# Public Access To Judicial Proceedings And Records In Maine: Worth Protecting

By Sigmund D. Schutz

Plaintiffs and defendants in legal actions typically have little interest in a transparent justice system. A litigant often has the opposite interest, wanting as little light as possible shed on his proceedings, and preferring them to be shrouded in secrecy. A litigant's priority is the success of his case – only rarely is the case itself about public access to judicial proceedings and records. Corporate defendants in civil litigation are notoriously publicity averse. Some criminal defendants would also prefer that their matters be handled in secret for fear of embarrassment or harm to reputation. It is easy to file a motion to seal or to stamp as "confidential" documents that a client does not want made public, or to acquiesce to such a motion made by opposing counsel. Even a litigant not sensitive to publicity may find it hard to justify spending money fighting over public access to court proceedings or records. Is that a battle worth fighting?

Public access to legal proceedings is also a secondary concern for most courts. Judges are not awash in spare time. Most have little appetite for involvement in disputes that are not directly relevant to the merits of the case at hand, and no great interest in the policing of filings under seal or motions to seal records, particularly when consented to. To decide whether a judicial record should be public may involve a tedious *in camera* review of voluminous records. Why spend time on a public access issue on which the parties are in agreement?

The reason for doing so is this: public court proceedings and court records are essential to the public interest, the rule of law, and a fair judicial system. The U.S. Supreme Court has said that "[o]penness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[1] Justice Brennan has written: "Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability."[2] Justice Blackmun has referred to secrecy in judicial proceedings as "a menace to liberty" and observed that "justice cannot survive behind walls of silence."[3] These principles are reflected in a set of rigorous standards that must be met before judicial proceedings or records can be closed to the public.

How does Maine law treat public access to judicial proceedings and records?

## Control Over Access to Courtrooms and Court Records

When questions arise about access to government records in Maine, the usual starting point is the Freedom of Access Act, which sets out procedures for accessing public records.[4]

However, the Act applies to state agencies and political subdivisions, not to the judicial branch. With respect to court proceedings, the Maine Supreme Judicial Court (Law Court) has written that "media access to courtrooms is within the judicial power committed to this Court by the Maine Constitution."[5] The same rule applies to court records.[6] This is a function of the separation of powers. "[T]he people of Maine conferred all of the judicial power upon the judicial department and left none to be exercised by the Legislature, except in cases of impeachment."[7]

A notable example of that exclusive judicial power over access to courtrooms is a Direct Letter of Address the Law Court issued in 1986 to inform the Legislature that it could not compel the courts to allow cameras in the courtroom.[8] The Court declined to give effect to legislation requiring that it permit radio and television broadcasting of judicial proceedings.[9]

A pair of administrative orders govern access to judicial records and proceedings and electronic coverage of the courts. The order entitled "Public Information and Confidentiality"[10] describes the procedure for accessing public information,[11] and states that courtrooms and court records are generally public. A second administrative order, "Cameras and Audio Recording in the Courtroom," is addressed to electronic coverage of judicial proceedings.[12] There is, of course, a difference between proceedings that are open, and proceedings for which electronic coverage is permitted.

In light of the Court's authority to regulate courtrooms and court records, the Legislature's authority to intrude into such matters is, at best, open to question. That has not stopped the Legislature from enacting legislation to regulate public access to certain types of judicial proceedings and records, or the Law Court from applying such legislation: for example, the Law Court has cited and applied a statute restricting access to a child protection proceeding – a subject matter which does raise legitimate privacy concerns.[13] It is less than clear, however, why the Legislature has the right to close courtrooms when it comes to certain proceedings, but lacks the authority to open the courtroom when it comes to camera or electronic coverage. An explanation may be that constitutional issues were not before the Court in the child protection case, and that the parties lacked standing to assert the First Amendment rights of the public.[14] A First Amendment and separation of powers challenge should be considered whenever a statute purports to require secret judicial records or proceedings in Maine.

