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Public Access to Physician and Attorney Disciplinary Proceedings

By Michael Spake

“KNOWLEDGE WILL FOREVER GOVERN IGNORANCE: AND A PEOPLE WHO MEAN TO BE THEIR OWN GOVERNORS, MUST ARM THEMSELVES WITH THE POWER WHICH KNOWLEDGE GIVES.” - JAMES MADISON¹

INTRODUCTION

Unlike criminal and civil trials, there is no presumptive right of access under the First Amendment to attorney and physician disciplinary proceedings.² In spite of this, public access is not always denied. Several State Attorney Bars and State Boards of Medicine have procedures which permit public and press access to disciplinary hearings.³ These procedures along with state open meeting statutes have resulted in a statutory right of access. Additionally, twenty-five states have explicit “open court” state constitutional provisions requiring public access to disciplinary proceedings.⁴

1. Letter from James Madison, to W. T. Barry (Aug. 4, 1822), at <http://www.jmu.edu/madison/madison.htm> (last visited March 4, 2002).

2. The sources of presumptive rights of access to court and administrative proceedings are: (1) the First Amendment; (2) the common law; and (3) legislative enactments. These rights are not absolute.

3. See Hayes, *infra* note 35, at 1119; Press-Enterprises Co. v. Superior Court of California, 478 U.S. 1, 9-10 (1986) [hereinafter *Press II*].

4. ALA. CONST. art. I, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; IND. CONST. art. I, § 12; KY. CONST. § 14; LA. CONST. art. I, § 22; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; W.VA. CONST. art. III, § 17; WYO. CONST. art. I, § 8. See also *Daily Gazette Co. v. Comm. on Legal Ethics of the W. Va. State Bar*, 326 S.E.2d 705, 714 (W. Va. 1984) (holding that a State Bar Rule closing attorney disciplinary proceedings was unconstitutional) [hereinafter *Daily Gazette I*]; *Dailey Gazette Co. v. W. Va. Bd. of Med.*, 352 S.E.2d 66, 72 (W. Va. 1986) (holding that part of the West Virginia Medical Practice Act which closed physician disciplinary proceedings was unconstitutional) [hereinafter *Daily Gazette II*].

Since *Richmond Newspapers, Inc. v. Virginia*,⁵ the U.S. Supreme Court has repeatedly held that the First Amendment guarantees that criminal trials are public events.⁶ Accordingly, the First Amendment right of access has become firmly established by a line of recent Supreme Court decisions enforcing the right of the public and press to attend criminal proceedings.⁷ Since *Richmond Newspapers*, courts have extended the right of access to civil trials.⁸ However, the right of the public to attend civil trials under the First Amendment is subject to exceptions.⁹

Contrary to criminal and civil proceedings, courts have held that there is no presumptive right of access to administrative and disciplinary proceedings. However, courts have varied in their decisions permitting a Constitutional right of access of the press to administrative hearings under the First Amendment. Regarding attorney and physician disciplinary hearings, courts have found no First Amendment right of access.

In order to shed light on access to disciplinary hearings, this paper will analyze the current state of the law concerning the public's and press' right of access to physician and attorney disciplinary proceedings. Part I describes the history of public access and discusses public access under the First Amendment. Part II describes the right of access to criminal and civil trials since *Richmond Newspapers*. Part III examines public access to administrative hearings. Part IV analyzes and discusses

5. 448 U.S. 555 (1980).

6. *See* *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 610-11 (1982).

7. *See generally* *Gannet Co. v. DePasquale*, 443 U.S. 368 (1979) (plurality opinion) (recognizing a qualified constitutional right of public to attend pretrial suppression hearing); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding that an order excluding public and press from criminal trial in its entirety violates the First Amendment); *Globe Newspaper Co.*, 457 U.S. at 596 (holding that statutory per se exclusion of public and press from trial testimony of minors who are complaining witnesses in sex crime cases is unconstitutional); *Press II*, 478 U.S. 1 (1986) (stating that access right extends to preliminary proceedings in criminal cases).

8. *See* *Hayes*, *infra* note 35, at 1117.

9. *Standard & Poor's Corp. v. Commodity Exch., Inc.*, 541 F. Supp. 1273, 1277-78 (S.D.N.Y. 1982) (holding trade secrets to be a legitimate interest allowing for exclusion of the public from testimony at trial); *Mayer v. State*, 523 So. 2d 1171, 1175-76 (Fl. Dist. Ct. App. 1988) (upholding state statute closing hearings involving unwed mothers, custody, sexual abuse, or permanent placement of children as constitutional); *In re Adoption of H.Y.T.*, 458 So. 2d 1127, 1128-29 (Fl. Dist. Ct. App. 1984) (upholding the validity of a state statute mandating the closure of proceedings in adoption as constitutional); *State ex rel. Great Falls Tribune Co. v. Mont. Eighth Judicial Dist. Court, Cascade County*, 777 P.2d 345, 350-51 (Mont. 1989) (upholding closure of trial in order to protect the physical safety of a trial participant).

public access to attorney and physician disciplinary proceedings.

HISTORY OF THE PUBLIC ACCESS DOCTRINE

Public Access

Public attendance at judicial proceedings is embedded throughout the traditions of Anglo-American law.¹⁰ Prior to the Norman Conquest, the freeman of the community in England attended trials.¹¹ Like a jury, attendance was compulsory for the freeman, because they ultimately rendered judgment.¹² Statutes were later created exempting mandatory attendance.¹³ The right of public access, however, was never compromised as it evolved from the Magna Carta.¹⁴ This feature eventually became "one of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access."¹⁵

The American Colonial Courts adopted the practice of allowing public access.¹⁶ In fact, records from colonial Virginia indicate that trials were open.¹⁷ Other colonies also adopted public access to judicial proceedings.¹⁸ Referring to the Magna Carta and Coke's Institutes, public access was recognized in New Jersey,¹⁹ Pennsylvania,²⁰ Massachusetts,²¹ North Carolina,²² and Vermont.²³ Additionally, the Continental

10. See generally *Richmond Newspaper*, 448 U.S. at 564-69 (illustrating that throughout its evolution, the criminal trial was open to all who wanted to attend).

11. *Id.* at 565.

12. *Id.*

13. *Id.*

14. See *id.* at 566.

15. *Id.* at 566-67 (quoting EDWARD JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967)).

16. *Id.* at 567.

17. *Id.* (noting that "nothing to the contrary has been cited").

18. *Id.* at 567-68.

19. CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY (March 13, 1677), reprinted in *SOURCES OF OUR LIBERTIES*, 184-88 (Richard Perry ed., 1959); see also *Richmond Newspaper*, 448 U.S. at 567 (quoting the open court provision of the CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY (March 13, 1677)).

20. FRAME OF GOVERNMENT OF PENNSYLVANIA (April 25, 1682), reprinted in *SOURCES OF OUR LIBERTIES* 209-21, 217 (Richard Perry ed., 1959). See also *Richmond Newspapers*, 448 U.S. at 568 (quoting the FRAME OF GOVERNMENT OF PENNSYLVANIA (April 25, 1682)).

21. MASSACHUSETTS BODY OF LIBERTIES (December 10, 1641), reprinted in *SOURCES OF OUR LIBERTIES*, 148-61 (Richard Perry ed., 1959).

