CHAPTER SEVEN: ACCESS TO COURTS AND DOCUMENTS

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Chief Justice Warren Burger opened the courthouse door to the public's right of access when he wrote in 1980: "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581 (1980). The U.S. Supreme Court decision sprang from a criminal trial in which judge, prosecutors and defense lawyers were trying to clear the courtroom during the fourth attempt to try a man for murder. Reporters in attendance, along with everyone else, left the courtroom without objection. In concurring with Burger, Justice John Paul Stevens called it a "watershed case" because it gave constitutional protection for the first time to "the acquisition of newsworthy matter."

In the decade following, the public's right of access to courts and documents has been tested countless times because newsworthy information flows through every stage of the court system. Newsworthy information is not limited to trial; it may be found at a pre-trial hearing to suppress evidence, during jury selection, in the documents a judge uses to issue a warrant, in a deposition taken in preparation for trial or in the testimony of a grand jury witness. However, not all information that flows through the court system is public. Whether the public and the news media will have access to the information depends on the following factors: (1) is there a constitutional or common law right of access to the information? (2) Even if there is, is there an interest, such as privacy or the right to a fair trial that overrides the presumptive right of access? (3) Is there a statutory basis for denying access? (4) If there is no right of access but no statutory

basis for denying access, are there practices or policies that prevent the public or news media from obtaining access?

The terminology of limited access is often interchangeable. Courtrooms are "closed" or "sealed;" hearings are "closed" or held "in camera" or "in chambers"; individuals are "gagged"; and documents and files are "sealed," "impounded," "suppressed," "restricted," or placed under a "protective order." The validity of such practices rests on the law, of course, but even the improper practices can be abated only if the public or the news media challenge them. Much of the law on access in the state and federal courts in Illinois is unsettled because neither the public nor the news media has risen to the challenge.

The Police Beat: Police logs (blotters or dockets), incident reports, investigative reports, arrest reports and "rap sheets."

As a general rule, criminal investigations are not public matters. The presumption of openness that applies to the courts does not apply to activities that precede the filing of a criminal charge. Attempts to gain access to information before it becomes part of a court file or court case have at least five obstacles to overcome: (1) there is no constitutional or common law right to the information; (2) the information might undermine the criminal investigation; (3) the information might endanger the life or physical safety of law enforcement personnel or other persons (informants); (4) the information might compromise the security of a correctional facility; and (5) the information might injure the reputation of individuals who become part of the investigation.

Reporters tend to believe they have a right to police records because reporters are often able to obtain them through relationships with police sources. In most cases, however, the law

regarding access to police records has been considerably less clear. That has now changed to a certain extent. Until recently, Illinois had no statutory provision that specifically granted the media access to arrest reports. In 2000, Illinois enacted a new statute that requires law enforcement agencies to make available to the news media arrest reports in most cases. The following information must now be made available to the news media within 72 hours of the arrest: (1) information that identifies the person; (2) information detailing any charges relating to the arrest; (3) the time and location of the arrest; (4) the name of the investigating or arresting agency; (5) if incarcerated, the amount of bail or bond; and (6) if incarcerated, the time and date the person was received, discharged or transferred from the arresting agency's custody. ILCS 160/4a, 20 ILCS 2605/55a, 50 ILCS 205/3b, and 110 ILCS 12/12.

Reporters have attempted to use the Illinois Freedom of Information Act to obtain police records. The Act exempts from public disclosure most law enforcement records and most criminal history records. ILCS 140/1, et.seq. A reasonable interpretation of the Act, however, would regard incident reports and investigative reports as law enforcement records because they relate primarily to the investigation of criminal activity. Similarly, police logs (blotters or dockets) and "rap sheets" (an individual's criminal identification record) would be regarded as criminal history records because they, by nature, identify a particular individual.