## Public Access to Criminal Proceedings

The public enjoys a presumptive First Amendment right of access to criminal trials. "[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice."[15] Relying on federal precedent, the Law Court has acknowledged that "members of the public have a First Amendment right to access certain criminal proceedings."[16] "The basis for this right is that without access to documents the public often would not have a 'full understanding' of the proceeding and therefore would not always be in a position to serve as an effective check on the system."[17] Federal opinions are binding on Maine courts because the First Amendment applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment[18] and – even if that were not the case – the Law Court interprets the free speech clauses under the Maine and federal constitutions in parallel.[19]

In addition to the public's First Amendment right to attend criminal trials, the Sixth Amendment guarantees to criminal defendants the right to "a speedy, public, and impartial trial."[20] Referring to a criminal defendant's Sixth Amendment rights, the Law Court has explained that a public trial protects "against possible abuse of the judicial process and the arbitrary use of judicial power[,]" may lead to more truthful testimony, and may generate publicity that will cause witnesses to come forward.[21] These are also good reasons for public access to criminal trials under the First Amendment.

A Maine statute provides that all pre-trial criminal proceedings are open to the public unless the Court finds "a substantial likelihood" that (A) injury or damage to the accused's right to a fair trial will result from conducting the proceeding in public; (B) alternatives to closure will not protect the accused's right to a fair trial; and (C) closure will protect against the perceived injury or damage.[22] The statute contains exceptions to preserve the court's power to maintain decorum and to determine the validity of a privilege.[23] The standard for closing pre-trial criminal proceedings as formulated by the Supreme Court is similar. "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[24]

The only Maine case of which the author is aware on the subject of public access to pre-trial criminal proceedings is an unreported Superior Court decision addressing access to a bind-over hearing to determine whether two juveniles arraigned in Juvenile Court would be tried as adults. The Court concluded that "a qualified First Amendment right of access applies to bind-over hearings involving serious crimes," and that "it is difficult to imagine a fact situation where the media could ever be lawfully excluded from a bind-over hearing."[25] The Court ruled that the hearing would be public.

## Public Access to Civil Proceedings

All civil trials in Maine are public. The Rules of Civil Procedure provide: "All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room."[26] The Rules also provide that "[i]n every trial, the testimony of witnesses shall be taken in open court, unless a statute, these rules or the Rules of Evidence provide otherwise."[27] However, "[a]ll

other acts or proceedings may be done or conducted by a justice or judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the county or division where the action is pending."[28]

Neither the U.S. Supreme Court nor the Law Court has weighed in on whether there is a constitutional right of access to civil trials, but the U.S. Supreme Court recognized a common law right of access to judicial proceedings in *Richmond Newspapers, Inc. v. Virginia*.[29] A plurality found that "historically both civil and criminal trials have been presumptively open."[30] Other courts have made clear that there is a constitutional right to access civil trials.[31] The California Supreme Court summed up the prevailing rule, stating that "every lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials."[32] Likewise, the District of Columbia high court noted that "[n]o court has expressly concluded that the first amendment does not guarantee some right of access to civil trials."[33]

## Standard for Closed Judicial Proceedings

Where there is a constitutional presumption of access, the U.S. Supreme Court applies the *Press-Enterprise II* three-part test to determine whether a court may close proceedings to the public. To close proceedings, the trial court must make specific, on-the-record findings: (1) that closure is necessary to further a compelling governmental interest; (2) that the closure order is narrowly tailored to serve that interest; and (3) that no less restrictive means are available to adequately protect that interest.[34] The party seeking to restrict access bears the burden of showing that closure is "strictly and inescapably necessary."[35] The same unreported Superior Court decision mentioned earlier applied *Press-Enterprise II* to vacate an impoundment order in the context of a bind-over hearing.[36]