22. CONSTITUTION OF NORTH CAROLINA, A DECLARATION OF RIGHTS, & C. (December

Congress recognized public access to judicial proceedings.²⁴ This public access movement continued into the Northwest Territories when Ohio and Indiana adopted the idea of public access into their respective state constitutions.²⁵

The legal and political theory behind open courts was that access provided citizens assurance of the fairness of proceedings.²⁶ Thus, public access became a bulwark of free and democratic government by providing a system of checks and balances involving public opinion, which ultimately restrained judicial power.²⁷ Second, access discouraged perjury, misconduct and bias.²⁸ Jeremy Bentham recognized these observations of Hale and Blackstone in writing:

Without publicity, all other checks are insufficient: in comparison of publicity all checks are of small account. Recordation, appeal, whatever other institution might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.²⁹

First Amendment

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."³⁰ As a result, the First Amendment protects against the arbitrary exercise of power by federal and state governments restricting free speech. A strict interpretation of the First Amendment would limit its applicability to means of

14, 1776), *reprinted at* SOURCES OF OUR LIBERTIES, 355-57 (Richard Perry ed., 1959).

23. *See Richmond Newspapers*, 448 U.S. at 567-68 (citing CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY (March 13, 1677), *reprinted in* SOURCES OF OUR LIBERTIES, 184-88 (Richard Perry ed., 1959); FRAME OF GOVERNMENT OF PENNSYLVANIA (April 25, 1682), *reprinted in* SOURCES OF OUR LIBERTIES, 209-21 (Richard Perry ed., 1959); MASSACHUSETTS BODY OF LIBERTIES (December 10, 1641), *reprinted in* SOURCES OF OUR LIBERTIES, 148-61 (Richard Perry ed., 1959); CONSTITUTION OF NORTH CAROLINA, A DECLARATION OF RIGHTS, & C. (December 14, 1776), *reprinted in* SOURCES OF OUR LIBERTIES, 355-57 (Richard Perry ed., 1959); and CONSTITUTION OF VERMONT, CH. 1, A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF VERMONT (July 8, 1777), *reprinted in* SOURCES OF OUR LIBERTIES, 364-367 (Richard Perry ed., 1959)).

24. *See Richmond Newspapers*, 448 U.S. at 568.

25. *See* IND. CONST. art. I, § 12; OHIO CONST. art. I, § 16.

26. *See Richmond Newspapers*, 448 U.S. at 569 (stating that openness "gave assurance that the proceedings were conducted fairly to all concerned . . .").

27. *Id.*

28. *Id.*

29. *Id.* (quoting JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

30. U.S. CONST. amend. I.

expression. However, constitutional rights must be given their fullest effect.³¹ Under this framework, the First Amendment acknowledges and protects public access.

Although the First Amendment guarantees the freedom of public access and press, and although the U.S. Supreme Court has stated that a trial is a public event,³² the First Amendment does not guarantee access to all types of proceedings.³³ The Supreme Court recognizes limitations regarding First Amendment rights to public access. One such limitation is that "the press is regularly excluded from grand jury proceedings, our [Supreme Court's] own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations."³⁴

CURRENT RIGHT OF ACCESS

In deciding whether a First Amendment right of access extends to a particular proceeding, the Supreme Court relies upon a two-prong test.³⁵ First, the Court determines whether the proceeding has been historically open to the public.³⁶ Specifically, the Court examines whether there has been a historical presumption of access.³⁷ Second, the Court evaluates whether access to the proceedings sought would contribute to the self-governing function and further the democratic process.³⁸ Thus, the test formulates a right of access that is qualified, not absolute, by permitting closure "by an overriding interest based on findings that closure is es-

31. *Bridges v. California*, 314 U.S. 252, 263 (1941) ("For the First Amendment does not speak equivocally It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.").

32. *Craig v. Harney*, 331 U.S. 367, 374 (1947).

33. *Branzburg v. Hayes*, 408 U.S. 665, 683-85 (1972).

34. *Id.* at 684.

35. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 25:1-7 (3d ed. 1996); see also Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 269 (1995); G. Michael Fenner & James L. Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 428 (1981) (explaining that two considerations define the scope: current and historical practice and public policy, the most important policy being self-government); Michael J. Hayes, *What Ever Happened to 'The Right To Know'?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1130-36 (1987) (tracing the development of the Supreme Court two-prong test and then criticizing it).

36. Hayes, *supra* note 35, at 1117.

37. *Id.* at 1116.

38. *Id.* at 1117.

sential to preserve higher values.”³⁹ Notwithstanding the requirement of an “overriding” interest, the Court states that to support an order excluding the public and press, reasonable alternatives to closure must be exhausted.⁴⁰ Additionally, the trial court must make specific findings in order to demonstrate the need for closure.⁴¹

Richmond Newspapers and Criminal Proceedings

The Supreme Court first formulated a test to decide a First Amendment right of public access in *Richmond Newspapers*. This case evolved from multiple mistrials during a murder trial.⁴² At the commencement of the fourth trial, the defendant moved that the public and press be excluded from the courtroom.⁴³ Upon hearing no objections, the judge, relying on Virginia Code § 19.2-266, closed the trial.⁴⁴ The trial judge exclaimed “having people in the courtroom is distracting to the jury.”⁴⁵ Additionally, “[Counsel for Defendant] referred to ‘difficulty with information between jurors,’ and stated that he ‘didn’t want information to leak out,’ [and] be published by the media, perhaps inaccurately, and then be seen by the jurors.”⁴⁶

The plurality opinion noted that the trial judge did not make any findings to support closure, did not inquire into alternative solutions, and failed to recognize any constitutional rights.⁴⁷ Seven members of the Court agreed that there was a First Amendment right to attend criminal trials. However, six Justices submitted separate opinions.⁴⁸

Chief Justice Burger, joined by Justices White and Stevens, acknowledged that in order for the First Amendment to fulfill its core purpose of

39. *Press II*, 478 U.S. 1, 9 (1986) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) [hereinafter *Press I*]).

40. *Press I*, 464 U.S. at 512-13.

41. *Id.*

42. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559 (1980).

43. *Id.*

44. VA. CODE ANN. § 19.2-266 (Mitchie 2000) (providing in part: “In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.”).

45. *Richmond Newspaper*, 448 U.S. at 561.

46. *Id.*

47. *Id.*

48. *See id.* at 581-82 (White, J., concurring), 582-84 (Stevens, J., concurring), 584-98 (Brennan, J., concurring) (joined by Justice Marshall), 598-601 (Stewart, J., concurring), 601-04 (Blackmun, J., concurring), 604-06 (Rehnquist, J., dissenting).

providing information related to "the functioning of government," some right of access protection is needed.⁴⁹ Noting that such a right of access was not explicitly enumerated in the Constitution or the Bill of Rights, Chief Justice Burger stated:

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself . . . In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees . . . Free speech carries with it some freedom to listen . . . What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted."⁵⁰

In a concurring opinion, Justice Brennan, joined by Justice Marshall, interpreted the First Amendment right of access differently. Justice Brennan argued that the general character of the Constitution gives meaning to the First Amendment.⁵¹ As a result, the "First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government."⁵²

Brennan conceded that the "the stretch of this protection is theoretically endless,"⁵³ but warned that it "must be invoked with discrimination and temperance."⁵⁴ Justice Brennan offered two "helpful principles" to aid in establishing limits to access rights.⁵⁵ First, "a right of access has special force when drawn from an enduring and vital tradition of public entree to [a] particular proceeding."⁵⁶ Thus, a tradition of openness to a particular proceeding creates a stronger right of access. Second, the

49. *Id.* at 575-77.

50. *Id.* at 575-76.

