

ACCESS TO COURT RECORDS

THE BASICS

Access to court records is as important as the right to attend the proceeding itself. Court records may be sealed only by statute or by a court order setting forth findings that (1) there exists an overriding interest supporting sealing; (2) there is a substantial probability the interest will be prejudiced absent sealing; (3) the proposed sealing order is narrowly tailored; and (4) there is no less restrictive means of achieving the overriding interest. (CRC 243.1, 243.2, NBC Subsidiary, Inc. v. Superior Court, 20 Cal.4th 1178 (1999); Copley Press v. Superior Court, 63 Cal.App.4th 367 (1998)). The order must specify the documents and pages, or portions of pages, that are to be sealed. Sealed records may be reviewed only upon an order of the court.

- Material not introduced in, or filed with the court is not public. Court records are not covered by the California Public Records Act. Thus, the Act's provisions on access, time, and cost do not apply.

WHAT'S OPEN

Anyone is entitled to see any evidence introduced in open court and any unsealed court record (including transcripts) in the court file. No fee is required to view records, but there may be a fee for copies.

- Criminal: Executed search and arrest warrants after the 10th day after issuance (Penal Code §1534); grand jury testimony that resulted in an indictment after 10 days following delivery of the transcript to the defendant; (Penal Code §938.1) probation officer reports for the 60 days following sentencing or grant of probation (Penal Code §1203.05); old probation reports when the subject is charged with a new crime; written victim statements (Penal Code §1191.15) after sentence is entered.
- Civil: Settlement agreements that are filed in court. A party seeking to keep an agreement secret must show that the need for secrecy outweighs the presumption of public access (Matter of Hearst, 67 Cal.App.3d 777 (1997)). If a party to the settlement is a public agency, the settlement is public under the Public Records Act (Govt. Code §6254(b)); Freedom Newspapers v. County of Orange, 158 Cal.App.3d 893 (1984)).

Note: A defendant's right to a fair trial is not the only reason to seal a record.

WHAT'S CLOSED

Criminal: Records of **grand juries** that do not enter an indictment (Penal Code §924.6); **juvenile court** records (Welf. & Inst. Code §827), except some records when minors escape detention facilities (Welf. & Inst. Code §828), and after a §602 petition has been sustained for a Welf. & Inst. Code §676(a) offense; **pre-sentencing mental evaluation records** (Penal Code §1203.03) [the contents may be in Probation Officer Reports]; **indigent applications** (Penal Code §987.9); any record for which the court finds disclosure would jeopardize a defendant's right to a fair trial.

Civil examples: **Adoption records** (Fam. Code §9200); **trade secret information** (Civ. Code §3426.5); **civil attachment records** for 30 days upon request of the plaintiff (Civ. Proc. Code §482.050); **discovery records** such as deposition transcripts, interrogatory answers and other documents obtained in discovery, until filed in court records or introduced in evidence. But a party may be willing to share them.

WHAT TO DO ABOUT CLOSED RECORDS

1. Protest stipulations to seal by asking the court's permission to speak and saying:

"The right to open court records belongs to the public, not the parties. Access to court records may be limited only by statute [or in a criminal case by proof that there is an overriding interest to support sealing]. (NBC Subsidiary v. Superior Court, 20 Cal.4th 1178 (1999); Copley Press v. Superior Court, 63 Cal.App.4th 367 (1998)). I request that the records not be sealed without a hearing."

2. And, if you intend to have your lawyer involved:
"I request that the court set a hearing and permit my counsel to appear, to file opposition to the sealing of the records."

3. If a clerk says records are sealed, ask for the order.

4. If a settlement is secret, you can file a protest if the settlement is filed in court. If a public agency is a party, the settlement is public under the Public Records Act.

5. Write a story or Letter to the Editor.

A POCKET GUIDE TO ACCESS TO COURTS AND COURT RECORDS IN CALIFORNIA

A SERVICE OF:
**THE FIRST AMENDMENT PROJECT
SOCIETY OF PROFESSIONAL
JOURNALISTS (Nor. Cal.)**

HOW TO USE THIS GUIDE

This pocket guide is intended to be a quick reference and provide general information to journalists and citizens. It addresses some common court access problems, but does not substitute for research or consultation with a lawyer on detailed questions. This guide current as of December 3, 2003.