Common-law rights of access are "not coterminous" with the constitutional right of access, but "courts have employed much the same type of screen in evaluating their applicability to particular claims."[37] However, the standard of review on appeal does depend on the source of the right of access. The standard is *de novo* where there is a First Amendment right of access, but a lesser, albeit "more rigorous than garden-variety" abuse of discretion review when the right of access is based exclusively in the common law.[38]

## Public Access to Court Records – Criminal

Criminal court records are public in Maine pursuant to the relevant administrative order, which provides: "Information and records relating to cases that are maintained in case files, dockets, indices, lists, or schedules by and at the District, Superior, or Supreme Judicial Courts are generally public and access will be provided to a person who requests to inspect them or have copies made by the clerk's office staff unless the information or a part of it is confidential . . . ."[39] However, the Administrative Order mentions the possibility that a case may be sealed: "In some limited circumstances, all information about a case may be impounded, [or] specific information within a case [may be impounded], such as the identity of a party, or the fact that an impoundment motion was made and granted may be impounded or sealed."[40] There are no statistics available on the frequency of this practice in Maine.

The Law Court does not appear to have recently decided a case on the subject of access to records in criminal cases, but an old case involving admission of evidence does mention that "[c]onvictions are matters of court record, permanent and accessible."[41]

The source of the public's right of access to records in criminal cases, either constitutional or common law, is unsettled in Maine. The U.S. Supreme Court has recognized a common law right of access, observing that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[42] In both civil and criminal cases, "the existence of a common law right of access to . . . inspect judicial records is beyond dispute."[43] Some courts have also recognized a constitutional right of access to court records, with one noting that "the public and press have a first amendment right of access to pretrial documents in general."[44] The constitutional right to access documents is a corollary to the constitutional right to attend proceedings.[45]

The public does not have unfettered access to all records filed with the court in criminal cases. The Law Court held that a presentence investigation report, for example, is ordinarily confidential and may only be discoverable on a particularized showing, in the discretion of the court.[46]

## Public Access to Court Records – Civil

In Maine, as in the federal courts, judicial records of civil cases are open to the public. The relevant administrative order does not distinguish between civil and criminal records with respect to the general presumption of public access.[47]

## Standard for Confidential Court Records

The Law Court set a high bar to obtain an impoundment order, namely, the clearest showing of necessity, writing that "[a]lthough under appropriate circumstances a court may impound records when publication would impede the administration of justice, the power of impoundment should be exercised with extreme care and only upon the clearest showing of necessity."[48]

In a case challenging a court order denying confidentiality to exhibits admitted in evidence at trial, *Bailey v. Sears, Roebuck & Co.*, the Law Court distinguished between the comparatively lenient "good cause" standard for entry of a protective order governing discovery materials and the more

rigorous standard that must be met before trial exhibits will be sealed.[49] The Court quoted with approval a First Circuit opinion:

> Material of many different kinds may enter the trial record in various ways and be considered by the judge or jury for various purposes . . . . It is neither wise nor needful for this court to fashion a rulebook to govern the range of possibilities. One generalization, however, is safe: the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial. This dividing line may in some measure be an arbitrary one, but it accords with the long-settled practice in this country separating the presumptively private phase of litigation from the presumptively public.[50]
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> "[T]he court concluded that non-disclosure of judicial records could be justified only by the most *compelling reasons.*"[51]

In *Bailey* the Law Court affirmed the denial of a request to seal trial exhibits despite an affidavit from the defendant that disclosure of the evidence in question would "result in a direct loss of revenue . . . and would spare our competitors the considerable burden of financing their own research and development."[52] The Court explained: "On this record we cannot say the trial court abused its discretion by determining that the defendants had failed to satisfy the court that they had established good cause or that justice required the continued protection of the exhibits admitted in evidence as distinguished from the materials produced in the course of the discovery process."[53]

## Procedure: How to Get Access

Practice before Maine Superior Courts can be informal when it comes to access to judicial records or proceedings. Trial judges have been willing to allow members of the media or their representatives to be heard on the filing of a letter, brief, or even by impromptu telephone conference on questions of access to a particular court proceeding. In general, this lack of formality is speedy, inexpensive, and efficient.