51. *Id.* at 587 (Brennan, J., concurring).

52. *Id.* at 588 (Brennan, J., concurring).

53. *Id.* (Brennan, J., concurring) (quoting William J. Brennan, Address at the Dedication of the Samuel I. Newhouse Center for Law and Justice in Newark, N.J., in 32 RUTGERS L. REV. 173, 177 (1979)).

54. *Id.* (Brennan, J., concurring).

55. *Id.* at 589 (Brennan, J., concurring).

56. *Id.* (Brennan, J., concurring).

value of access must be measured specifically by the public importance to the trial process itself.⁵⁷ Thus, access should be granted whenever it furthers the function or purposes of the particular process involved.

After the plurality opinion in *Richmond Newspapers*, the standard of review to determine whether the constitutionally protected right of public access had been violated remained unclear. The Court clarified the standard of review a year later in *Globe Newspaper Co. v. Superior Court for Norfolk County*.⁵⁸

Globe Newspaper overturned a Massachusetts statutory per se exclusion of public and press from the trial testimony of minors who are complaining witnesses in sex crime cases.⁵⁹ This occurred when reporters from the Boston Globe were excluded from several preliminary proceedings and petitioned the trial court to open all future proceedings to the public and press.⁶⁰ The trial court denied the motion and closed all proceedings involving a man accused of committing forcible rape against minors.⁶¹ The court relied on section 16A of Chapter 278 of the Massachusetts General Laws, which on its face provided for mandatory closure of such trials.⁶² Using the two-prong test from *Richmond Newspapers*, the *Globe Newspaper* Court reaffirmed that the right of access applied to all criminal trials, thereby ruling that section 16A of Chapter 278 Massachusetts General Laws was unconstitutional.⁶³

Press-Enterprise Co. v. Superior Court ("Press I")⁶⁴ used the same test to determine a public right of access to *voir dire* proceedings.⁶⁵ Prior to *voir dire* proceedings involving the trial for the rape and murder of a teenage girl, Press-Enterprise Company filed a motion seeking ac-

57. *Id.* (Brennan, J., concurring).

58. 457 U.S. 596 (1982).

59. *Id.* at 598. Relying on MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981), the Court stated:

At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

Id.

60. *Globe Newspaper*, 457 U.S. at 598-99.

61. *Id.* at 599.

62. *Id.*

63. *Id.* at 610-11.

64. 464 U.S. 501 (1984).

65. *Id.* at 513.

cess to the proceedings.⁶⁶ Claiming that public access could inhibit the candor of the jurors and jeopardize the defendant's fair trial rights, the state opposed the motion.⁶⁷ The trial court permitted access to the proceeding, but excluded the press and public from the special death penalty *voir dire*.⁶⁸ Press-Enterprise applied for release of the transcript, but after the defendant was convicted and sentenced to death, the trial court denied the motion for access.⁶⁹ Upon appeal, the Supreme Court held that *voir dire* proceedings are presumptively open and that this presumption can "be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."⁷⁰

Press I marked the first instance in which the Supreme Court examined public access outside the realm of criminal trials.⁷¹ "the process of jury selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system."⁷²

Press-Enterprise Co. v. Superior Court ("Press II")⁷³ applied the standard to preliminary hearings and affirmed the definitive standard for determining whether a right of access exists.⁷⁴ *Press II* concerned the exclusion of the press and public from a preliminary hearing that was conducted to determine whether the defendant must answer a criminal complaint charging him with twelve counts of murder.⁷⁵

Applying precedent, the Supreme Court ruled that a qualified right of access exists if: (1) there is a tradition of access to the proceeding and (2) access plays a "significant positive role in the functioning of the particular process in question."⁷⁶ The Court emphasized that when there is a "qualified" right of access, the reviewing court must decide whether the government can restrict that right.⁷⁷ Restriction of a qualified right of access is determined by the strict scrutiny test applied in *Globe Newspaper* and *Press I*: the right of access can only be restricted if it is out-

66. *Id.* at 503.

67. *Id.*

68. *Id.*

69. *Id.* at 504.

70. *Id.* at 510.

71. Hayes, *supra* note 35, at 1119.

72. *Press I*, 464 U.S. at 505.

73. 478 U.S. 1 (1986).

74. *Id.* at 9.

75. *Id.* at 3.

76. *Id.* at 7. This two-factor test became known as the "tests of experience." *Id.* at 9.

77. *Id.*

weighed by an "overriding" government interest and if the denial of access is narrowly tailored to achieve that interest.⁷⁸

The only issue unresolved by the Supreme Court after *Press II* was whether the right of access and the standard that defines it could be extended outside the context of criminal proceedings. However, since *Richmond Newspaper*, courts have articulated that a constitutional right of access is applicable to civil, as well as to criminal trials.⁷⁹

Civil Trials

The California Supreme Court recently applied Brennan's "tests of experience and logic" to civil trials.⁸⁰ In *KNBC-TV*, the California Supreme Court became the first state Supreme Court to rule that the First Amendment provides a right of access to ordinary civil trials and proceedings.⁸¹

In a civil action involving prominent entertainment figures, the California Superior Court sustained a motion which excluded the public and press from all proceedings that did not occur in the presence of a jury.⁸² After several closed proceedings, KNBC-TV, a NBC subsidiary, obtained a writ of mandate from the California Court of Appeals vacating the trial court's closure order on the ground that the findings of the trial court did not support such blanket exclusions.⁸³ The California Supreme Court upheld the writ.⁸⁴

78. *Id.* at 9 (quoting *Press I*, 464 U.S. at 510).

79. *See, e.g., Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 24 (2d Cir. 1984) (stating that the public and press have a First Amendment right to attend, but not to televise, a civil trial); *see also Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (holding that the public has a First Amendment right of access to civil proceedings concerning a motion for preliminary injunction in securities litigation; closure is not warranted merely to protect disclosure of poor corporate management); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1984) (holding that First Amendment right of access applies to civil proceedings for contempt, but portions of proceeding involving trade secrets were properly closed); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (declaring that First Amendment right of access applies to hearings in class actions concerning prison overcrowding); *State v. Cottman Transmission Sys., Inc.*, 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988) (noting that First Amendment and state constitutional right of access apply to proceedings and documents in unfair trade practices lawsuit; closure not justified merely in order to minimize damage to corporate reputation).

80. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 353 (Cal. 1999) [hereinafter *KNBC-TV*].

81. *Id.*

82. *Id.* at 340.

83. *Id.*

84. *Id.*

In its analysis of a right of access to civil trials, the California Supreme Court held that the U.S. Supreme Court's reasoning in *Richmond Newspaper* and its progeny extends beyond criminal trials to encompass civil trials and proceedings.⁸⁵ Furthermore, the court ruled that civil proceedings are presumptively open and public access serves to "demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings," while "provid[ing] a means . . . by which citizens scrutinize and check the use and possible abuse of judicial power; and . . . enhance the truth-finding function of the proceeding."⁸⁶

In similar fashion to the U.S. Supreme Court, the California Supreme Court believed that the right of access to a civil trial was a qualified right.⁸⁷ Although the court held that open access was a presumptive right, it recognized that closure is permitted, but only in the rarest of circumstances where a court expressly finds (after notice and an open hearing) that:

- (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.⁸⁸

85. *Id.* at 361.

86. *KNBC-TV*, 980 P.2d at 354 (citations omitted); *see also* *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 597 n.22 (1980) (Brennan, J., concurring). The Court explained:

[T]he availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, "[r]ecordation . . . would be found to operate rather as cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance."

