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The Public's Right of Access to "Some Kind of Hearing": Creating Policies that Protect the Right to Observe Agency Hearings

*Christopher B. McNeil**

In the fall of 2006, a Cincinnati, Ohio, foster care couple caring for a three-year-old developmentally disabled boy bound him with duct tape, wrapped him in a blanket, and left him in a closet for three days while the couple attended a family reunion.¹ After they returned, they found him dead and disposed of his body by burning it in an incinerator, while publicly claiming the child had wandered off during an outing.² In the investigation and murder trial that followed, it became clear that the foster care agency that had placed the child in this home would be charged by the state department that regulates foster agencies in Ohio.³

The public response to news of the murder generated an unusual amount of interest in the department's administrative

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1. Associated Press, *Foster Mother Gets 54 Years in Toddler's Death*, MSNBC, Feb. 22, 2007, <http://www.msnbc.msn.com/id/17264173/>; Associated Press, *Police: 'Missing' Toddler Killed By Foster Parents*, FOX 11 KRXI RENO, Aug. 29, 2006, <http://www.foxreno.com/news/9753080/detail.html>.

2. Barrett J. Brunsman, *Jury Rejects Carroll's Plea*, THE ENQUIRER (Cincinnati), Feb. 21, 2007, <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20070221/NEWS01/702210338>.

3. Editorial, *Report's Criticisms of Lifeway for Youth*, THE ENQUIRER (Cincinnati), Nov. 28, 2006, <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20061128/NEWS01/611280395/-1/newsmarcus>.

hearing. How could the private foster care agency have permitted a vulnerable child to be placed with a couple who could do such a horrible thing? What kind of protections are in place to make sure such an agency is taking all appropriate steps to screen potential foster parents? These issues captured the attention of the press and public interest groups throughout the nation during the weeks that led up to the hearing on the department's charges against the foster care agency.

It is perhaps an understatement to observe that the typical administrative hearing garners little or no media attention; agency hearings tend to be either highly technical (like the setting of Medicaid reimbursement rates for nursing home providers) or short and boring (like the batch of fifty separate challenges to parking citations issued by Chicago transit officers in any given morning in the city's Office of Administrative Hearings). In addition, many hearings conducted by state administrative agencies have statutorily created barriers to public access. In the foster care agency case, for example, Ohio law prohibits the release of the identities of foster care applicants and providers.⁴ As a result, there were motions seeking protective orders that barred the public identification of those persons who had been screened by the foster care agency. Similarly, it is not unusual, particularly in industrial or utility rate cases, or in other administrative action involving closely held trade secrets, to find one or more of the parties demanding the sealing of records and the closure of evidentiary hearings, prohibiting public access to the hearing.

Agency adjudications are not trials; they are an expedient alternative employed because the subject matter is better suited to executive branch decision-making than adjudication by a jury or a trial court judge. There are no juries in agency hearings; the judges are not part of the judicial branch of government; and in many cases the agency that investigated and prosecuted the case also hired, trained, supervises, and can fire the person who will preside over the fact-finding process. Due process requires the agency provide the litigants with "some kind of hearing," but there is no right to the full range of protections afforded to civil or

4. OHIO REV. CODE ANN. § 5153.17 (LexisNexis 2007).

criminal litigants in judicial proceedings.⁵ Agency hearings lack the formality of judicially controlled trials, frequently permitting hearsay and other evidence that would be excluded during civil or criminal trials conducted by judicial branch courts. Also, through the strength of sheer volume alone, the public tends to be wholly uninterested in the process, at least until something like the foster care agency case attracts national media attention.

Compared to trials, particularly criminal trials involving highly publicized crimes, media attention given agency hearings generally pales in comparison. It is probably true that in the main, few trial courts are so frequently confronted with high-profile cases as to cause much concern about how to balance a litigant's right to due process and a fair trial with First Amendment rights of access to judicial proceedings. Nevertheless, high-profile cases do arise from time to time, and in response many courts have rules in place that have been designed to strike the right balance between access and a fair trial. But what happens when the tribunal is part of the executive branch of government? Do the rules change when the proceedings are conducted by an administrative agency instead of a judicial branch court?

While the high-profile administrative hearing may be rare, there is still a need to ensure both a fair hearing and a hearing that is open to the public. What follows is a review of the law applicable to public access of agency-run hearings. While staying clear of the more state-specific open meetings and public records laws, this Article considers the balance between First Amendment provisions guaranteeing media access to executive branch evidentiary hearings on the one hand, and due process protections for the litigants in those hearings on the other hand. It surveys existing judicial branch media access laws and policies, and notes how judicial branch trials differ from agency-run hearings. Taking those differences into account, it concludes with a model set of public access rules for administrative adjudicators for use in high-profile hearings.

5. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1275 (1975) (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

I. WHAT MAKES ADMINISTRATIVE HEARINGS DIFFERENT FROM COURT TRIALS?

If the question was largely an academic one at the start of the new millennium, its character changed significantly after the attacks of September 11th and the subsequent United States military detention of persons identified as enemy combatants at Guantanamo Bay, Cuba. In a few short years, our interest in how the executive branch conducts quasi-judicial hearings has sharpened, piqued by governmental limitations placed on access to adjudicative hearings both at home and abroad. Just how public does an administrative hearing have to be? What rights of access apply when the interests being litigated are limited to those wholly within the authority of a regulatory body? Does an agency have an obligation to balance participant privacy rights against public access rights? Do “open meetings” laws that apply when agencies, boards, and commissions conduct public business also apply when they conduct evidentiary hearings? Are there benchmarks of fair and effective media relations policies, standards that governmental agencies should consider adopting when anticipating the role of the media in the operation of administrative adjudications?

In many respects, media policies that have been developed by judicial branch courts would seem to serve as appropriate templates for executive branch adjudicators. There are, however, some differences to consider. Agency hearings are conducted without juries, so an agency media policy can be crafted without standards for how the media will interact with prospective or impaneled jurors. Agency adjudicators generally lack the power to enforce a contempt citation, raising questions of whether an agency can hold media representatives accountable for acts that violate the agency’s media policies. Further, administrative hearings tend to be civil in nature. To the extent an agency bases its media policies on models implemented by trial courts (models that likely accommodate interests of persons charged with crimes), the agency’s policies may need to be adjusted to grant greater access than that of the trial court. Despite these differences, the question remains: how can we balance First Amendment interests in an open hearing against the tendency of executive adjudicators to operate in a relatively controlled and oftentimes closed environment?

II. APPLYING FIRST AMENDMENT ACCESS RIGHTS TO EXECUTIVE BRANCH HEARINGS

It is true that most of the case law describing the rights of access under the First Amendment arises in the context of judicial proceedings, not proceedings conducted by executive branch adjudicators. This distinction was not lost on the Department of Justice when it argued in post-9/11 deportation proceedings that “the political branches of government are completely immune from the First Amendment guarantee of access.”⁶ The argument failed both times it was used,⁷ but the fact that such a claim was raised suggests that some care needs to be taken when applying the judicial trial access doctrine to executive branch hearings.

It is also true that the right of access to executive branch activity may flow from more than one source. When a state regulatory board meets, for example, state open meetings laws generally ensure the right of access, subject to statutorily granted restrictions (such as the ability to close a board meeting to the public and go into executive session to discuss pending litigation).⁸ These laws may be of limited relevance, however, if the executive agency delegates its power to adjudicate a claim—as when it relies upon an administrative law judge (ALJ) or hearing officer. Open meetings laws typically apply only when a majority of the members of the board or commission meet.⁹ An executive agency, board, or commission can avoid the application of state open meetings laws simply by delegating their fact-finding authority to a proxy, usually an employee or person under a contract, who is given the power to preside over the evidentiary hearing.

6. Comm. on Commc'ns & Media Law, Ass'n of the Bar of the City of N.Y., “*If It Walks, Talks and Squawks . . .*” *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L.J. 21, 38 (2005) (citing *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002)).

7. *Id.* See also *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 201, 208–09 (3d Cir. 2002).

8. See *Gannett Pac. Corp. v. City of Asheville*, 632 S.E.2d 586 (N.C. App. 2006) (discussing closure to the public of a meeting of the City Council to discuss water supply agreement and possible litigation over North Carolina General Statutes section 143-318.11(a)(3)).

9. *Id.*

The First Amendment access doctrine is the appropriate starting point when crafting any media relations policy, whether for a judicial branch court or for proceedings conducted by administrative agencies. Whether the public's "qualified right of access"¹⁰ may be restricted requires an analysis articulated in a line of cases that started in 1980 with *Richmond Newspapers*¹¹ (guaranteeing under the First Amendment the right to attend criminal trials). The series of cases end in 1986 with *Press-Enterprise II*,¹² in which the Court extended the right of access to preliminary proceedings in addition to trials, and introduced a two-part test considering whether "the place and process have historically been open to the press and the general public," and whether "public access plays a significant positive role in the functioning of the particular process in question."¹³ In between these benchmarks, the Court held in *Globe Newspaper*¹⁴ that a court's restrictions on public access to criminal proceedings can be justified only upon proof of a "compelling governmental interest," and such prohibitions could impose only those restrictions that are "narrowly tailored to serve that interest."¹⁵ It also extended the doctrine beyond the criminal trial *per se*, applying First Amendment media access rights in *Press-Enterprises I*¹⁶ in the context of the voir dire segment of criminal proceedings.¹⁷

III. TESTS USED WHEN BALANCING ACCESS AND DUE PROCESS

Media policies that restrict public access in the context of judicial branch proceedings thus are subject to four tests. First, when evaluating restrictive media policies, the court must determine whether an open proceeding is "substantially likely to

10. Comm. on Commc'ns & Media Law, *supra* note 6, at 37.

11. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

12. *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986).

13. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002) (citing *Press-Enterprise II*, 478 U.S. at 8).

14. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

15. Comm. on Commc'ns & Media Law, *supra* note 6, at 33-34 (citing *Globe Newspaper*, 457 U.S. at 606-07).

16. *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984).

17. Comm. on Commc'ns & Media Law, *supra* note 6, at 33-34.

prejudice another transcendent value.”¹⁸ Second, if the court is satisfied that such prejudice is likely, it must determine “whether any alternative exists to avoid that prejudice without limiting public access.”¹⁹ Third, if no such alternative exists, the court must determine “whether the limitation of access is narrowed (in scope and time) to the minimum necessary.”²⁰ Fourth, the court must determine “whether the limitation of access effectively avoids the prejudice it is intended to address.”²¹

Consider, for example, the case where claimants seeking unemployment compensation convinced the ALJ to close the evidentiary hearing on their claims. Here, the claimants were two attorneys who resigned from positions with the New York Attorney General’s office, claiming that their continued involvement in a political corruption investigation would have violated their duties under the New York Code of Professional Responsibility.²² When a newspaper reporter challenged the closure order, the ALJ responded that it was a misdemeanor for an officer or employee to disclose information obtained in these hearings “without authority of the commissioner or otherwise required by law.”²³ Conducting a statutory analysis and not relying on any constitutional authority,²⁴ the court held the ALJ erred in closing the hearing without first allowing the newspaper an opportunity to be heard on the question, and without conducting an examination into “whether compelling reasons existed for closure of any portion of the hearing.”²⁵

On the other hand, where there is no common law or statutory right of access, as was the case with professional disciplinary

18. *Id.* at 36 (citing *Press-Enterprise I*, 464 U.S. at 510; *Globe Newspaper*, 457 U.S. at 606–07).

19. *Id.* (citing *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 14 (1986); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984)).

20. *Id.* (citing *Press-Enterprise I*, 464 U.S. at 510; *United States v. Antar*, 38 F.3d 1348, 1363 (3d Cir. 1994)).

21. *Id.* (citing *Globe Newspaper*, 457 U.S. at 609–10; *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976); *In re Charlotte Observer*, 882 F.2d 850, 854–55 (4th Cir. 1989)).

22. *Herald Co., Inc. v. Weisenberg*, 452 N.E.2d 1190 (N.Y. 1983).

23. *Id.* at 1192.

24. *Id.* at 1191 (refusing to consider the newspaper’s First Amendment arguments raised for the first time on appeal).

25. *Id.* at 1193.

proceedings for teachers in New York, the constitutional analysis for public access to disciplinary hearings follows the rationale found in *Press-Enterprise Co. I* and *II*.²⁶ Noting that historically teacher disciplinary hearings were closed to the public in New York, the Court of Appeal concluded that the trial court correctly found there was no First Amendment right of access because "there is no suggestion that professional disciplinary hearings have any tradition of being open to the public and no showing that the public access plays 'a significant positive role' in the functioning of the proceedings."²⁷

Note that courts distinguish between the fact-finding part of an agency's evidentiary hearing and the deliberative process that follows such a hearing.²⁸ While fact-finding may resemble the trial, an agency's deliberation over the evidence resembles the jury deliberation and may be closed to the public. Rejecting the newspaper's claim of a First Amendment right to observe the deliberations of a disciplinary board after the fact-finding process ended, the court held that "[n]one of the cases cited by the media on the right of access, however, extends that right to judicial, jury, or administrative deliberations. . . . Further, the Supreme Court has long recognized a general bar against probing 'mental processes' of administrative decision-makers."²⁹

Consider also the tension between First Amendment access interests and the need for secrecy founded on grounds of public safety. While applying the same tests under *Richmond Newspapers*, two federal appellate courts have reached significantly different conclusions about the need for public access to administrative hearings conducted by the federal Immigration Court. In response to the attacks of September 11th, Chief U.S. Immigration Judge Michael Creppy issued a directive that required all immigration judges to "hold hearings individually, to close the hearings to the

26. *Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1046 (N.Y. 1990).

27. *Id.* at 1049 (citing *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II)*, 478 U.S. 1, 8 (1986)).

28. *See, e.g., Marion County Sheriff's Merit Bd. v. Peoples Broad. Corp.*, 547 N.E.2d 235 (Ind. 1989).