In civil cases, intervention is the appropriate procedural mechanism to contest the closure of proceedings or records. In *Bangor Publishing v. Town of Bucksport*, the Law Court endorsed intervention as the proper means for a newspaper to challenge the propriety of a protective order sealing public records.[54] The Court ruled that the newspaper could not obtain access to sealed documents without intervening and seeking relief through the courts.[55] The Civil Rules allow intervention when an appropriate showing has been made.[56] The Rules also state that requests to inspect and copy sealed records may be made by motion, although the rules do not make the nature of the motion clear.[57]

The *Bangor Publishing* decision casts doubt on the continued validity of a prior case rejecting a media party's motion to intervene and contest closure of a civil proceeding. In *Doe v. Roe*, the court held that the interest in public access to civil proceedings was not sufficient to permit intervention in a proceeding to consider approval of a minor settlement.[58] The *Bangor Daily News* had moved to intervene in a medical malpractice case to obtain access to a sealed settlement agreement between a juvenile and a medical provider. The newspaper asserted that it had two interests justifying intervention as of right: first, "as news gatherer and disseminator of information to the community, claiming the public has an interest in the quality of local medical care," and second, an interest in "exposing to public scrutiny the proper functioning of the court in its judicial duties."[59] With regard to that second interest, the newspaper maintained "that by its intervention for the purpose of lifting the impoundment, the public may assure itself that the court's approval of the settlement was not merely rubberstamped, but fair to both parties and protective of the minor's interests."[60] The Superior Court agreed.

The Law Court, however, reversed, finding that both asserted interests were insufficient to warrant intervention as of right. With respect to the first interest, quality medical care, the Court reasoned:

> While Bangor Publishing Company may be interested in discovering and publishing the identities of the parties and the terms of the settlement, neither it nor the public has a direct interest at stake in the underlying claim itself. The public will neither "gain nor lose by the direct legal operation and effect of the judgment." Were it not for the participation of a minor in the settlement, the agreement would not have been brought before the court.[61]

The Court also rejected the second asserted interest, the functioning of the judicial system, explaining that "[t]his claim of interest similarly lacks a nexus to the subject of the claim sufficient to warrant intervention in the case."[62] Although *Doe v. Roe* involved intervention as of right only, the Court signaled that permissive intervention likely would also have been improper.[63] This outcome is contrary to the subsequent *Bangor Publishing* decision, where the court wrote that intervention was the only means of being heard with respect to access to judicial records, albeit where the interest was grounded in access to public records of a municipality.

The outcome in *Doe v. Roe* is also contrary to the weight of federal authority. But the *Doe* Court cannot be faulted for having found, in essence, that the interest in public access to court proceedings "does not fit neatly within the literal language" of Rule 24.[64] The problem is that Rule 24 is not interpreted strictly when it comes to a challenge to a closure order. "[E]very court of appeals to have considered the matter has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of challenging confidentiality orders."[65] "As some of these courts have explained, although there is ample justification for the common fact or

law requirement when the proposed intervenors seek to become a party to the action, 'there is no reason to require such a strong nexus of fact or law when a party seeks to intervene only for the purpose of modifying a protective order.'"[66] The "courts have widely recognized that the correct procedure for a non-party to challenge a protective order is through intervention for that purpose."[67]

If the public is given the opportunity to be heard in a future case involving a minor settlement in Maine, the outcome might well be a finding that such hearings are public in whole or in part, just as they are in several other jurisdictions.[68]

In criminal cases, the public and the press also have a right to challenge closure of court records and proceedings: "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'"[69] Neither the Law Court nor the U.S. Supreme Court have specified the appropriate procedural device for asserting a right to public access by a non-party. In a Superior Court access case, the Court ruled in favor of a "petition in the nature of a *mandamus*" seeking equitable relief from the Court.[70] The courts may also allow a straightforward motion to lift an impoundment order or intervention for the limited purposes of litigating a claim of access in a criminal case, even though intervention generally is not allowed in such cases.