Id. (quoting *In re Oliver*, 333 U.S. 258, 271 (1948)).

87. *KNBC-TV*, 980 P.2d at 361.

88. *Id.* at 365; *see also* Carol Crocca, Annotation, *Propriety of Exclusion of Press or Other Media Representatives from Civil Trial*, 39 A.L.R. 5th 103, 128-29 (1996). Crocca wrote:

The right of the press to attend civil trials under the First Amendment is subject to exceptions to protect a variety of competing interests in different kinds of proceedings, and a court has upheld the validity of a statute mandating closed adoption proceedings. The courts have also weighed the right of the press against other constitutional rights, including that of a fair trial, a state constitutional privacy right and the right, particularly of a person charged with civil contempt, to the due process right to a public trial. In the last circumstance, the courts held that the

PUBLIC ACCESS AND ADMINISTRATIVE PROCEEDINGS

Administrative Proceedings

Throughout the evolution of the right of public access, lower courts have been much less assertive in extending the right of access to non-judicial proceedings or documents. Several cases have explicitly held that the First Amendment right of access does not extend to government information outside the judicial branch.⁸⁹ Some courts, though, have found certain proceedings were required to be open.⁹⁰ Thus, courts have differed as to whether the press has a constitutional right of access to certain administrative proceedings.

right to press access and public trial prevailed except when the alleged contemnor was not subject to incarceration. Litigants have also sought protection of various business interests from publicity, and while it was held that the protection of business reputation did not justify exclusion of the press, trade secrets and other confidential information, were deemed to justify such protection by the courts.

Personal privacy interests have also been considered by the courts against the right of the press to attend civil trials, and they have, in the circumstances, sometimes held it proper to exclude the press based on the protection of the parties' privacy and sometimes not. It has been noted that a party's status as a public figure does not justify a greater right of privacy, and in fact, if involving a position of public trust, may militate against closure. As to the privacy of nonparties, while it has been held that the wishes of witnesses not to testify in public, without more, did not support an order closing civil proceedings, courts have recognized that the protection of the privacy of minors, for example, children in a divorce proceeding, was a legitimate basis for denying access to the press. In cases considering closure of proceedings to protect medical information concerning a litigant, however, courts have determined that closure was not warranted.

Several matters of public policy or concern have been held to justify the exclusion of the press from civil actions, including the facilitation of settlement, the physical safety of the public or a trial participant, public morality, and the secrecy of grand jury proceedings. However, in other cases involving an alleged threat to the integrity of jury deliberations, to prison discipline, and to the secrecy of grand jury proceedings, investigations, immunity hearings, and the like, the courts found the evidence insufficient to support an order excluding the press.

Id.

89. See, e.g., *ACLU of Miss. v. Mississippi*, 911 F.2d 1066, 1074 (5th Cir. 1990) (records of state agency dedicated to maintaining racial segregation); *Calder v. IRS*, 890 F.2d 781, 783 (5th Cir. 1989) (IRS records of Al Capone); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1172 (3d Cir. 1986) (en banc) (state environmental agency records); *Combined Comm. Corp. of Okla. v. Boger*, 689 F. Supp. 1065, 1068 (W.D. Okla. 1988) (NCAA letter of inquiry to state college); *Dean v. Guste*, 414 So. 2d 862, 865 (La. Ct. App. 1982) (school board executive session).

90. *Fitzgerald v. Hampton*, 467 F.2d 755, 766 (D.C. Cir. 1972) (civil service hearing); *Dep't of Health & Rehabilitative Servs. v. Tallahassee Democrat, Inc.*, 481 So. 2d 958, 960 (Fla. Dist. Ct. App. 1986) (licensing hearing); *Herald Co. v. Weisenberg*, 455 N.Y.S.2d 413, 415-16 (N.Y. App. Div. 1982) (unemployment hearing).

At least one court has used the *Richmond Newspaper* two-prong standard to find a right of access outside the judicial branch. In *Society of Professional Journalists v. Secretary of Labor*,⁹¹ a federal district court held that the United States Constitution does not expressly require open meetings.⁹² Also, it determined that no common law right of access to government bodies exist.⁹³ However, the court ruled that the press and public have a First Amendment right of access to formal administrative fact-finding hearings.⁹⁴ As a result, the press and public had a constitutional right of access to Mine Safety and Health Administration hearings investigating the cause of a Utah mine fire.⁹⁵

Society of Professional Journalists involved a formal fact-finding hearing by the Mine Safety and Health Administration ("MSHA") regarding a mine disaster.⁹⁶ The hearing did not involve the adjudication of the rights of the parties, but was a part of its investigation into the cause of a coal mine fire.

Although state executive branches are not expressly required by the Constitution to open their proceedings, the court noted that all fifty states including the District of Columbia have "Sunshine" statutes requiring some meetings to be open.⁹⁷ However, their decision to open the proceedings was based on "the penumbra of the First Amendment guarantees."⁹⁸

The decision to open the MSHA proceedings was also based on the court's attempt to apply the *Richmond Newspapers* test according to how the Supreme Court would rule.⁹⁹ Examining the same policy considerations as the Supreme Court, the court found little historical tradition regarding open access to administrative hearings.¹⁰⁰ As a result, the court decided that civil trials, which have been historically open, were "analogous to administrative fact-finding proceedings" like the one at issue.¹⁰¹

91. 616 F. Supp. 569 (C.D. Utah 1985).

92. *Id.* at 572.

93. *Id.*

94. *Id.* at 573.

95. *Id.* at 575-76.

96. *Id.* at 570.

97. *Id.* at 572.

98. *Id.* at 573.

99. *Id.* at 575.

100. *Id.*

101. *Id.*; see also *Fitzgerald v. Hampton*, 467 F.2d 755, 764 (D.C. Cir. 1972) ("In administrative hearings, the rule of the 'open' forum is prevailing."); see generally 2 KENNETH

Furthermore, the court examined the broad spectrum of administrative hearings, rather than the narrow instances of MSHA proceedings.¹⁰² In the end, the court found a tradition that favored openness.

Next, the court examined the procedural importance of openness. Like the Supreme Court, the court stated: "public awareness and opportunity to criticize that is the very foundation of our democracy."¹⁰³ Thus, "[o]penness safeguards our democratic institutions,"¹⁰⁴ while "[s]ecrecy breeds mistrust and abuse."¹⁰⁵ Furthermore, like the Supreme Court, the court found exceptions as to when the right of access would apply.¹⁰⁶

Importantly, *Society of Professional Journalists* only applies a right of access to administrative fact-finding proceedings.¹⁰⁷ Thus, not all hearings are presently open. The Secretary "does not have the unfettered right to decide whether the hearings conducted by him are public or not."¹⁰⁸ An impartial judiciary should determine such a decision.¹⁰⁹

Unlike the D.C. Circuit Court, the Supreme Judicial Court of Massachusetts did not find a First Amendment right of access to licensure proceedings of employment agencies in *WBZ-TV4 v. Executive Office of Labor*.¹¹⁰ The Massachusetts court did not proceed beyond the first-prong, finding no historical tradition of access.¹¹¹

The dispute in *WBZ-TV4* involved a scheduled hearing on the application of Professional Nanny, Inc., for a license to operate an employment agency.¹¹² Massachusetts' law prohibited "the operation of an employment agency without a license."¹¹³ Furthermore, the Commissioner of Labor and Industries did not permit general public access to these hear-

CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 14:13 (2d ed. 1978) (stating that hearings of a somewhat formal character are generally open to the public).