29. *Id.* at 240 (citing *United States v. Morgan*, 313 U.S. 409, 422 (1971); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 577 (D. Utah 1985), *appeal dismissed*, 832 F.2d 1180 (10th Cir. 1987) ("The Constitution is not . . . a Freedom of Information Act.")).

public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.”³⁰ This meant no family members, no press, no outside observers—even the court’s docket was closed to the public so that no outside observers would know the names of persons whose cases were being heard on any given day.³¹ Newspapers challenged the closure of immigration hearings in both the Sixth Circuit, in *Detroit Free Press v. Ashcroft*,³² and in the Third Circuit, in *North Jersey Media Group v. Ashcroft*.³³ Both courts agreed that the constitutional analysis found in *Richmond Newspapers* applies to administrative hearings conducted by the Immigration Court, with the Sixth Circuit making it plain that the *Richmond* analysis applies to quasi-judicial proceedings like those that are conducted by the executive branch.³⁴ The appellate courts differed, however, on the degree of access immigration courts historically tolerated and on the intrinsic value of openness in immigration proceedings.

The Sixth Circuit found the history of access to immigration hearings was sufficient to meet the *Richmond* test requiring open access, whereas the Third Circuit found the history to be lacking, holding that “[n]ewspapers cannot claim a general First Amendment right to government proceedings without urging a judicially-imposed revolution in the administrative state.”³⁵ The Sixth Circuit was particularly expressive in condemning the government’s position, writing:

The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in

30. C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW § 10.04 (2005) (citing *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 952 n.7 (E.D. Mich.), *aff’d*, 303 F.3d 681 (6th Cir. 2002)).

31. *Id.*

32. 195 F. Supp. 2d 937.

33. 205 F. Supp. 2d 288 (D. N.J.), *rev’d*, 308 F.3d 198 (3d Cir. 2002).

34. DIENES ET AL., *supra* note 30, at § 10.04 (citing *Detroit Free Press*, 303 F.3d at 694–95).

35. *Id.* (citing *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696 (6th Cir. 2002)).

deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.³⁶

In a 2–1 decision (with Judge Scirica dissenting), the Third Circuit found the Immigration Court's history of public access insufficient to give rise to a First Amendment right of access.³⁷ Beyond that, the court reasoned that in this context the court's "logic" test could not be met. Drawing from both *Richmond* and *Press-Enterprise II*, the court observed that "[t]he logic test compels us to consider 'whether public access plays a significant positive role in the functioning of the particular process in question.'"³⁸ It recalled "six values typically served by openness":

[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury.³⁹

While the court agreed with the Sixth Circuit that open access to immigration proceedings "performs each of these salutary functions,"⁴⁰ the court held that "that cannot be the story's end, for to gauge accurately whether a role is positive, the calculus must perforce take account of the flip side—the extent to which openness impairs the public good."⁴¹ Finding that "open

36. *Id.*

37. *Id.*

38. *N. Jersey Media Group*, 308 F.3d at 216 (quoting *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986)).

39. *Id.* at 217 (quoting *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994)).

40. *Id.*

41. *Id.*

deportation hearings would threaten national security," the court rejected the newspaper's First Amendment claim.⁴²

Also noteworthy is the difference in each court's approach to the media policy imposed by the Chief Immigration Judge. The Third Circuit relied upon the declaration of Dale Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence, who convinced the court that there could be no case-by-case determination of whether access needed to be limited. In his declaration, Watson stated that "the government cannot proceed to close hearings on a case-by-case basis, as the identification of certain cases for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure."⁴³ Without much critical analysis, the Third Circuit appears to have accepted this premise, writing that "[t]hese officials believe that closure of special interest hearings is necessary to advance these goals, and their concerns, as expressed in the Watson Declaration, have gone un rebutted. To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them."⁴⁴

The Sixth Circuit, on the other hand, found that the very broad directive from the Chief Immigration Judge lacked the requisite case-specific analysis: "The directive is over-inclusive by categorically and completely closing all special interest hearings without demonstrating, beyond speculation, that such a closure is absolutely necessary."⁴⁵

IV. CREATING EFFECTIVE MEDIA POLICIES

To be effective, media policies must not only anticipate the tests courts will use when those policies are challenged, but also squarely address the practical concerns likely to be raised by the media and the public. Those concerns are not static; they change with the public's interest in a given proceeding. Media policies thus tend to provide one set of rules for day-to-day business and

42. *Id.*

43. *Id.*

44. *Id.* at 219.

45. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710 (6th Cir. 2002).

another set of rules for use with high-profile cases. For example, when planning for the needs of the public and the media in federal criminal proceedings against Lewis Libby, the district court recognized that the trial “has generated widespread public and media interest,” in part due to the possibility that Vice President Cheney and commentator Tim Russert might be called as witnesses.⁴⁶ After receiving over one hundred requests for press credentials, the trial court permitted only two journalists to be present in the courtroom during voir dire. The court, however, also created a Media Center, where credentialed journalists could view the proceedings in their entirety (including jury selection), through live closed circuit video and audio feeds (although recording was not permitted).⁴⁷ The court denied a request for audio recordings of the daily proceedings, stating that it historically has made no audio recordings of any of the proceedings of such trials, and noting the restrictions applicable under the Judiciary Policies of the Judicial Conference of the United States.⁴⁸

The court’s approach was thus consistent with the commentary supplementing the “cameras in the courtroom” policy found in the General Management and Administration section of the Guide to Judiciary Policies and Procedures used by federal judges. The commentary notes a distinction between the use of cameras during ceremonial proceedings (where cameras are generally permitted) and during non-ceremonial proceedings. During non-ceremonial proceedings, cameras may be utilized “only for the limited purposes specified in the policy statement: presentation of evidence, perpetuation of the record, security, other purposes of judicial administration, and the photographing, recording, or broadcasting of appellate arguments.”⁴⁹ As the Guide explains,

Except with respect to ceremonial proceedings and appellate proceedings, the Conference policy does not authorize the contemporaneous photographing, recording, or broadcasting of proceedings from the courtroom to the

46. *United States v. I. Lewis Libby*, No. 07-0002 (RBW), slip op. at 1, 6 (D.D.C. Jan. 9, 2007), available at <http://www.spj.org/pdf/libby/LibbyOrder.pdf>.

47. *Id.* at 2.

48. *Id.*

49. ADMINISTRATIVE OFFICES OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES ch. 3, pt. E (2001) (on file with author).

public beyond the courthouse walls. The Judicial Conference remains of the view that it would not be appropriate to require all non-ceremonial proceedings to be subject to media broadcasting.⁵⁰

V. THE HIGH-PROFILE CASE

What makes a case a high-profile case? A precise definition might be neither possible nor necessary. A survey of state media access policies suggests that state trial courts frequently establish standards for day-to-day media access to judicial proceedings, while often creating a second-tier set of protocols for use in high-profile cases.⁵¹ One example comes from Lake County, Ohio, which has a Media Relations and Public Access Plan.⁵² In this plan, the court defined “special interest” or “high-profile” cases as involving one or more of the following:

The interest of a fair trial for the litigants is jeopardized in any way.

The security and decorum of the court are in jeopardy.

The news media directly or indirectly interferes with the court's daily function and purpose.

The court's facilities are, or foreseeably will be, overburdened.

50. *Id.*

51. Media policies considered for this analysis were from the following courts: COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO, MEDIA RELATIONS AND PUBLIC ACCESS PLAN (Apr. 1, 2005), available at <http://www2.lakecountyohio.org/courts/images/Lake%20County%20Common%20Pleas%20Court%20Media%20Plan%20Eff%204-1-05.pdf>; SUPERIOR COURT OF CAL., COUNTY OF KINGS, MEDIA PLAN FOR SUPERIOR COURT HIGH PROFILE CASES (July 2005), available at <http://www.kings.courts.ca.gov/News%20and%20Media/NM%20Docs/PressMediaPlan%20Rev%207.05.pdf>; California Courts, Photographing, Recording, and Broadcasting in the Courtroom, § B, R. 980 (Jan. 1, 1997), available at <http://www.courtinfo.ca.gov/reference/cameras-toc.htm>; Seventh Judicial Cir. Court of Fla., Media Procedures for Special Interest/High-Profile Proceedings (June 15, 2007), available at <http://www.circuit7.org/Communications/mediaguidelines.html>; Tenth Judicial Cir. Court of Fla., Procedures for Special Interest/High Profile Proceedings, Admin. Order No. 1-19.0 (Aug. 11, 1994), available at <http://www.jud10.org/AdministrativeOrders/orders/Section1/1-19.0.htm>; U.S. Dist. Court, Dist. of Alaska, Media Guide (Jan. 2005), available at http://www.akd.uscourts.gov/reference/general/media_guide.pdf.

52. COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO, *supra* note 51.

The administration of the court and of justice would be best served by implementing this media plan.

It appears to the public that the court is not being administered fairly and efficiently.⁵³

It is not always easy to predict, however, when a case will become "high-profile," nor is it necessarily essential to define with real precision what constitutes a high-profile case. Administrative hearings generally attract very little media attention. As such, if a reporter shows up at an administrative hearing, that by itself may suggest the case is, or could become, of great public interest, warranting the use of procedures designed to ensure reasonable access to the proceedings. Over time, this lack of media attention may have created a culture of insulation in state agencies, in which by rule or practice the agency deems it prudent to close its evidentiary hearings to the public. While this might be understandable, it is based on a premise that perhaps will not withstand close judicial scrutiny. What would happen, for example, if a state agency regulating nuclear power plant applications determined that trade secret laws and homeland security regulations required the closure of the fact-finding hearings associated with the licensing process?