The Act does not specifically exempt from disclosure "the name of a person in the custody of a law enforcement agency and the charges for which that person is being held," and "chronologically maintained arrest information," such as traditional arrest logs or blotters. 5 ILCS 140/7-1(d). In practical terms, this means the public and the news media are entitled to the bare-bones information attendant to an arrest (but see 5 ILCS 160/4a above for an alternative way of obtaining arrest reports). While it is not clear what constitutes the bare-bones

information under the Act, because arrest logs and blotters are not uniform generally, it usually includes only the name and address of the arrestee, the charges involved, and the identity of the arresting officers. In fact, many law enforcement agencies have policies that limit release of further information. To the extent that reporters obtain further information, they do so at the discretion of law enforcement and sometimes in violation of policy.

In 1989, a federal case involving the accessibility of "rap sheets" prompted the U.S. Supreme Court to address this tension between access and confidentiality. In interpreting the federal Freedom of Information Act, the court denied public access to "rap sheets," finding that by their very nature as criminal histories of individuals, they can be expected to constitute an unwarranted invasion of personal privacy. *Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989). In effect, the court carved out one zone of restricted access that applies when law enforcement records zero in on individuals and another zone of presumptive access when the records might be more likely to shed light on the government's law enforcement performance.

Search and Arrest Warrants

Reporters have a limited right of access to search warrants, depending to a large extent on when access is sought. The warrant process is perfected in four steps and reporters have the strongest opportunity for access at the last step. First, a law enforcement officer appears before a judge to secure the warrant. Although the officer may testify or present documents such as a complaint or affidavit to the judge, the hearing is often ex parte, in that only law enforcement is represented. The person named on the warrant is seldom present and is not likely to know that a warrant is being secured. Because the hearing is usually a part of the investigative process, it is

confidential. Illinois law provides that the complaint on which the warrant is issued "need not be filed with the clerk of the court" until the warrant has been served. 725 ILCS 5/108-4. Reporters have no right to be present at the hearing or to have access to the information until after the warrant is served.

The second step is the issuance of the warrant, which is done by a judge. Like the officer's complaint or affidavit for the warrant, the warrant itself is not considered public until after it is served. Service of the warrant, the third step, must be made on the person being searched by providing that person with a copy of the warrant. If property is seized pursuant to a search warrant, an inventory of the property taken must be left with the person or on the premises if the person is not present. Although a reporter has no right to a copy of the warrant or the inventory at the time it is being served, the person being served is not prohibited from making public the potentially incriminating information.

The fourth step in the process is the point at which a reporter has the greatest likelihood of gaining access to the documents relating to the warrant process. By law, warrants and inventories of property seized must be returned to the judge after the warrant is served, and then filed, along with the officer's complaint, with the clerk of the court. 725 ILCS 5/108-4 & 5/108-5. Also see Fed.R.Crim.Pro., rule 41(d) & (g). Though there is no case law in Illinois on the right of access to search warrants and cases from other jurisdictions are divided, other courts have generally found a right of access to the officer's affidavit, the warrant and the property inventory after the warrant is executed and returned. *In re Search Warrant for Secretarial Area Outside the Office of Thomas Gunn*, 855 F.2d 569 (8th Cir. 1988), *In re Baltimore Sun*, 886 F.2d 60 (4th Cir. 1989). This common law right of access can be overcome, however, by an overriding interest in confidentiality, which can come from law enforcement, in the form of

jeopardizing an ongoing investigation, or from the defense, in the form of a threat to a fair trial or to the suspect's reputation if not yet charged. As with search warrants, there is no case law in Illinois on the right of access to arrest warrants.

As a practical matter, reporters are more likely to be privy to the issuance of arrest warrants than to the issuance of search warrants because arrest warrants are issued more frequently in open court. It should be noted, though, that most arrests occur without the issuance of bench warrants (by a judge). In those instances in which law enforcement officials seek an arrest warrant and seek to keep it confidential, they would need to show, if challenged, that disclosure would present a risk that the suspect would flee if tipped off to the warrant.

Wiretaps

Illinois law explicitly provides, as does federal law, that applications for wiretaps, wiretap orders and recordings all be sealed. 725 ILCS 5/108A-7(b), 5/108B-10(a). Also see 18 U.S.C. sec. 2518(8)(b). Illinois' statute notes that applications and orders may be unsealed for "good cause," as does the federal statute. Though no right of access to information relating to a court-ordered wiretap exists, those who are targeted for surveillance and all those overheard must be notified of the surveillance within 90 days of the completion of the wiretap. 725 ILCS 5/108-8; 18 U.S.C. sec. 2518(c). They are not prohibited from sharing that information.