102. *Soc'y of Prof'l Journalists*, 616 F. Supp. at 575-76.

103. *Id.* at 576.

104. *Id.*

105. *Id.*

106. *See id.* at 577.

107. *Id.*

108. *Id.* at 578.

109. *Id.*

110. 610 N.E.2d 923, 925 (Mass. 1993).

111. *Id.*

112. *Id.* at 924.

113. MASS. GEN. LAWS ch. 140, § 46B (1990) ("Notwithstanding the other provisions of this chapter no person shall open, keep, maintain, carry on, or advertise any employment agency unless he has been issued a license . . .").

ings.¹¹⁴ Only applicants and those protesting the application were allowed to attend.¹¹⁵

Seeking an injunction to prohibit the Commissioner from excluding WBZ-TV4, the petitioner argued that *Richmond Newspapers* and its precedent permitted a constitutional right of access.¹¹⁶ However, the court disagreed and ruled that no historical access to licensing hearings existed.¹¹⁷ Specifically, the court stated: "Nothing has come to our attention that suggests that administrative agency licensing hearings were 'historically . . . open to the press and general public . . . at the time when our organic laws were adopted.'"¹¹⁸ Thus, the court found no indication that such a proceeding has been opened to the public since the establishment of United States law.¹¹⁹ Overall, it is difficult to draw conclusions regarding the scope of the right of access to administrative proceedings under the two-prong test. Courts have sent mixed signals on the test's potential to expand the right of access beyond those already recognized by the Supreme Court. Accordingly, courts have used the two-prong test to deny, as well as validate, a right of access to various administrative hearings. Some courts, like the one in *Society of Professional Journalists*, have found that administrative hearings satisfy both the tradition and contribution function prongs. However, other courts, like that in *WBZ-TV4*, have denied such a right, finding a lack of tradition of public access.¹²⁰

Statutory Right to Access

Embedded in the principles of democratic government is the principle of open government. Government processes should be open for public scrutiny.

Common law does not recognize the right of the public to attend administrative and licensure disciplinary proceedings. Likewise, the Supreme Court has never held that such a right is guaranteed by the Constitution. However, a right to attend these types of proceedings has been

114. *Id.* at 924.

115. *See id.*

116. *Id.* at 925.

117. *Id.*

118. (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)).

119. *Id.*

120. *See also* *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986) (upholding the district court's dismissal of Petitioner's amended complaint because it failed to allege a traditional right of public access exists).

established by open meetings legislation. Today, all fifty states and the District of Columbia have comprehensive open government statutes in their codes.¹²¹

Similar to the contribution prong of recent Supreme Court right of access cases, the rationale behind open meetings legislation is to effectively enable the public to examine government proceedings. This concept supports the basic idea that the right of the public to participate in democracy includes the right to be informed. Thus, by having statutory right of access, citizens are able to examine public affairs.

Opponents to open meeting laws argue that public access to govern-

¹²¹ 1. ALA. CODE § 36-12-40 (1991 & Supp. 1996); ALASKA STAT. §§ 40.25.100-.220, 44.62.310, 44.62.312 (Michie 1998); ARIZ. REV. STAT. ANN. §§ 39-121 to -122 (West 1996 & Supp. 1997); ARK. CODE ANN. §§ 25-19-101 to -107 (Michie 1996); CAL. GOV'T CODE §§ 6250-6268 (West 1995 & Supp. 1997); COLO. REV. STAT. §§ 24-6-401 to -402, 24-72-201 to -309 (1988 & Supp. 1996); CONN. GEN. STAT. ANN. §§ 1-200-241 (West 1988 & Supp. 1997); DEL. CODE ANN. tit. 29, §§ 10001-05 (1997); D.C. CODE ANN. §§ 1-1504, 1-1521 to 1-1529 (1992 & Supp. 1997); FLA. STAT. ANN. §§ 119.01-.15, 395.3035 (West 1996 & Supp. 1998); GA. CODE ANN. §§ 50-18-70 to -76 (1998); HAW. REV. STAT. §§ 92-1, -21, -25, -29 to -71, 92F-1-92F-42 (1993 & Supp. 1996); IDAHO CODE §§ 9-337 to -348, 67-2341 (1997); § 67-2341 (1995 & Supp. 1998); 5 ILL. COMP. STAT. ANN. 120/1-6, 140/1 to 11 (West 1993 & Supp. 1997); IND. CODE §§ 5-14-3-1 to -10 (1997); IOWA CODE ANN. §§ 22.1-.13 (West 1995 & Supp. 1997); KAN. STAT. ANN. §§ 45-215 to -225, 75-4317 to -4320a (1995); KY. REV. STAT. ANN. §§ 61.805-.850, .870-.991 (Michie 1993 & Supp. 1996); LA. REV. STAT. ANN. §§ 44.1-.42 (West 1982 & Supp. 1997); ME. REV. STAT. ANN. tit. 1, §§ 401-10 (West 1989 & Supp. 1996); MD. CODE ANN., STATE GOV'T §§ 10-611 to -628 (1993 & Supp. 1997); MASS. GEN. LAWS ANN. ch. 39, §§ 23A-23B; ch. 66, §§ 10-18 (West 1998); MICH. COMP. LAWS §§ 15.231-.246 (1994 & Supp. 1997); MINN. STAT. ANN. §§ 13.01-.99, 13D.01-.07 (1997 & Supp. 1999); MISS. CODE ANN. §§ 25-61-1 to -17 (1991 & Supp. 1997); MO. ANN. STAT. §§ 109.005-.510 (West 1999), §§ 610.010-.120 (West 1988 & Supp. 1999); MONT. CODE ANN. §§ 2-6-101 to -307 (1991); NEB. REV. STAT. ANN. §§ 84-712-84-712.09 (Michie 1995 & Supp. 1997); NEV. REV. STAT. ANN. 239.0005-.330 (Michie 1996); N.H. REV. STAT. ANN. §§ 91-A:1-A:8 (1990 & Supp. 1998); N.J. STAT. ANN. §§ 10:4-6 to -21, 47:1-47:1A-4 (West 1996); N.M. STAT. ANN. §§ 10-15-1 to -4, 14-2-1 to -3 (Michie 1995 & Supp. 1997); N.Y. PUB. OFF. LAW §§ 84-111 (McKinney 1988 & Supp. 1999); N.C. GEN. STAT. §§ 132-1 to -9 (1995 & Supp. 1996); N.D. CONST. art. XI, § 6; N.D. CENT. CODE §§ 44-04-18 to -18.2, -18.6 to -18.21 (1993 & Supp. 1997); OHIO REV. CODE ANN. §§ 121.21.1, 149.43-.44 (Anderson 1995 & Supp. 1996); OKLA. STAT. ANN. tit. 51, §§ 24A.1-.21 (West 1988 & Supp. 1998); OR. REV. STAT. §§ 192.410-.530 (1991 & Supp. 1996); PA. STAT. ANN. tit. 65, §§ 66.1-.4 (West 1996 & Supp. 1997); R.I. GEN. LAWS §§ 38-2-1 to -14 (1997); S.C. CODE ANN. §§ 30-4-10 to -110 (Law Co-op. 1991 & Supp. 1996); S.D. CODIFIED LAWS §§ 1-27-1 to -19 (Michie 1992 & Supp. 1997); TENN. CODE ANN. §§ 8-44-101 to -108, 10-7-503 to -508 (1997); TEX. GOV'T CODE ANN. §§ 551-001-552.353 (Vernon 1999); UTAH CODE ANN. §§ 52-4-1 to -10, 63-2-201 to -207 (1998); VT. STAT. ANN. tit. 1, §§ 315-20 (1996 & Supp. 1997); VA. CODE ANN. §§ 2.1-340 to -346.1 (Michie 1995 & Supp. 1997); WASH. REV. CODE ANN. §§ 42.17.250-.348, 42.30.010-.920 (West 1991 & Supp. 1999); W. VA. CODE §§ 29B-1-1 to -7 (1993 & Supp. 1997); WIS. STAT. ANN. §§ 19.31-.39 (West 1996 & Supp. 1997); WYO. STAT. ANN. §§ 16-4-201 to -205 (Michie 1997).