It is generally true that agency adjudications are not "public meetings," at least in those cases where the adjudicator is an administrative law judge, hearing examiner, or other delegated fact-finder. (If the agency is a board or commission, such as a state board regulating the practice of dentistry, in which board members themselves hear the evidence, then the applicable open meetings law may well apply.) The implication here is that while the parties to a fact-finding hearing would be given advance notice of a scheduled evidentiary hearing, there would be no notice akin to that given when the agency engages in rulemaking. Thus, a hearing that might otherwise attract a significant amount of public interest or media attention might proceed undetected by the press.

It is also true that state public records laws might not apply, at least not to the hearing itself. While the state agency prosecuting the case may well be within the scope of the state's open records laws (because the agency is the records custodian), the same

53. *Id.* § 5.1.6.

cannot always be said of the agency's adjudicator—who may be a contractor or part of a separate office of administrative hearings, whose duties do not include maintaining the records found within the scope of the state public records laws. Further, patient and other privacy protection rights may apply, constituting a substantial barrier to open access to both testimonial and documentary evidence being introduced at an agency hearing. (In the case involving the foster care agency, the state's position had been that foster care parent privacy rights were so pervasive under state law that even the hearing examiner assigned to the case would not be permitted to see the records maintained by the foster care agency or the department—a position that did not survive a challenge by the foster care agency.) As a result, the documents used as exhibits in an evidentiary hearing might not be available to the public, at least not until they are admitted as exhibits in the hearing, and a public record is made of those exhibits.

While the draft model that follows includes a definition of a "high-profile case," the policies themselves need not be limited to cases that attract national attention. Rather, the policies should be available whenever there is abnormal interest on the part of the public—interest that may be indicated by the presence of the press or simply by members of the public who have decided to spend their time attending an agency's evidentiary hearing.

Once the media plan describes the conditions that trigger "high-profile" measures, there generally is a provision for the exercise of discretion in how media access will be controlled—discretion by the presiding judge, the chief or administrative judge, the court press officer, the court administrator, or some other person appointed specifically as a liaison between the court and the media. Thus, if an administrative agency is to successfully craft a media plan based on judicial models, it would need to determine what conditions must exist to warrant these controls over the presumptively public hearing and who within the agency will decide whether those conditions exist in a particular case.

VI. ESSENTIAL ELEMENTS OF A HIGH-PROFILE AGENCY ADJUDICATION MEDIA PLAN

After identifying what constitutes a “high-profile” case and determining who will invoke media access controls in high-profile cases, judicial plans typically address six areas: (1) physical access to the courtroom structure (ways in, ways out, use of hallways, chambers, and courtrooms); (2) sharing or pooling of equipment; (3) issuance of press credentials; (4) restrictions on electronic monitoring and recording; (5) communication with the presiding officer; and (6) courthouse safety and security issues. Many plans also call for collaboration among stakeholders, where the court enlists members of the press, the public, the legal community, courtroom security officers, and others, to help fine-tune media policies long before a high-profile case arises.

While each of these factors needs to be considered in the context of administrative hearings, some thought must be given to the differences between hearings conducted by executive agencies and trials conducted by trial judges in the judicial branch. Unlike proceedings conducted before trial courts, many agency hearings are held in spaces dramatically different from local courtrooms. In states where there is a centralized office of administrative hearings, like the one in Hunt Valley, Maryland, the physical structure looks very much like a courthouse with a series of very small hearing rooms, few of which would actually accommodate more than a handful of people at any one time. More common, however, is the hearing conducted not in an office of administrative hearings, but by the agency itself, frequently well within the bowels of the agency’s administrative offices.

It is not at all uncommon, for instance, to find a hearing on whether a truck driver will lose his or her commercial driver’s license (CDL) being conducted in an office of the State Department of Motor Vehicles. The normal, garden variety CDL disqualification hearing garners virtually no attention, and the matter can be disposed of quickly and efficiently. If, on the other hand, the case has caught the attention of advocacy groups intent on drawing attention to the need for changes in state DUI laws (perhaps it involves an incident where the driver is a repeat DUI offender and Mothers Against Drunk Driving is bringing victims

and the press to the hearing), one can anticipate the need for control over the hearing room.