Grand Jury Information

Grand Jury information is similar to wiretap information in that the proceedings are ex parte and the information relating to the grand jury is confidential by statute. 725 ILCS 5/112-6. Also see Fed.R.Crim.Pro., Rule 6(e)(2) and (6). Grand jurors, prosecutors and anyone else privy to the grand jury proceeding, except witnesses who testify, are prohibited from disclosing information. In Illinois, as in the federal system, witnesses who testify, either voluntarily or under subpoena, may divulge whatever they want. The U.S. Supreme Court has held that it is a violation of the First Amendment to prohibit a witness from disclosing grand jury testimony after the grand jury's term has ended. *Butterworth v. Smith*, 110 S.Ct. 1376 (1990). In the federal system, the only accessible records or documents relating to a grand jury are orders impaneling grand juries, returning indictments, extending the period of service of grand jurors, and discharging grand juries. N.D.Ill.Crim.R. 1.04(e). No similar provision exists in Illinois. Grand jury information or transcripts of grand jury proceedings may become public if they are incorporated in a court file or used in a judicial proceeding. In addition, documents that are otherwise accessible (such as government documents available through the Freedom of Information Act) are not rendered confidential once subpoenaed or examined by a grand jury. *Board of Education v. Verisario*, 143 Ill.App.3d 1000, 1007 (1986). Though no provision expressly addresses whether the identities of grand jurors are public record, as a practical matter, grand jurors' signatures often appear on the indictments they return. By law, the foreman's signature must accompany all indictments, which must be returned in open court. 725 ILCS 5/112-4(d).

Criminal Charges (indictments and informations) and the Court File

Information relating to a criminal case is public to the extent that it becomes a part of the case record or is introduced or said in open court. Illinois law provides that case records are to be kept by the court clerks as public records, available for inspection without a fee. 705 ILCS 105/16-6 & 50 ILCS 205/1 et seq. In the federal courts, rules provide that all documents that are filed with the court and which are not suppressed, sealed, restricted, or documents awaiting expunction are part of the public record. In fact, there are rules that prohibit courthouse personnel from disclosing, without leave of court, information relating to a pending criminal matter that is not part of the public record. U.S. Dist. Ct. Rules N.D.Ill., LCrR57.2.

Illinois law identifies generally which documents are to be included in a case record. They include case number lists (which identify cases chronologically by filing date and name the defendant and the offenses charged), case indexes (which list defendants alphabetically and note the alleged offenses) and the basic file record. The basic file record ("the court file") is kept in the clerk's office except when it is needed in court or by the judge presiding over the case. The court file is to consist of the criminal charges against the defendant, the names and addresses of the attorneys, the name of the judge presiding at each hearing, all judicial rulings, notations on the hearings and trial proceedings, and pleadings, documents, orders and other papers. 705 ILCS 105/16, Supreme Court Administrative Order (1/1/71), Part I.

In practice, some court files are replete with such documents as motions, legal memoranda and exhibits, while others may be quite sparse. Though criminal charging documents (indictments, informations and complaints) are to be incorporated in the public court file, Illinois law specifically provides for occasions in which indictments can be filed under seal. Courts may seal indictments until a defendant is in custody or has given bail. 725 ILCS 5/112-6(b). No other statutory provision specifically authorizes judges to seal court files in criminal

cases, though case law notes that judges have supervisory authority to control court records and files. *Nixon v. Warner Communications Inc*., 435 U.S. 589 (1978); *In re Report of the Grand Jury*, 108 Ill. App. 3d 232, 235 (1982). That inherent authority is limited (as is a judge's authority to close a courtroom) by the constitutional presumption in favor of openness in the court system.