## Appeals: Interlocutory, Expedited, and Public

Oral arguments on the merits of appeals are public proceedings.[71]

An interlocutory appeal from an order closing a court proceeding to the public is allowed under the death knell exception to the final judgment rule. The Law Court has held the death knell exception permitted an interlocutory appeal by a mother from the denial of a motion to open to the public proceedings related to the termination of her parental rights. The Court ruled that the mother's right to compel the District Court to open the proceedings to the public "would be irreparably lost if the District Court's decision to keep the proceedings closed was not reviewed until a final judgment had been rendered and her contentions were then decided to be meritorious."[72] The Court reasoned: "If we were to conclude after the proceedings were completed that the mother had a constitutional right to have the hearings opened, little could be done to correct the deprivation of that right."[73] The Court rejected the notion that the release of transcripts of the proceedings to the public would be an adequate substitute for attendance at the hearings "at the time they are taking place."[74]

An appeal involving access claims should be resolved quickly. As the U.S. Supreme Court noted in another context, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[75]

## Conclusion

At the federal level, the First Circuit has described the presumption of public access to judicial records and proceedings as "vibrant" but not unfettered[76] and "strong and sturdy."[77] Maine law is no different. Although authority is sparse, the few Maine cases and statutes on point suggest that state law standards for closing courtrooms and court records are no less rigorous than federal standards. Nor could they be, since much of judicial access law is predicated on federal constitutional rights.

Nevertheless, as noted at the outset, there is tension between the public interest in open courts and the interests of parties, their lawyers, and courts. The focus of the parties to a proceeding is on deciding a particular case, and public access is normally only a secondary interest, if it is an interest at all. The result is that there may be too much secrecy in Maine courtrooms and court records – secrecy that would not survive scrutiny if the appropriate standards were vigorously applied and enforced.

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1. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508-509 (U.S. 1984) ("*Press-Enterprise I*").

2. *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 587 (U.S. 1976) (Brennan, J., concurring).

3. *Gannett Co. v. DePasquale*, 443 U.S. 368, 412 (U.S. 1979) (Blackmun, J., concurring in part and dissenting in part).

4. 1 M.R.S. §§ 400-141.

5. Supreme Judicial Court Direct Letter of Address, Me.Rptr., 490-509 A.2d CXXVI-CXXIX (April 25, 1986).

6. *State v. Ireland*, 109 Me. 158, 159-60, 83 A. 453 (1912) ("there must be and is an inherent power in the court to preserve and protect its own records"); *Clark v. Stetson*, 113 Me. 276, 281 (Me. 1915) ("At common law courts have the inherent power to preserve and protect their own records and to substitute copies of lost records."); *see also Allen v. Cole Realty, Inc.*, 325 A.2d 19, 22 (Me. 1974) (referring to the "inherent power of the Court over its own records" in the context of the court's power to correct record entries made by error or mistake). Likewise, the Supreme Court recognizes that "[e]very court has supervisory power over its own records and files . . . ." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978).

7. Supreme Judicial Court Direct Letter of Address, Me.Rptr., 490-509 A.2d CXXVI-CXXIX (April 25, 1986).

8. *Id.*

9. *Id.*

10. Me. Admin. Order JB-05-20 (A. 9-11).

11. These orders are available from the Court's website at: http://www.courts.state.me.us/rules_adminorders/adminorders/index.shtml (last visited Nov. 5, 2012).

12. Me. Admin. Order JB-05-15 (A.2-11).

13. *In re. Bailey M.*, 2002 ME 12, ¶ 15, 788 A.2d 590. "The Supreme Court has never determined whether the First Amendment right of public access attaches to juvenile proceedings[.]" *United States v. Three Juveniles*, 61 F.3d 86, 89 (1st Cir. 1995).