FOR MORE INFORMATION OR HELP:

FIRST AMENDMENT PROJECT.....510/208-7744
www.thefirstamendment.org

California First Amendment Coalition.....415/460-5060
www.cfac.org

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ACCESS TO COURT PROCEEDINGS

THE BASICS

The First Amendment right of free speech carries with it the right to listen. Therefore, court proceedings are presumed open, unless specifically closed by law or a party proves that an overriding interest in justice requires closure. (*Richmond Newspapers, Inc. v. Virginia*, 44 U.S. 555 (1980); *Globe Newspapers v. Superior Court*, 457 U.S. 596 (1982); *NBC Subsidiary Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999)).

WHAT'S OPEN

Criminal: All stages, from arraignment and bail hearings to change-of-plea hearings, pre-trial motions, jury selection, trial, and sentencing are presumed open. A proceeding may be closed if the court finds, on the public record, that the defendant's constitutional right to a fair trial is threatened. The defendant must prove that closure is required because "substantial probability" exists that a fair trial will be impaired, that any closure or gag order will be effective, and that there is no alternative. (*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Press-Enterprise v. Superior Court*, 464 US 501 (1984); *Press-Enterprise v. Superior Court*, 478 US 1 (1986)).

Civil: All court proceedings, including court hearings on discovery and pre-trial motions are presumed open. To close a proceeding, the court must find that (1) limiting public access serves an overriding interest; (2) there is a substantial probability that interest will be prejudiced without closure; (3) the closure order is narrowly constructed to serve that interest; and (4) there is no less restrictive way to protect that interest. The order to close a proceeding must state the factual and legal bases on the record. (*NBC Subsidiary, Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999) CRC 243.1) The court must give public notice that it intends to hold a hearing before closing a courtroom.

Note: In both criminal and civil matters, judges have wide discretion to impose gag orders on court personnel and trial participants such as parties and their lawyers.

WHAT'S CLOSED

General

- **side bar or in-chambers conferences**, although transcripts of proceedings are usually available.
- **settlement conferences** including mediation and arbitration hearings.

Criminal

- **juvenile proceedings**, unless the minor (a) is charged with specified violent crimes or (b) asks the court to open the hearing. The court is also closed if the crime is a sex offense and the victim requests a closed hearing, or during victim's testimony if the victim is under age 16. (*Welfare & Inst. Code §676*)

Civil

- many **family law proceedings**, e.g., adoption, visitation, custody, annulment, child support.
- **mental competency hearings** for involuntary commitment, unless a party asks that the hearing be open. (*Civ. Code §5118*)
- out of court **discovery** such as depositions, interrogatories and document productions. (*Seattle Times v. Rhinehart*, 467 U.S. 20 (1984))

RECORDING OR BROADCASTING IN COURT

Court proceedings may not be photographed, recorded or broadcast without a court order. (CRC 980). This rule has been applied to prohibit photography, recording and broadcast anywhere in the courthouse, not just within courtrooms, without court permission. Absent good cause for a shorter time period, a written request (Form MC-500 or local court form) must be made five days in advance. Inconspicuous personal recording devices are allowed with advance permission from the judge for the purpose of taking personal notes.

- No coverage is allowed for closed or "in chamber" proceedings, jury selection, jurors or spectators, or any conferences among counsel, between attorney and client or witness, or at the bench.
- The Court has discretion to limit or deny coverage and may require pooling.

Limitations: Limit of one still and one TV camera, unless judge allows more. Flashes and lights are prohibited. Judge decides placement in courtroom.

WHAT TO DO ABOUT CLOSED PROCEEDINGS

1. If you are in a courtroom, stand and say:
"I respectfully protest closure of this proceeding. The U.S. and California Supreme Courts have ruled that the First Amendment forbids exclusion of the public from pretrial and trial proceedings, without findings of fact identifying the overriding interest to be protected and the necessity of closure to protect that interest. The courts have also ruled openness is a constitutional presumption. More than speculation or a conclusory assertion of harm is required to justify closure. I ask that the court follow the ruling of:"

(FOR CRIMINAL PRETRIALS)

"Press Enterprise v. Superior Court, 464 US 1"

(FOR CRIMINAL JURY SELECTION)

"Press Enterprise v. Superior Court, 478 US 501"

(FOR CRIMINAL TRIALS)

"Richmond Newspapers v. Virginia, 448 US 555"

(FOR CIVIL TRIALS)

"NBC Subsidiary, Inc. v. Superior Court, 20 Cal. 4th 1178"

2. And, if you intend to involve your lawyer:
"I request that the court delay further proceedings to allow time for counsel to appear and file opposition to closure."
3. If the court door is closed, have a letter with language similar to 1 and/or 2 above delivered immediately to the bailiff or clerk.
4. Write a story or letter to the editor about the closure.