, 1st Dept) 285 App. Div 2d. 296, 550 NYS 2d 704, 18 Media L.R. 1560.
- 93 McDonough, *supra* note 15.
- 94 “I can’t tell you how many times I’ve said something is confidential and the media know more than I do about the case. Yet when it comes to confronting the welfare system to confirm facts, reports hit a wall. We end up with all this silliness. The people who have the answers and are responsible can’t give the answers while often the perpetrators or those relatives causing trouble freely speak to the media.” Judge James Payne, Presiding Judge, Marion County (Ind.) Juvenile Court, in McDonough, *supra* note 15.
- 95 Many state laws prohibit the departments of social services/children’s services from making public comments regarding their cases.
- 96 A sample petition for permission to speak about otherwise confidential matters is contained in Appendix B.
- 97 Canon 3B(9), REVISED CODE OF JUDICIAL CONDUCT; Canon 3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently. B. Adjudicative Responsibilities. (9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.
- 98 *Davis v. Alaska*, 415 U.S. 308 (1974); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *People v. Hammon*, 938 P.2d 986 (Cal. 1997).
- 99 A typical protective order might read as follows: “The attached juvenile court records are released to the parties on the following conditions: (1) they shall be used exclusively in the pending criminal prosecution involving the petitioner and shall not be further disseminated, and (2) after the conclusion of the criminal prosecution, they shall be destroyed or returned to this court.”
- 100 This is the approach used by some state legislatures. See CALIFORNIA WELFARE AND INSTITUTIONS CODE section 827, West Publishing (2004).
- 101 *Juvenile Dependency, Juvenile Delinquency, Family and Probate Exchange of Information*, Section L, JUVENILE RULES, GENERAL PROVISIONS, Superior Court, Santa Clara County, CA, (2003).
- 102 “Juvenile Court Judges should reach out to the media and make it possible for them to get to know how the juvenile court works.” Judge Leonard Edwards, *Improving Juvenile Dependency Courts: Twenty-Three Steps*, 48-4 JUVENILE AND FAMILY COURT JOURNAL (1997) at 11.
- 103 “Judges of the juvenile court...are encouraged to...(7) Educate the community and its institutions through every available means including the media concerning the role of the juvenile court in meeting the complex needs of at-risk children and their families.” Section 24(e), STANDARDS OF JUDICIAL ADMINISTRATION, California Judicial Council, West Publishing (2003); “...the juvenile court judge has an even broader role: providing the community information about how well the juvenile court is completing the tasks assigned to it. The juvenile court judge both informs and advocates within the community on behalf of children and their families.” Edwards, *supra* note 18 at 29. See also Moore, *supra* note 77 at 181.
- 104 John Hubner & Jill Wolfson, SOMEBODY ELSE’S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA’S TROUBLED FAMILIES, Crown Publishing, NY, (1996), at vii-xiv.
- 105 The book is now required reading for new social workers and child advocates (CASAs) in several jurisdictions and has a national audience. Its popularity has led to republication.
- 106 For further information about the Los Angeles County Media-Bench Committee, contact the Los Angeles Superior Court Public Information Office at (213) 974-5227.
- 107 For further information, contact the Los Angeles Superior Court Public Information Office at (213) 974-5227.



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- 108 On the issue of judicial stress, see Peter Jaffe, Claire Crooks, Billie Lee Dunsford-Jackson, & Judge Michael Town, *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54-4 JUVENILE AND FAMILY COURT JOURNAL, (2004) at 1-9; and see Page, *supra* note 9 at 22-23.
- 109 The Code of Ethics of The Society of Professional Journalists Sigma Delta Chi supports this position. In Section V, Fair Play, the following ethical admonitions are written: "Journalists at all times will show respect for the dignity, privacy, rights, and well-being of people encountered in the course of gathering and presenting news.... 2. The news media must guard against invading a person's right to privacy.... Journalists should show compassion for those who may be affected adversely by news coverage. Use special sensitivity when dealing with children and inexperienced sources or subjects." Code of Ethics found in THE COURTS AND THE NEWS MEDIA, *supra* note 23 at 319-321. Apparently, this code of ethics is not utilized by all journalists: Edwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA LAW REVIEW 913 (1997). "When a story does contain context, the particular context the media chooses often distorts the account." Judge Ernestine S. Gray, *The Media—Don't Believe the Hype*, 14-1 STANFORD LAW AND POLICY REVIEW, (2003) at 45-56.
- 110 There are many examples of the media publishing sensitive information identifying child victims and likely re-traumatizing them in the process. See *In the Matter of Ruben R.*, 641 N.Y.S. 2d. 621 (N.Y.App.Div. 1996); *State v. Oregonian Publishing Co.*, 613 P.2d 23 (Or. 1980). On the other hand, reports from states that have opened their child protection courts are that the news media has been sensitive and has rarely published children's names. FINAL REPORT, *supra* note 19 at 122-3 and 2001-2002 Annual Report, *supra* note 40, at 3.
- 111 "Presiding judges should assign judges to the juvenile court for a minimum of three and preferably for five years." Edwards, *supra* note 102 at 5; CALIFORNIA STANDARDS OF JUDICIAL ADMINISTRATION, Section 24(a), West Publishing (2003).
- 112 The Santa Clara County Web sites have been designated the best court-based Web site in the world by Justice Served. See [www.justiceserved.com](http://www.justiceserved.com).
- 113 The public Web site is <http://www.sccsuperiorcourt.org>. The self-help Web site is <http://www.sccselfservice.org>. The complex litigation Web site is <http://www.scccomplex.org>, and the Public Access Case Information Web site is <http://www.scccaseinfo.org>.
- 114 The response from the public has been extremely favorable to the juror information offered on the Web. The Superior Court has been receiving a steady stream of letters of appreciation from members of the public.
- 115 The public interest and enthusiasm for this service has been overwhelming. In addition to the 1,500 people served each month, hundreds of others are turned away. The demand is so great that the public starts lining up at the self-help center hours before it opens.
- 116 ANNUAL REPORT, National CASA, Seattle, WA (2003).
- 117 "An important role for the juvenile court judge is to reach out to these organizations and to offer opportunities for them to assist the court and the child welfare system." Edwards, *supra* note 102 at 11-12; Page, *supra* note 9.
- 118 A good example of an appellate court advising the trial courts how to approach the balancing of public and private interests is contained in the case of *In re T.R.*, *supra* note 27.
- 119 "It is high time public consciousness was raised about the issues surrounding Family Court as well as about the people in Family Court." Judge Judith Kaye, Chief Judge, New York State as the Family Court in New York State was opened to the public for the first time. Joe Sexton, *Opening the Doors on the Secrets and Problems of Brooklyn's Family Court*, NEW YORK TIMES, (Sept. 17, 1997), at 1; "Frankness and openness will also more likely render publicity about the juvenile dependency system informative and accurate rather than uninformed and destructive." Edwards, *supra* note 102 at 11.