14. In *Bailey M*. the Court found that the parties to the proceeding lacked standing to assert the First Amendment rights of the public. *In re. Bailey M*., 2002 ME 12, ¶ 11.

15. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602-03 (1982) (recognizing First Amendment access right and striking down statute that required "the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial"); *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 505 (1984) (constitutional presumption of openness to voir dire proceedings); *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13 (1986) (recognizing right of access to preliminary hearings); *El Vocero de Puerto Rico v. Puerto Rico,* 508 U.S. 147, 149 (1993) (same).

16. *In re. Bailey M*., 2002 ME 12, ¶ 11; see also *Press-Enterprise Co. v. Superior Court of Cal.*, Riverside Cty., 464 U.S. 501 (1984) ("*Press-Enterprise I*") (*voir dire* of prospective jurors must be open to the public under the First Amendment).

17. *Globe Newspaper Co. v. Pokaski,* 868 F.2d 497, 502 (1st Cir.1989).

18. *Presley v. Georgia,* 558 U.S. 209 (U.S. 2010).

19. The free speech clauses under the Maine and federal constitutions are generally interpreted in parallel. *Central Maine Power Co. v. Public Utilities Commission,* 734 A.2d 1120, 1999 ME 119, ¶ 8 ("With respect to free speech rights, 'the Maine Constitution is no less restrictive than the Federal Constitution.'"); *In re Letellier*, 578 A.2d 722, 727 (Me. 1990) ("the Maine Constitution does not make its protection of freedom of the press any more or less absolute or any more or less extensive than the constitutional protection accorded that freedom under the First Amendment"); *Gelder v. Cote*, 2007 Me. Super. LEXIS 154, *7 (Me. Super. Ct. July 16, 2007) ("In the absence of any authority supporting a different conclusion, this Court holds that the free speech rights protected by the Maine Constitution are 'coextensive' with those under the United States Constitution."). However, the Law Court has not foreclosed the possibility that state constitutional rights to free speech may be more extensive than comparable rights under the federal constitution. *See City of Portland v. Jacobsky,* 1984 Me. Super. LEXIS 24 *19 (Me. Super. Ct. Feb. 7, 1984) ("The Law Court has explicitly refused to be as bound to Federal bill of rights precedent as the City suggests, even in cases where it has limited its consideration to the First Amendment or other Amendments in the Bill of Rights.").

20. ME CONST. Art I, § 6; U.S. CONST. amend VI ("in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

21. *State v. Pullen*, 266 A.2d 222, 228 (Me. 1970).

22. 15 M.R.S. § 457(2).

23. *Id.* § 457(3).

24. *Presley v. Georgia*, 558 U.S. 209 (U.S. 2010).

25. *In re Am. Journal*, 1986 Me. Super. LEXIS 347 *7 (Me. Super. Ct. Dec. 3, 1986).

26. M. R. Civ. P. 77(b).

27. M. R. Civ. P. 43(a).

28. *Id*.

29. *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580 n.17 (1980) (plurality opinion).

30. *Id.*

31. *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3rd Cir. 1984) ("the First Amendment does secure a right of access to civil proceedings"); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2nd Cir. 1984) ("we agree with the Third Circuit in *Publicker Industries* … that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*"); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1984) (First Amendment access rights extend to contempt proceedings); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (First Amendment and common law limit judicial discretion to seal documents in civil litigation); *Newman v. Graddick*, 696 F.2d 796, 801-03 (11th Cir. 1983) (constitutional right of access to proceedings and common-law right of access to documents in civil case involving prison conditions). Our neighbor, New Hampshire, says so too. *Associated Press v. New Hampshire*, 888 A.2d 1236, 1247 (N.H. 2005).

32. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Cou*rt, 980 P.2d 337, 358 (Cal. 1999).

33. *Mokhiber v. Davis*, 537 A.2d 1100, 1107 n.4 (D.C. 1988).