Though there is no reported Illinois case law on the sealing of court files in criminal cases, federal appeals courts have treated such actions as analytically similar to closings of pre-trial hearings. *Associated Press v. U.S. District Court*, 705 F.2d 1143 (9th Cir. 1983), *U.S. v. Smith*, 776 F.2d 1104, 1112 (3rd Cir. 1985). It should be noted that because information becomes public through incorporation in the court file and because parties can place documents unilaterally in the court file, parties in criminal cases could effectively leak information through the court file that might be harder to air during a court hearing.

Pretrial Hearings

Most courts now hold that the right of access the Supreme Court established in 1980 for criminal trials applies to pre-trial criminal proceedings, such as preliminary hearings, suppression hearings and jury selection, which had a historical tradition of public accessibility. *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) [jury selection], *Press-Enterprise C. v. Superior Court,* 478 U.S. (1986) [preliminary hearing]; *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1 (1986) [preliminary hearing]; *Waller v. Georgia*, 467 U.S. 39 (1984) [suppression hearing], *People v. Jones*, 265 Ill.App.3d 627 (1994) [“It is established that the right to a public trial guaranteed under the sixth amendment applies to pretrial suppression

hearings."]. Even First Amendment rights of access to pre-trial hearings or criminal court files can be overcome by an overriding interest, for instance, in the pursuit of an ongoing investigation, in the safety or privacy of individuals or most commonly in a defendant's right to a fair trial. *U.S. v. Scarpelli*, 713 F. Supp. 1144, 1145-46 n.2 (N.D. Ill. 1989)[suppression hearing closed to protect defendant from "Godfather-style retribution"] If the interest in closure is not shown to be compelling, pre-trial hearings and criminal court files are to remain open.

Even if the interest is compelling, judges are to consider the following factors in balancing the right of access with the compelling interests supporting closure: (1) whether it is reasonably likely that the interest (such as in a fair trial) will be affected; (2) whether there is a narrower way to preserve that interest than closing the proceeding or sealing the file; and (3) whether there are any alternatives to closure. A court that closes a pre-trial hearing or seals a court file is required to articulate its findings in writing, and the failure to do so has been found to be an abuse of discretion. *Skolnick v Altheimer & Gray*, 191 Ill.2d 214, 730 N.E.2d 4, 246 Ill.Dec 324 (2000). Attempts in Illinois to close pre-trial hearings in criminal cases have been resolved at the trial level. There are no reported Illinois appellate cases since the U.S. Supreme Court's 1980 decision in *Richmond Newspapers*.

Some states require that the public or media be notified and allowed to object before a pre-trial criminal hearing is closed. *Miami Herald Pub. Co. v. Lewis*, 426 So.2d 1 (Fla. 1982). There is no indication in Illinois that such notice is required. In the federal system, Justice Department regulations impose on prosecutors an "affirmative duty" to oppose closure of trials and pre-trial hearings. Federal prosecutors may seek or consent to closure only with the express authorization of the associate attorney general and only if the public is given adequate notice of the proposed closure. The policy applies to criminal and civil cases but does not apply to the in

camera inspection of documents, grand jury proceedings or traditional sidebar conferences during trial. 28 CFR 50.9. No such regulation exists for county or state prosecutors in Illinois.

Discovery

Discovery in criminal cases is treated differently than other documents in criminal cases because the required exchange of information is not usually incorporated in a court file. Court rules do not require that discovery in criminal cases be filed with the court, but the rules do not prohibit it, either. Since the common law right of access to judicial records and documents is triggered when a document is filed with the court, some courts have ruled that access to discovery in criminal cases exists only to the extent the discovery information is incorporated into the court file or used in a proceeding. The issue is untested in Illinois. If discovery information in criminal cases is not incorporated into the court file or used in a court proceeding, it is not to be made accessible to reporters by attorneys privy to the information. An Illinois Supreme Court rule requires that discovery materials furnished to an attorney "be used only for the purposes of conducting his side of the case." S.Ct. Rule415(c). Committee comments to the rule explain that if the materials were to become "matters of public availability...the administration of criminal justice would likely be prejudiced." S.Ct. Rule 415(c).

A similar rule of confidentiality applies to information and records kept by pre-trial service agencies responsible for providing judges with information needed for bail decisions. Illinois law provides that unless such information has been disclosed in open court, it is not to be released without the permission of the defendant. 725 ILCS 5/331.