ment proceedings is a right guaranteed by the U.S. Constitution.¹²² This argument is based upon the belief that First Amendment freedoms of speech and press have as their underlying principle, the prevention of governmental interference with the communication of the facts of governmental proceedings.¹²³

Proponents of open meeting law argue oppositely that the Constitution does not guarantee public access. Such an argument is based upon the Ninth Amendment, which reserves to the people rights not enumerated elsewhere in the Constitution.¹²⁴

Overall, open meeting laws grant a statutory right to government proceedings in the absence of a common law or First Amendment right. However, although a statutory right of access may exist, closure may occur. The decision of a court to restrict a statutory right of access is based on compelling reasons, balancing of interests, or "good cause."¹²⁵ These factors are crucial to physician and attorney disciplinary hearings where no first amendment right of access exists.

122. See generally Christopher W. Deering, *Closing the Door on the Public Right to Know: Alabama's Open Meetings Law after Dunn v. Alabama State University Board of Trustees*, 28 CUMB. L. REV. 361 (1997-1998).

123. See *id.* at 371 n.46. Justice Black, as a strong proponent of the First Amendment, stated:

I view the guarantees of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. Freedom to speak and write about public questions is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death.

Id. (quoting *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 301-02 (1941) (Black, J., dissenting). But see David M. O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 587 (1980) (arguing that the First Amendment is an insufficient basis for a right to know claim).

124. Deering, *supra* note 122, at 372 nn.50-51; see also *id.* at 372 n.51 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J. dissenting)). Justice Harlan set forth a "rational continuum" approach to the Ninth Amendment's scope:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Id.

125. See generally Deering, *supra* note 122.

ACCESS TO PHYSICIAN AND ATTORNEY DISCIPLINARY PROCEEDINGS

Physician Disciplinary Proceedings

Like administrative proceedings, physician disciplinary proceedings are agency hearings regulated by the state government. Two courts have examined whether a constitutional right of access to disciplinary proceedings exists.¹²⁶

The court in both decisions concluded that there is no First Amendment right of access inasmuch as there is "no historical basis for open professional disciplinary hearings" and no showing that "the public played a significant role in the licensing or policing of professionals."¹²⁷

In *Johnson Newspaper Corp. v. Melino*,¹²⁸ the Appellate Division of the Supreme Court of New York upheld a lower court's denial of an order compelling public access to a disciplinary hearing involving a dentist charged with unprofessional conduct.¹²⁹ The *Johnson Newspaper* court affirmed the lower court's decision and dismissed the petitioner's argument that there is a constitutionally-based public right of access to professional disciplinary hearing.¹³⁰ The court instead applied what it described as the Supreme Court's two-tiered test.¹³¹ The test "includes 'whether the place and process have historically been open to the press and general public' and 'whether public access plays a significant positive role in the functioning of the particular process in question.'"¹³² Noting *Press II*, the court found no historical basis for open professional disciplinary hearings.¹³³ Additionally, there was "no showing that public access plays 'a significant role' in the functioning of the proceedings."¹³⁴ As a result, the court found no presumptive right of access.

In a later case, *Dr. J.P. v. Chassin*,¹³⁵ the Appellate Division of the

126. *Johnson Newspaper Corp. v. Melino*, 547 N.Y.S.2d 915, 917 (N.Y. App. Div. 1989) (holding that disciplinary proceeding involving a license to practice dentistry is confidential); *Dr. J.P. v. Chassin*, 594 N.Y.S.2d 930, 925 (N.Y. App. Div. 1993) (holding that disciplinary proceeding involving a license to practice medicine is confidential).

127. *Johnson Newspaper*, 547 N.Y.S.2d at 915-16; *Chassin*, 594 N.Y.S.2d at 934.

128. *Johnson Newspaper*, 547 N.Y.S.2d at 915.

129. *Id.* at 917.

130. *Id.* at 915-16.

131. *Id.* at 916.

132. *Id.* at 916.

133. *Id.*

134. *Id.* (quoting *Press II*, 478 U.S. 1, 8 (1986)).

135. *Chassin*, 594 N.Y.S.2d at 935.

Supreme Court of New York again held that no First Amendment right of public access exists in physician disciplinary proceedings.¹³⁶ *Chassin* involved a physician who sought to enjoin the State Board of Professional Medical Conduct from disclosing information with respect to the proceedings until they were finally determined.¹³⁷ The basis of this contention was that New York state law mandated that professional disciplinary proceedings remain confidential until a final determination is rendered.¹³⁸

Although the respondents raised no First Amendment right of public access, the court upheld *Johnson Newspaper*, ruling that:

The right to public access to a professional disciplinary proceeding depends upon "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question."¹³⁹

Furthermore, the court stated that:

It has been the traditional policy of this State to maintain confidentiality in professional misconduct proceedings until final determination. That policy of confidentiality serves the public purpose of removing any disincentive to the filing of professional misconduct complaints by protecting any private or confidential information that a complainant would not want publicly disclosed.¹⁴⁰

Therefore, by strictly applying the two-prong test of *Press II* the Appellate Division of the Supreme Court of New York affirmed, and upheld that no First Amendment right of public access exists in professional disciplinary proceedings.¹⁴¹

Physician Disciplinary Proceedings and Open Meeting Laws

Although no court has concluded that a Constitutional right of public access exists in physician disciplinary proceedings, state open meeting

136. *Id.* at 934.

137. *Id.* at 931, 935.

138. *Id.* at 933-35.

139. *Id.* at 935.

140. *Id.*

141. *Johnson Newspaper*, 547 N.Y.S.2d at 916.

laws have provided another means of public access. As stated above, state open meeting laws provide a statutory right to proceedings where presumptive or Constitutional rights do not exist. In addition, states have created a statutory right of access governing medical boards.¹⁴² These statutes, which provide a right of access to medical disciplinary hearings, provide exemptions which support closure. One such exemption is physician reputation. The justification for such closure is the need to protect the reputation of a physician from damage that may result from an airing of unsubstantial charges. Also, physician disciplinary proceedings are closed in order to protect the confidentiality rights of the physician-patient relationship. In some instances these laws conflict with general open meeting laws.¹⁴³ A decision as to which law applies varies by state.¹⁴⁴

Overall, most courts recognize the rights granted by the organic statute of medical boards rather than the state's general open meeting laws. As a result, most physicians' disciplinary hearings are closed until "good cause" is determined, thus protecting patient confidentiality. This procedure demonstrates a boards' sensitivity toward patient protection and the possibility of irreparable harm to a physician's reputation resulting from unfounded accusations.