Also noteworthy is the frequent lack of security, where in the ordinary course of a day's hearing there may be several dozen litigants filing in and out of a hearing room under conditions that resemble not so much a trial but a casting call. Agency adjudicators need to be able to plan for the exceptional case, where the issues are highly charged and have garnered demands for public or media access. While courts may have developed protocols for these exceptional cases, few agencies know to do so. One has only to recall the national press coverage of the hearings conducted before the administrative agency responsible for reviewing challenges to vote counts in the various Florida counties during the 2000 presidential election to be reminded of how ill-suited many of these hearing rooms are for handling high-profile cases.

VII. APPLYING MODELS OF COURT MEDIA PLANS TO ADMINISTRATIVE ADJUDICATION

If one were to draw the best practices in use from judicial branch courts, intending to apply those practices to help create media policies for use by administrative agencies, some care would need to be taken. First, we would need to recognize that agencies may lack a solid understanding of the obligation to balance due process and free speech rights. After all, courts are very familiar with these terms, but agencies encounter them only when they engage in adjudication (which in some agencies may happen only rarely). Second, we should understand that due process protections are fluid, not fixed. A licensee facing the revocation of his or her license is not entitled to a jury, or in many cases to discovery. While judicial branch courts must safeguard a criminal defendant's right to empanel a qualified jury, no such right extends to the licensee. As a result, media access plans need to take into account the nature of the rights at stake in an administrative hearing. And third, we should recognize and accept the obligation to work towards keeping agency adjudications open. Even in the context of agency adjudications, the presumption is that the proceeding should be open and accessible to the public and the media. As the district court noted in deciding access rights in the context of

immigration hearings, “there are two broad categories of exceptions to the practice of openness in the courtroom: those based on the need to keep order and dignity in the courtroom, and those which center on the content of the information to be disclosed to the public.”⁵⁴ Only “the most compelling reasons” can justify closure based on the content of the information being disclosed during an administrative hearing.⁵⁵ While there does not appear to be one set standard for when an administrative proceeding needs the benefit of a policy that balances due process rights with public access rights, adjudicators should be mindful of the nature and intensity of media attention when designing a policy for high-profile administrative hearings.

In addition, these public access rules need to take into account specific privacy protections that may exist—such as statutes that restrict the disclosure of complainant identities in medical licensing cases or limit the public’s access to records in cases involving foster care or adoption agencies. The policies also have to recognize (and not contradict) existing laws providing for accommodating persons with disabilities and similar public access requirements.

It should also be noted that the media is not some alien outlier here. While a high-profile case may cause outside journalists to pay attention to a local administrative hearing, rules for public access need to be designed for the public—including friends and family, Internet bloggers, local and regional reporters, as well as representatives of the national press.

VIII. A DRAFT SAMPLE AGENCY MEDIA PLAN

With these principles in mind, guided by policies implemented by a number of courts across the country but mindful of the differences existing between judicial branch courts and executive branch adjudicators, consider the sample media access policy presented in the appendix for use in high-profile cases conducted by administrative agencies. Note that the sample observes this

54. *Freitas v. Admin. Dir. of Courts*, 92 P.3d 993, 998 (Haw. 2004) (citing *Detroit Free Press v. Ashcroft*, 195 F. Supp 2d 937, 945 (E.D. Mich.), *aff’d*, 303 F.3d 681 (6th Cir. 2002)).

55. *Id.*

limit: It does not address the equally important rights of access to the documents and records typically associated with agency action. Thus, the policy focuses on physical, visual, and auditory access to the room where a hearing is to be conducted, but defers to state public records laws for access to transcripts, documentary evidence, and other records that play a part in administrative hearings.⁵⁶ So too, the media access policy needs to be written so as not to conflict with existing laws requiring safe ingress and egress to public buildings for all, including persons with disabilities.

56. *See infra* app.

APPENDIX

Public Access Rules for Administrative Adjudicators in High-Profile Hearings

(1) Definitions

(a) “Media coverage” means any photographing, recording, reporting, or broadcasting of administrative hearings, and includes transmission through television, radio, photographic images, the Internet, Wi-fi and satellite transmission, and any other form of transmission outside the hearing room.

(b) The “hearing room” means the room in which the adjudication hearing is to be held.

(c) The “agency adjudicator” means the administrative law judge, administrative hearing examiner, administrative hearing officer, or any person serving as the presiding officer in a fact-finding hearing conducted pursuant to the State Administrative Procedure Act.

(d) A “high-profile case” is an administrative proceeding in which an adjudicator will preside over a fact-finding hearing conducted pursuant to the State Administrative Procedure Act where at least one of the following is true:

i. The interests of a fair hearing for any litigant may be jeopardized due to the degree of media attention being given to the proceeding;

ii. The security and decorum of the administrative proceeding may be in jeopardy due to the degree of media attention being given to the proceeding;

iii. The news media directly or indirectly interferes with the administrative proceeding;

iv. The agency’s facilities for conducting the administrative proceeding are, or foreseeably will be, overburdened;

v. The administration of justice would be best served by implementing this media plan; or

vi. It appears to the public that the administrative proceeding is not being fairly or efficiently conducted.