Plea Negotiations and Plea Agreements

Before plea negotiations can ripen into a guilty plea, an exchange between the judge and the defendant must take place "in open court." During the public exchange, the judge must inform the defendant of the minimum and maximum sentence possible, the plea agreement must be spelled out, and the judge must indicate whether he or she has already concurred with the agreed sentence. S.Ct. Rule 402. Therefore, to a limited degree, reporters have a statutory right of access to plea agreements. However, no rule entitles reporters or the public access to the plea discussions between prosecutors and the defense.

The rule on guilty pleas is ambiguous as to whether preliminary plea discussions involving the judge are to be public or confidential. Four federal circuit courts have held that the plea agreements themselves are traditionally public records, and are therefore constitutionally accessible, just like trials and court files, unless overridden by a compelling interest in secrecy that is narrowly tailored to serve that interest. *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991), *Oregonian Pub. Co. v. U.S. District Court*, 920 F.2d 1462 (9th Cir. 1990), *U.S. v. Haller*, 837 F.2d 84 (2d Cir. 1988), *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986). The courts noted that plea agreements, which constitute well over 75% of all criminal convictions, are the most common form of criminal adjudication, but they did not address the question of access to discussions or negotiations leading up to the agreements.

Trial and Trial Evidence

Though the 1980 U.S. Supreme Court decision in *Richmond Newspapers* declared that the public has a constitutional right to attend criminal trials, countless cases have arisen since then over the right of access to information that surfaces during trial but not necessarily in open court. Courts have granted access to completed juror questionnaires, *Lesher Communications Inc. v. Contra Costa Superior Court*, 224 Cal. App. 3d 774 (1990), to the names and addresses of jurors and rejected potential jurors, *In re Globe Newspaper Co*., 920 F.2d 88 (1st Cir. 1990), *In re Baltimore Sun Co*., 841 F.2d 74 (4th Cir. 1988). And some courts have granted access to transcripts of sidebar and in chambers conferences, *U.S. v. Smith*, 787 F.2d 111 (3d Cir. 1986), though others have not. *Moody v. U.S*., 17 Med.L.Rptr. 2096 (11th Cir. 1990), *U.S. v. Moody*, 18 Med.L.Rptr. 1233 (M.D. Ga. 1990).

In a recent Illinois federal case, the Seventh Circuit Court of Appeals reversed a district court ruling that had denied the press' petition to intervene and for the release of records that had been sealed in a criminal proceeding without making any findings explaining the sealing. The court held that, "Although the press has no right of access to discovery materials not yet admitted into the record, the district court must provide an explanation for its decision to seal material in its possession, and that explanation must be crafted in such a manner as to make meaningful appellate review possible." The court also reaffirmed the press' right to intervene in criminal proceedings for the limited purpose of raising constitutional and common law claims of access to court proceedings. *In re Associated Press, et al. USA v. Ladd, et al*., No. 98-1474 (Decided 12/7/98).

Courts have often distinguished a reporter's right of access to evidentiary information from attempts to copy, photograph or broadcast the evidence, which courts have been less willing to allow. *Nixon v. Warner Communications, Inc*., 435 U.S. 589 (1978)[Nixon tapes],

Application of KSTP Television, 504 F.Supp. 360 (D.Minn. 1980)[video of kidnap victim], *U.S. v. Edwards*, 672 F.2d 1289 (7th Cir. 1982)[audiotape of state senator], *New York v. McCray*, 18 Med.L.Rptr. 1652 (N.Y. Sup.Ct. 1990)[graphic photos of Central Park assault victim]. Also see *U.S. v. Finley*, 16Med.L.Rptr. 1735 (N.D. Ill. 1989)[judge treated tapes and transcripts identically and allowed access]. The decision of whether to allow the media to copy for broadcast audio or video tapes that have been admitted into evidence is within the discretion of the trial judge, though the Seventh Circuit Court of Appeals has held that it is improper for a judge to consider whether the tapes will be inaccurately reported or misunderstood. *U.S. v. Guzzino,* 766 F.2d 302 (7th Cir. 1985). See also *Valley Broadcasting Co. v. U.S. District Court*, 798 F.2d 1289 (9th Cir. 1986).