Additionally, some courts determine a right of access using the

142. Joseph D. Steinfield & Robert A. Bertsche, *Current Developments in the Law of Access*, 371 PLI/Pat 7, 54 (1993). According to a 1992 report by the Federation of State Medical Boards, Montana appears to be the only state that allows public access to patient complaints against licensed medical doctors prior to investigative action. However, significant majorities of State Medical Boards allow public access to formal disciplinary proceedings, once good cause has been determined in the initial complaint. Oregon does not allow public access to any part of its physician disciplinary proceeding. *Spray v. Bd. of Med. Exam'rs*, 627 P.2d 25, 25 (Or. Ct. App. 1981).

143. *Chassin*, 594 N.Y.S.2d at 935.

144. *See* Appeal of Plantier, 494 A.2d 270, 275-76 (N.H. 1985) (ruling that a general right-to-know law, N.H. REV. STAT. ANN. 91-A:3, II(c) (Supp. 1998), that was generally applicable to any functions affecting citizens by boards or commissioners of state agencies, allowing them to meet in executive session in matters which might adversely affect the reputation of any person, was not applicable to a medical disciplinary proceeding, when a doctor requested an open hearing under [N.H. REV. STAT. ANN. § 329:17, X (Supp. 1998)], which provided that hearings would be closed unless the physician requested an open hearing.). As a result, an open meetings law, which provided closure during deliberations, was not applicable and the hearing was open since the physician had not requested a closed hearing. *Id.* at 276; *see also* *Spray v. Board of Med. Exam'rs*, 627 P.2d 25, 25 (1981) (holding that the Oregon open meetings law did not apply to deliberations of the board of medical examiners' meeting to decide licensure revocation.). The court determined that OR. REV. STAT. 192.690 (1999) provided that open meetings law should not apply to deliberations of state agencies conducting hearings on contested cases. *Id.*

Mathews due process balancing test.¹⁴⁵ A license to practice law or medicine is considered a property right by the courts, and like other forms of property, the possessor cannot be deprived of property rights without due process.¹⁴⁶ As a result, rather than utilize the two-prong test, courts may apply a balancing test in order to determine public access under open meeting laws.¹⁴⁷

In conclusion, no court has found a First Amendment right of access to physician disciplinary proceedings for either the public, or the press. However, states vary in the procedures used to contemplate such hearings. Some states have created a statutory right of access. However, these statutes have exemptions designed to protect the physician, the individual, and government interests.

Attorney Disciplinary Proceedings

Attorney disciplinary proceedings vary greatly from state to state. No court has found a First Amendment right of access to attorney disciplinary proceedings for the public or the press.¹⁴⁸ However, rules governing attorney disciplinary proceedings permit access in some states.

145. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (balancing private interest, the risk of an erroneous deprivation of such interest, probable value of additional or substitute procedural safeguards, and government interests).

146. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property . . . is an . . . individual entitlement grounded in state law, which cannot be removed except 'for cause.'"); see also *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957) (holding that a "[s]tate cannot exclude a person from the practice of law or from any other occupation in a manner . . . that contravene the Due process . . .").

147. *Obasi v. Dep't of Prof'l Regulation*, 639 N.E.2d 1318, 1326 (Ill. 1994) (holding that since the hearing was not impeded due to the presence of cameras, due process rights were not violated).

148. *But c.f. Doe v. Supreme Court of Florida*, 734 F. Supp. 981, 988 (S.D. Fla. 1990) (holding that the state bar rule requiring complete confidentiality in the attorney discipline process violated the First Amendment of the United States Constitution by requiring those who file grievances against lawyers to remain quiet). The court opined that the interests of the state bar in encouraging the filing of complaints and the cooperation of witnesses, protecting individual attorneys' reputations, upholding the bar's integrity, and making the disciplinary process easier, did not sufficiently outweigh the public's right to publicly discuss the character and competence of an attorney. *Id.* at 986. The *Doe* court held that the Florida Bar rule prohibiting complainants from disclosing information involving disciplinary proceedings was not a valid time, place, and manner restriction on speech. *Id.* The court reasoned that the rule was specifically aimed at the content of the speech and constituted an "absolute bar, which provided no alternative avenues of expression." *Id.* at 985. The court held that the Florida Bar rule was not "narrowly tailored to meet the specific interest it is said to serve. Rather, it broadly stifles speech when the ends it purports to achieve can be met by more narrow means." *Id.* at 988.

Unlike physician disciplinary hearings, many State Bar Associations continue to close their disciplinary proceedings to the public. In 1992, a report of the National State Bar Association reported twenty-eight states allowed public access; however, access is only allowed after the disciplinary board finds probable cause to believe misconduct occurred.¹⁴⁹ Other states allow public access only after a final judgment is made public.¹⁵⁰ Oregon allows public access from the initial filing of the complaint, whereas West Virginia and Florida permit access to initial complaints once probable cause is found.¹⁵¹ In Virginia most proceedings are closed leaving only a small number of hearings open.¹⁵²

The justification offered for the secrecy of disciplinary proceedings is the need to protect the reputation of attorneys from irreparable harm that may result from an airing of unsubstantial charges.¹⁵³ However, public criticism of legal disciplinary proceedings and an effort to reduce the appearance of impropriety has fostered efforts to open attorney disciplinary proceedings to the public.

Due to the public perception of mistrust, state bar associations as well as the American Bar Association have supported the controversial recommendation to open disciplinary proceedings.¹⁵⁴ One recommendation suggested opening disciplinary proceedings fully to public scrutiny. This recommendation of the American Bar Association's Commission of Disciplinary Enforcement, the "McKay Commission," would open

149. Steinfield & Bertsche, *supra* note 142, at 53 (including Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Texas, Utah, Washington, and Wisconsin).

150. *Id.* (including Alabama, Alaska, Delaware, Hawaii, Idaho, Iowa, Kentucky, Mississippi, Missouri, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming).

151. *Id.*

152. *Id.*

153. *Contra* Don J. DeBenedictis, *Advice is Legal*, 77 A.B.A. J. 17, 18 (1991) ("Yet, in Oregon, which has had an entirely open system for fifteen years, there has been no evidence that public disclosure has harmed the reputation of any of the state's 18,000 attorneys.").

154. AM. BAR ASS'N, REPORT ON THE COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT MCKAY RECOMMENDATION 7 (1992) ("McKay Commission"). The McKay Commission is convinced that secrecy in discipline proceedings continues to be the greatest single source of public distrust of lawyer disciplinary systems. Because it engenders such distrust, secrecy does great harm to the reputation of the profession. The public's expectation of government and especially of judicial proceedings is that they will be open to the public, on the public record, and that the public and media will be able to freely comment on the proceedings. *Id.*; see also N.J. BAR ASS'N, MICHELS COMM'N REPORT (1993); ILL. BAR ASS'N, ILL ATT'Y REGISTRATION AND DISCIPLINE COMM'N REPORT (1997).

attorney disciplinary proceedings to the public from the time of filing of a formal complaint to the delivery of notice to the accused attorney.¹⁵⁵

Like physician disciplinary proceedings, most rules governing proceedings provide a statutory right of access dependent upon a finding of good cause. This limitation balances protecting an attorney's reputation, stock, and trade with the importance of informing the public of a complaint against an attorney. Even if a statutory right of access exists, the right protects an attorney against frivolous complaints while also serving the public.