34. *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 13-14 (1986); *see also Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510-11 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (access restrictions must be "necessitated by a compelling governmental interest, and … narrowly tailored to serve that interest").

35. *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

36. *In re Am. Journal,* 1986 Me. Super. LEXIS 347 *5 (Me. Super. Ct. Dec. 3, 1986) ("the guidelines [in *Press-Enterprise II*] should be used in all pretrial criminal hearings that meet the criteria established by the U. S. Supreme Court").

37. *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002).

38. I*d.*

39. Administrative Order JB-05-20 (A. 9-11), "Public Information and Confidentiality," § III(A)(1).

40. *Id*. § II(G)(2) n. 2.

41. *State v. DePalma*, 128 Me. 267, 268, 147 A. 191, 191 (1929).

42. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted).

43. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3rd Cir. 1984).

44. *Associated Press v. District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

45. *In re New York Times Co*., 828 F.2d 110, 114 (2nd Cir. 1987) (citations omitted) (construing "the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access"); *see also In re Providence Journal Co*., 293 F.3d 1, 10 (1st Cir. 2002) ("this constitutional [access] right … extends to documents and kindred materials submitted in connection with the prosecution and defense of criminal proceedings") (quoting *Globe Newspaper Co. v. Pokaski,* 868 F.2d 497, 502 (1st Cir.1989)); *Associated Press v. District Cour*t, 705 F.2d 1143, 1145 (9th Cir. 1983) ("the public and press have a first amendment right of access to pretrial documents in general").

46. *Halacy v. Steen*, 670 A.2d 1371, 1375 (Me. 1996).

47. Administrative Order JB-05-20 (A. 9-11) "Public Information and Confidentiality," § III(A)(1).

48. *Maine Auto Dealers Assn. v. Tierney*, 425 A.2d 187, 189 n.3 (Me. 1981) (citation omitted).

49. *Bailey v. Sears, Roebuck & Co.*, 651 A.2d 840, 843-44 (Me. 1994).

50. *Id.* at 843-844 (quoting *Poliquin v. Garden Way,* 989 F.2d 527, 533 (1st Cir. 1993)).

51. *Id.* at 844 (emphasis added).

52. I*d.*

53. *Id.*

54. *Bangor Publ. Co. v. Town of Bucksport*, 682 A.2d 227, 229 (Me. 1996).

55. *Id*. at 233.

56. M.R.Civ.P. 24.

57. M. R. Civ. P. 79(b)(2) ("Requests for inspection or copying of materials designated as confidential, impounded, or sealed within a case file must be made by motion in accordance with Rule 7.").

58. *Doe v. Roe,* 495 A.2d 1235 (Me. 1985).

59. *Id*. at 1237-1238.

60. *Id*. at 1238.

61. *Id.* at 1238.

62. *Id*.

63. *Id.* at 1238 n.5.

64. *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000).

65. *Jessup,* 227 F.3d. at 997-998; *National Children's Ctr.*, 146 F.3d at 1045 (collecting cases).

66. *Jessup,* 227 F.3d at 997-998 (quoting *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992)); *see also Pansy v. Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) (holding that any party challenging a confidentiality order "meets the requirement of Fed. R. Civ. P. 24(b)(2) that their claim must have 'a question of law or fact in common' with the main action.").

67. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citing *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988)); see also In re Associated Press, 162 F.3d 503, 507 (7th Cir. 1998) (intervention is the "most appropriate procedural mechanism" for challenging clo-

sure orders); *Hertz v. Times-World Corp.*, 528 S.E. 2d 458, 463 (Va. 2000) (mandamus was erroneously granted because intervention provided adequate remedy at law).