Some judges resolve the conflict between media access and a defendant's right to a fair trial by controlling the timing of the release of information. For instance, one judge withheld the release of potentially prejudicial information until after the jury was sworn in; *U.S. v. Dorfman*, 550 F. Supp. 877, 887 (N.D. Ill. 1982), reversed as to other orders, 690 F.2d 1230 (7th Cir. 1982); *U.S. v. Swindel*, 16 Med.L.Rptr. 1990 (N.D.Ga. 1989). Another withheld the release of audio and video tapes until the case was submitted to the jury, *U.S. v. Evans*, 16 Med.L.Rptr. 1174 (N.D.Ga. 1989). Still another permitted access to tapes "during convenient recesses of the trial." *U.S. v. Torres*, 602 F. Supp. 1458, 1465 (N.D. Ill. 1985).

Illinois law specifically prohibits anyone (reporters included) from observing, listening to or recording the deliberations of a jury. A violation is a class A misdemeanor. In addition, the statute provides that juror notes taken during trial are confidential and are to be destroyed after the verdict has been returned. 705 ILCS 315/1. No law expressly prohibits jurors from talking to reporters, though it is strongly discouraged until the verdict is in. See *In re Globe Newspaper*

Co., 920 F.2d 88 (1st Cir. 1990). Judges will always admonish jurors not to discuss the case with anyone, even among themselves, until the time of deliberations and then only among themselves. Reporters are advised that it is a felony in Illinois to communicate with jurors or witnesses before the verdict or testimony if the interaction is intended to influence the person. It is also a felony after the verdict or testimony if the interaction is intended to "harass or annoy" the person. 725 ILCS 5/32-4 & 32-4a.

Generally, the law does not distinguish for purposes of access between the public and the news media. One exception in criminal cases (another relates to juvenile proceedings) is that in sex offense trials, "the media" are exempt from a provision that allows a judge to exclude the public from a proceeding while a minor sex-offense victim is testifying. 725 ILCS 115-11.

Access to Individuals (parties, witnesses, lawyers, judges and jurors)

There are four basic ways in which information from individuals to the news media is choked off: (1) a "gag order" on the news media that prohibits reporters from talking to sources or publishing information they have; (2) a court order or "gag order" on individuals that limits the information flow in a particular case; (3) a court rule, often called a "no comment" rule, that limits the information flow on an ongoing basis; and (4) an informal court admonition that reinforces for individuals that the court would prefer for them not to talk to the news media.

Of the four, only a gag order on the news media is patently unconstitutional and is seldom attempted. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). Typically, when a court imposes a gag order on individuals involved in a criminal case, the purpose is to curtail

inflammatory rhetoric that might disrupt the judicial process or jeopardize a fair trial. The order may apply to lawyers, parties, witnesses and jurors.

The Illinois Supreme Court has held in a civil case that for a gag order to be valid, the trial judge must specifically find that out-of-court statements pose a "serious and imminent threat to the fairness and integrity of the trial," the gag order must be the least restrictive measure available to preserve the fairness of the trial, and the order cannot be vague or overbroad. *Kemner v. Monsanto Co*., 112 Ill. 2d 223 (1986). It is not clear whether Illinois courts would apply a lesser standard, such as "reasonable likelihood" of prejudicing a fair trial, in criminal cases. See *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991) [no-comment rules applying "substantial likelihood of material prejudice" test in criminal cases are constitutional]; *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) [no-comment rules require "serious and imminent threat" test].

The "no comment" rule exists in Illinois as part of the Rules of Professional Conduct, and limits the types of information lawyers can share with the news media. ILCS S.Ct. Rules of Prof. Conduct RPC Rule 3.6.and 3.8. While the rules do not apply to parties, witnesses or jurors, they prohibit lawyers and prosecutors from making out-of-court statements if the statements "would pose a serious and imminent threat" to the fairness of an adjudicative proceeding. These two rules were amended in 2000 by the Illinois Supreme Court and expanded the definition of extrajudicial statements that are presumptively prejudicial.