Right of Access and State Constitutions

In Oregon and West Virginia, the state constitutions provide a right of access to disciplinary hearings.¹⁵⁶ West Virginia and Oregon both have extended the guarantees of public access beyond those that the United States Supreme Court has recognized under the First Amendment.¹⁵⁷ In doing so, Oregon and West Virginia have relied exclusively on analysis of the state open court provision found in their respective state constitutions.¹⁵⁸ As a result, West Virginia has treated recognized federal rights to public access as only a minimum guarantee, while Oregon courts hold that public access is not a qualified right, but an absolute right.¹⁵⁹

West Virginia

After *Richmond Newspaper* and before *Press II*, the West Virginia Supreme Court held that a right of public access to pretrial hearings in criminal proceedings was guaranteed under the state's open courts provision.¹⁶⁰ In its analysis, the court examined whether relevant state constitutional protections exceeded those provided by the Federal Constitu-

155. AM. BAR ASS'N, REPORT ON THE COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT MCKAY RECOMMENDATION 7 (1992).

156. W. VA. CONST. art. III, § 17 ("The courts of this state shall be open . . ."); OR. CONST. art. I, § 10 (stating "No court shall be secret . . .").

157. See, e.g., *Daily Gazette II*, 352 S.E.2d 66 (W. Va. 1986) (holding that state constitutional open court provision required that disciplinary proceedings of state medical board should be open); *State ex rel. Oregonian Publishing Co. v. O'Leary*, 303 P.2d 173 (Or. 1987) (holding that public access to judicial proceedings was an absolute right).

158. W. VA. CONST. art. III, § 17 ("The courts of this state shall be open . . ."); OR. CONST. art. I, § 10 (stating "No court shall be secret . . .").

159. Jack B. Harrison, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1329-30 (1992) (discussing the constitutional issue of public access to judicial proceedings).

160. *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544, 546-47 (W. Va. 1980).

tion.¹⁶¹ Because West Virginia's open courts provision did not, the court's ruling developed an independent state constitutional doctrine allowing for open court proceedings. This right was later extended to attorney and physician disciplinary proceedings.¹⁶²

In *Daily Gazette Co. v. Committee on Legal Ethics of the West Virginia State Bar*,¹⁶³ the West Virginia Supreme Court heard a challenge to a state statute that closed the disciplinary proceedings of the state bar ethics committee to the public.¹⁶⁴ The petitioners brought a mandamus action to compel the Committee on Legal Ethics to release information concerning its investigation of an attorney's disciplinary proceeding.¹⁶⁵ Although the mandamus action was made moot when the attorney agreed to release information regarding the proceeding, the court provided a brief discussion on the issue of public access.¹⁶⁶ The court focused on petitioner's inquiry whether the open courts provision of the state constitution guaranteed a right of public access to adjudicatory proceedings outside the direct scope of the legal system.¹⁶⁷ The court included state bar proceedings as a part of the legal system because the unique nature of attorney disciplinary proceedings does not exempt them from the requirements of the West Virginia Constitution art. III, § 17.¹⁶⁸ According to the court, the primary function of attorney disciplinary proceedings was to protect the public's interest.¹⁶⁹ Therefore, a compelling need for openness existed.¹⁷⁰ Thus, the court extended the qualified right of public access under the state's open courts provision to attorney disciplinary proceedings.¹⁷¹ As a result, this right of access under the West Virginia Constitution was extended beyond formal trials to other

161. *Id.*

162. See *Daily Gazette I*, 326 S.E.2d 705 (W. Va. 1984); *Daily Gazette II*, 352 S.E.2d 66, 70-72 (W. Va. 1986).

163. 326 S.E.2d 705 (W. Va. 1984).

164. *Id.* at 709. Article VI § 30 of the West Virginia State Bar By-Laws states: All proceedings involving allegations of misconduct by or the disability of an attorney shall be kept confidential until and unless a recommendation for the imposition of public discipline is filed with the court by the committee on legal ethics, or the respondent attorney requests that the matter be public, or the investigation is predicated upon a conviction of the respondent attorney for a crime.

165. *Id.* at 706-07.

166. *Id.* at 707-09.

167. *Id.* at 709-11.

168. *Id.* at 711.

169. *Id.*

170. *Id.*

171. *Id.*

types of judicial and quasi-judicial proceedings.¹⁷² However, this right was extended in attorney disciplinary proceedings only after there was a finding of probable cause.¹⁷³

Two years later, the court further extended this right of access to quasi-judicial proceedings under the state's open court provision when it held that the disciplinary proceedings of the State Board of Medicine were likewise to be open.¹⁷⁴ In this case, the Supreme Court of Appeals of West Virginia affirmed a lower court's order enjoining the Board of Medicine from closing disciplinary proceedings.¹⁷⁵ The court determined that relevant parts of the West Virginia Medical Practice Act¹⁷⁶ were unconstitutional.¹⁷⁷ Like attorney disciplinary proceedings, the court held that if the Board of Medicine makes a preliminary determination that probable cause exists, the proceedings shall be public.¹⁷⁸ Overall, the right of public access to professional disciplinary proceedings in West Virginia is a qualified right dependent upon a finding of probable cause.¹⁷⁹

Oregon¹⁸⁰

Unlike the West Virginia courts, which ruled that its state's open courts provision provides a qualified right of public access, the Oregon court articulated an absolute right of public access to judicial proceedings.¹⁸¹ While the court concluded that the open courts provision might not apply to some traditionally closed proceedings, the court made clear that tradition would not be determinative of the issue of openness.¹⁸²

Thus, the Oregon court developed a state constitutional doctrine inde-

172. *Id.* at 710.

173. *Id.* at 712-13.

174. *Daily Gazette II*, 352 S.E.2d at 70-72.

175. *Id.* at 71-72.

176. W. VA. CODE § 30-3-6 (1980).

177. *Daily Gazette II*, 352 S.E.2d at 70-71 (providing in part: "Meetings of the board shall be held in public session, except that . . . disciplinary proceedings shall be held in closed sessions, unless the party subject to discipline requests that the hearing be held in public session.").

178. *Id.* at 70.

179. *See id.* at 70-71.

180. *See generally* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, (1970).

181. *State ex rel. Oregonian Publ'g Co. v. O'Leary*, 736 P.2d 173, 176 (Or. 1987).

182. *Id.* at 177. Proceedings that might be exempted are those, which were traditionally closed before the adoption of the Oregon Constitution, such as jury deliberations and collegial court conferences. *Id.*

pendent of the federal doctrine of public access. Accordingly, it is unclear why Oregon is the only state that completely closes its physician disciplinary hearings, but provides complete public access to the same proceedings for attorneys. Nevertheless, no Oregon or federal court has addressed this parity in public access.

CONCLUSIONS

Providing public access to judicial and quasi-judicial proceedings is a valuable means of protecting the public. Although no First Amendment right of access exists, the rules governing state attorney and physician disciplinary proceedings create a right of access. This legal right in some states reflects traditional constitutional analysis and balances professional interest with public interest.

With the exception of a few states, most formal hearings are open to the public. These proceedings are “trial-like” and similar to civil and criminal proceedings, which have a tradition of open access. Opening formal disciplinary hearings once good cause is determined, weighs importantly on the process. Conditioning access upon establishing good cause protects the public interest without harming a professional’s reputation. Additionally, determining good cause before opening a hearing protects a citizen’s confidentiality rights as either a patient or client. Finally, not opening disciplinary proceedings to the public until good cause is established, compliments the constitutional threshold that “[t]he presumption [of openness] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values.”¹⁸³

183. *Press II*, 478 U.S. 1, 9 (1986) (quoting *Press I*, 464 U.S. 501, 510 (1984)).