(e) The "media information officer" shall be the Agency's designee, and shall be responsible for communicating with members of the public and those providing media coverage.

(2) Application

These provisions apply when either the agency adjudicator or the media information officer has determined that a matter pending on the agency's docket is a high-profile case, as that term is defined in this media policy.

(3) Physical Access to the Hearing Room

A. The hearing room will be opened to the public one-half hour before the proceedings are scheduled to begin.

B. The media information officer shall designate a specified number of seats in the public area of the hearing room for (a) the parties' family, friends and designees; (b) media representatives; and (c) the general public.

C. Admission to the public section of the hearing room shall be gained by presenting a pass that shall be issued by the media information officer on a first-come, first-served basis, unless the demand for access exceeds the space available. The media committee will determine whether the demand for space is such that the pass shall be valid for one session only (either morning or afternoon). The hearing room will be cleared between the morning and afternoon sessions.

D. Hallways, building entrances and exits, the steps and sidewalks leading to the building, and rooms in the building other than the hearing room, shall not be used for media coverage.

(4) Sharing or Pooling of Equipment

A. If warranted by the demand for the use of equipment, the media information officer will convene a meeting of media representatives. The media representatives will be given the opportunity to determine whether pooling of media equipment will be necessary, which representatives will be granted access to the proceedings, and the conditions under which that access will be granted.

B. Either the media information officer or, if warranted, the members of the media representatives, will determine whether more than one photographer will be permitted, and whether any limits on the number of cameras or lenses is warranted.

C. No cell phones or cell phone cameras will be permitted to capture or transmit any of the proceedings.

D. All cameras will be located in the back of the hearing room unless otherwise provided by the agency adjudicator.

E. Only one audio system for external radio, Internet, or Wi-fi broadcast will be permitted in the hearing room.

F. The media coverage provider or providers acquiring access to the hearing room shall provide, upon request and without charge, a copy of the unedited media to the agency.

G. The agency adjudicator may permit the use of an inconspicuous personal recording device (other than a cell phone), by any person seeking to make an audio recording of the proceedings as personal notes of the proceedings. The recordings shall not be used for any purpose other than as personal notes.

(5) Issuance of Press Credentials

A. All applications to provide media coverage shall be made to the media information officer, not later than 48 hours before the scheduled start of the hearing.

B. The media information officer shall issue press credentials to members of the media who present satisfactory proof that they are bona fide members of the media.

C. The media information officer may convene a meeting of interested media representatives for the purpose of establishing a media committee.

(6) Restrictions on Electronic Monitoring and Recording

A. Media coverage of conferences between attorneys and their clients in the hearing room is prohibited, as is focusing on or photographing any materials on counsel tables, in a way that would permit the recording of non-public material, such as an attorney's notes or confidential comments to a client.

B. No media equipment may be set up or taken down while the hearing is in session.

C. No media equipment may be used during the lunch break or when the hearing is not in session.

D. Neither spotlights nor flash units may be used in the hearing room.

E. All cables placed in corridors, sidewalks, or streets shall be covered in such a manner as not to impede the flow of vehicular or pedestrian traffic.

F. Proceedings in the hearing room shall not be photographed, recorded, or broadcast, except as provided in this rule.

G. No proceedings will be delayed or continued for the sole purpose of allowing media coverage.

(7) Hearing Room Safety and Security Issues

The media information officer shall be responsible for identifying the agency officer responsible for safety and security issues. The safety and security officer, the media information officer, and the agency adjudicator, shall develop a security coverage plan.

(8) Establishment and Duties of the Media Committee

A. The media information officer shall be the chair of any media committee convened under these policies. The members of the committee shall include the agency adjudicator and at least one representative each, as selected by the media information officer, from television, print, radio, wire service, and Internet service.

B. As soon as practicable after establishing the media committee, the media information officer shall convene a meeting of the media representatives selected to serve on the committee.

C. Among the duties of the media committee are: designating pool coverage; determining pool equipment and camera locations; recommending to the agency adjudicator suitable interview and press conference areas; assisting with the allocation of press credentials and hearing room seating assignments; equipping the hearing room and any supplemental media room; and working with the media to accommodate any special needs.

D. The media committee may recommend the establishment of a media room. If recommended and approved, the media room will be designated within close proximity to the proceeding. It will

be operated under the direction of the media information officer, and will be open during normal working hours to all media representatives with agency-issued media credentials. The room will accommodate monitors and other equipment provided by the media committee members, to permit coverage of the proceedings by media representatives who are unable to obtain seating in the hearing room.