Amended Rule 3.8 now holds prosecutors accountable for the extrajudicial statements of others. It states in part that "a prosecutor or other government lawyer in criminal litigation shall exercise reasonable care to prevent *investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an*

extrajudicial statement that the public prosecutor or other government lawyer would be forbidden from making under Rule 3.6." (Emphasis added). Thus, it will now be more difficult for members of the media to perform their news gathering function because prosecutors will undoubtedly impose "blackouts" on information that was readily available in the past.

Amended Rule 3.6, which applies to both prosecutors and defense attorneys, permits lawyers to state without elaboration: "(1) the claim, offense or defense involved, and except when prohibited by law, the identity of the person involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or results of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; (7) in a criminal case (i) the identity, residence, occupation and family status of the accused, (ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person, and (iii) the identity of investigating and arresting officers and agencies and the length of the investigation."

Federal courts have similar rules that limit statements lawyers can make to the news media. See for example, IL R USDCTND Rule 3.6 and IL R USDCTSD Rule 83.3. In a case involving the El Rukn street gang, U.S. District Judge James Holderman recommended a federal inquiry into remarks made to the news media by two defense attorneys on the eve of jury selection. The judge ruled that the statements posed "a serious and imminent threat of interference with the fair administration of justice." *U.S. v. Bingham*, 19 Med.L.Rptr. 1660 (N.D. Ill. 1991).

In Illinois, the Code of Judicial Conduct states that a judge "should abstain from public comment about a pending or impending proceeding in any court" and should require similar abstention by court personnel. The rule also states, however, that a judge is not prohibited from making public statements in the course of official duties or from explaining the procedures of the court. ILCS Code of Jud. Conduct, Cannon 3, S.Ct. Rule 63. Though no Illinois case law elaborates on the limitation, the committee commentary to the rule, found in the pocket part, notes that the rule adapted from the ABA's Canons of Judicial Ethics allows judges to discuss "matters of public record, such as the filing of documents."

Sentencing, Imprisonment and Criminal Records

Sentencing hearings, like pre-trial hearings and trials, are presumptively public. They prompt thorny access questions, however, because in imposing sentences, judges must consider information that would not otherwise be admissible at trials. Some information that judges consider becomes public record by law. In cases of violent crime or driving under the influence in which there is a victim, the "full verbatim record" of the sentencing hearing, including the victim impact statements, is to be public record and filed with the court clerk. 730 ILCS 5/4-1(a)(6) & (c).

Unless it is expressly incorporated into the court record, it is not clear in Illinois if other information considered at sentencing is public on the ground that it went into the judge's sentencing calculus. Pre-sentence reports are the most controversial. They contain information about the defendant's criminal, economic, family, work, mental and personal background, and information about the victim, and are to be considered by the judge before imposing sentence in

all felonies in which the sentence is contested. Illinois law provides that they be "filed of record with the court in a sealed envelope" and open for inspection only for specific purposes, including the imposition of a sentence. 730 ILCS 5/5-3-4. In federal court, pretrial services, information and reports are deemed confidential. U.S. Dist.Ct. Rules N.D.Ill., LCrR46.4. No Illinois case law exists as to whether pre-sentence reports are confidential or whether they become public once they are considered in sentencing or at least to the extent that they are referred to in open court.

Other courts have addressed the issue of access to pre-sentence reports but under different statutory schemes. The Seventh Circuit Court of Appeals has held that the news media must show a "compelling need with sufficient specificity to merit disclosure." The court noted that as to pre-sentence reports, "the public must generally be satisfied with the information, often quite extensive, disclosed during an open sentencing hearing or otherwise obtainable from sources available to the press." *U.S. v. Corbitt*, 879 F.2d 224, 240 (7th Cir. 1989). A different federal circuit reached the opposite conclusion, granting a newspaper access to a pre-sentence report as a means by which the public would become more aware of how sentencing decisions are made. *U.S. v. Schlette*, 842 F.2d 1574, 1583 (9th Cir. 1988). A similar rationale was given to allow access to letters and a psychological report that was considered by a sentencing judge but not a part of the pre-sentence report, *Sarasota Herald Tribune v. Holtzendorf*, 14 Med.L.Rptr. 1063 (Fla.Ct. of Apps. 1987), and to documents filed as part of a sentence reduction hearing. *CBS, Inc. v. U.S. District Court*, 765 F.2d 823 (9th Cir. 1985).