68. *A.P. v. M.E.E.*, 354 Ill.App.3d 989, 998 (Ill App.Ct. 1st Dist. 2004) (rejecting wholesale seal but finding that "redacting the names of the adult and minor beneficiaries [of the settlement] could serve to protect the minors' privacy interests without resorting to the overly broad measure of sealing entire documents or concealing the identities of other adult parties"); *Burstein v. Lanzaro,* 404 N.J. Super. 16, 25 (App.Div. 2008) (reversing seal on amount and terms of a minor settlement); *Storms v. O'Malley*, 779 A.2d 548, 569-570 (Pa.Super.Ct. 2001) (affirming denial of seal on proceedings to enforce minor settlement); see also *Bank of America National Trust & Savings Association v. Hotel Rittenhouse Associates*, 800 F.2d 339, 345 (3d Cir. 1986) ("Having undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.").

69. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n. 25 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)).

70. *In re Am. Journal,* 1986 Me. Super. LEXIS 347 *4-*5 (Me. Super. Ct. Dec. 3, 1986).

71. M.R.App. P. 12B(e); *see also In re. Grand Jury Proceedings,* 983 F.2d 74, 75 (7th Cir.1992).

72. *In re. Bailey M.*, 202 ME 12, ¶ 8.

73. *Id.*

74. *Id.* ¶ 8 n.4; see also *Halacy*, 670 A.2d at 1373 n.2 (allowing interlocutory appeal from order requiring disclosure of pre-sentence investigation report); *Me. Health Care Ass'n Workers' Comp. Fund v. Superintendent of Ins.*, 2009 ME 5, ¶ 7, 962 A.2d 968, 971. (finding that "death knell" exception allowed appeal from discovery order in adjudicatory proceeding involving records claimed to be "highly proprietary, confidential, and protected by the trade secret privilege").

75. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir.1994) ("access should be immediate and contemporaneous" because "[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment.").

76. *Siedle v. Putnam Invs.*, 147 F.3d 7, 10 (1st Cir.1988).

77. *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987).


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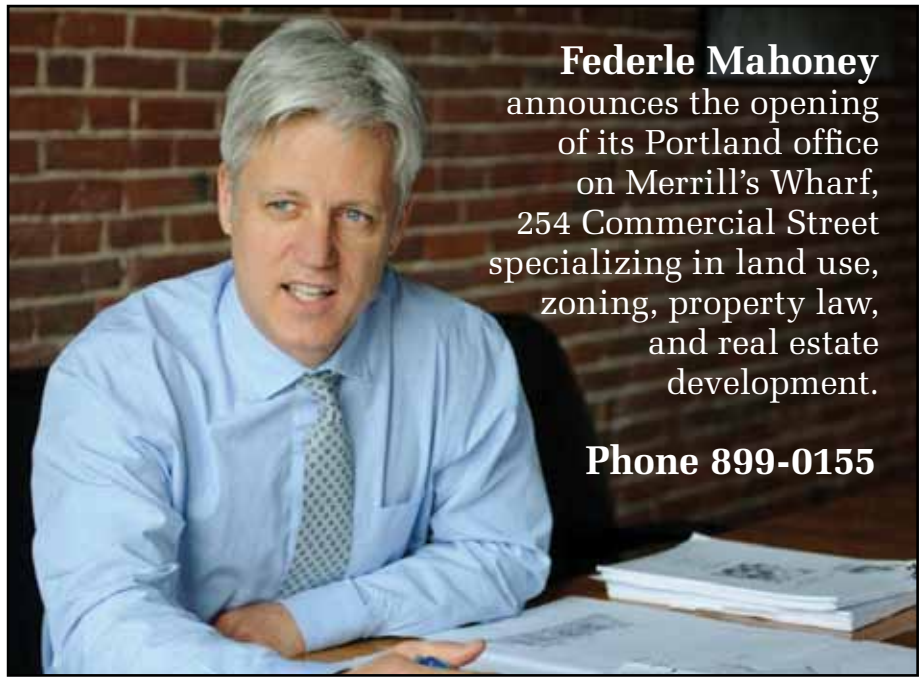


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