Once a defendant is imprisoned, information that exists in a prison record is treated differently than information available in the court file. The presumption of openness no longer applies. Illinois law expressly states that an inmate's master record file is confidential. 730

ILCS 5/3-5-1(b). Inmates are entitled to visitors and communication through letters. 730 ILCS 5/3-7-2. However, reporters have no greater right of access to them than does the public. *Saxbe v. Washington Post Co*., 417 U.S. 843 (1974).

The Illinois Department of State Police is responsible for accumulating information on people's criminal records, specifically arrests, fingerprints, investigated complaints of domestic violence, charges, convictions, acquittals, sentences and prison service. 20 ILCS 2630/1 et seq. Only conviction information is to be public. 20 ILCS 2630/7 & 20 ILCS 2635/5. The law defines "conviction information" for access purposes as criminal history events directly relating to the conviction, such as the arrest, the charges filed the sentence or fine imposed and all probation, parole and release information. 20 ILCS 2635/2.

Civil Cases

Although the U.S. Supreme Court has not expressly held that the openness presumed in criminal cases is applicable to civil cases, most courts now treat civil cases as being presumptively accessible proceedings. See *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*, 178 F.3d 943 (7th Cir. 1999)["… the parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding."]. The Illinois Supreme Court has also interpreted the "first amendment right of access as requiring a showing of 'compelling' or similar stringent interest to overcome the constitutional right to review records … The mere fact that a person may suffer embarrassment or damage to his reputation as a result of allegations in a pleading does not justify sealing the court file." *Skolnick*

et al. v Altheimer & Gray et al., 191 Ill.2d 214, 730 N.E.2d 4, 246 Ill.Dec. 324 (2000); *Sealed Documents*, 81 Ill. B.J. at 457 nn. 13, 14.

Illinois law identifies generally which civil case documents are to be kept by court clerks as public records available for inspection without fee. They include a general docket (of all suits in the order in which they were filed), a plaintiff's and defendant's index (entered in alphabetical order), a judgment docket (of all final judgments, entered in alphabetical order) and the civil case record.

The public court file consists of the case number, date of filing, plaintiff and defendant names, names and addresses of the attorneys, the name of the judge presiding at each hearing, the date an event occurs, or a paper is filed or an order is signed, all judicial rulings, notations on the hearings and trial proceedings, notations of court costs and "pleadings, documents, orders and other papers." As with criminal court files, the record ("the court file") is kept in the clerk's office except when needed in court or by the judge presiding over the case.

In estate cases, the file is to include an additional record sheet of claims against the estate and a copy of the will, which is to be kept separate from the court file. Adoption case files, juvenile case files and petitions for marriage license orders are to be "impounded." The Illinois Code of Civil Procedure allows parties in a civil case to appear under fictitious names if they show "good cause." Though no other statutory provision specifically allows pleadings or other documents in civil case files to be veiled or sealed, Illinois courts generally have held that a trial court's inherent power to control its files allows it to impound any part of a file in a particular case. Those rulings have been somewhat curtailed by rulings that require courts to consider whether an impoundment order in a civil case promotes a compelling government interest that outweighs the 'heavy presumption' that the order is unconstitutional.

Conclusion

It is not uncommon for court personnel, lawyers and judges to be unclear or misguided about the public's right of access to certain documents or proceedings. As this chapter suggests, the law on access continues to evolve and courts do not always agree on how the balance should be struck between the administration of justice and the public's right to know. The key to keeping the courthouse doors open is an informed and vigilant news media. While some courts have grown accustomed to allowing limitations on access if the litigants agree to restrictions, reporters and news organizations must continue to be assertive and proactive in ensuring that the right of access is expanded and not curtailed.

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Change Number:	2
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Total Editing Time:	2 Minutes
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Number of Pages:	22
Number of Words:	6,548
Number of Characters:	34,116