

RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS AND DOCUMENTS:



A Reporter's Manual

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EXECUTIVE SUMMARY OF THE RIGHT OF ACCESS

Q. Can judicial proceedings be closed to the press and public?

A. Generally, no. A right of access exists under the laws of the United States and Pennsylvania that confers on the press and public a presumptive right to access all judicial proceedings. Absent a strong countervailing interest, courts must remain open.

Q. Does this apply equally in state and federal court?

A. Yes. The right of access is founded in United States and Pennsylvania common law, the First Amendment of the United States Constitution, and Sections 7 and 11 of the Pennsylvania Constitution. The Pennsylvania Constitution provides support for the right of access in two separate provisions. Article I, Section 11 states that “[a]ll courts shall be open.” Article I, Section 7 provides protections for a free press. There is significant overlap in these bodies of state and federal law, and in application, there are virtually no differences regarding the right of access in Pennsylvania state and federal courts.

Q. What is a strong countervailing interest that would cause a court to order closure of a judicial proceeding?

A. There are two approaches to making this determination: common law and constitutional. The common law balancing approach asks whether the party seeking closure has proved there is an interest in secrecy that outweighs the presumption of openness. The constitutional approach asks whether closure serves an important governmental interest and there is no less restrictive means of achieving it.

The burden always is on the party seeking closure. The press therefore does not have to justify the request for access. Pennsylvania courts have clarified that both private and public interests can be protected through closure. For example, protecting trade secrets and the privacy and reputation of innocent parties can warrant closure in the same way national security interests also could overcome the presumption of openness. Even if a party seeking closure can overcome the common law presumption, then the party still must overcome the higher constitutional burdens.

Q. Does the right of access depend on whether the proceeding is civil or criminal?

A. No. The right of access applies to both civil and criminal proceedings.

Q. Does the right of access include criminal pretrial proceedings?

A. It depends on the nature of the hearing. If the pretrial hearing is solely to preserve testimony, courts have held there is no right of access to the proceeding itself, but transcripts can be accessed thereafter. Otherwise, the right of access generally applies unless the presumption of openness is rebutted under one of the two countervailing interest approaches set forth above.

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Q. Does the right of access include the jury selection process?

A. Yes, jury selection proceedings are subject to the presumption of openness. The names of jurors also are subject to access, but their addresses are not.

Q. Are there bright line exceptions to the right of access?

A. The right of access does not entitle the press access to grand jury proceedings.

Q. Am I entitled to review judicial documents and records?

A. Yes, the right of access to judicial proceedings includes access to judicial documents and records. While documents and records are subject to the common law and constitutional approaches discussed above, additional considerations apply. Under the common law, a court asks whether the document constitutes a “public judicial document”: a document that is filed with the court and used by the court to render a decision. The right of access under the Pennsylvania Constitution and First Amendment is stronger than the common law. Under the constitutional approach, courts will ask whether the material is the kind of information that courts will protect and whether there is good cause to protect it.

Q. Are there judicial documents and information that I cannot access?

A. Yes. Discovery responses and documents, discovery depositions, jurors’ addresses, search warrants in relation to grand jury investigations, and information contained in sealed settlement agreements all constitute information and documents that are generally not accessible. If such information becomes part of a motion or filing that is not sealed, however, it is subject to access. For example, private documents and information exchanged during discovery generally cannot be accessed unless the information is revealed in a motion, such as a motion to compel discovery.

Q. How does the Public Access Policy of Pennsylvania interact with the right of access?

A. In addition to considering the common law and constitutional rights of access, the Public Access Policy governs access to case records in the Pennsylvania state court system. Note: the Public Access Policy does not apply to federal court judicial records.

The Public Access Policy establishes a unified system for accessing case records, dockets, indices, or other documents filed with a court. The public and press can submit oral or written requests to the applicable court custodian for access to such case records.

Q. Are there any case records that are not accessible under the Public Access Policy?

A. Yes. Section 9 of the Public Access Policy provides that the following information is not accessible: 1) case records in proceedings involving birth records; 2) case records concerning guardianship proceedings; 3) information sealed pursuant to a court order; 4) information that is otherwise restricted pursuant to federal law, state law, or state rule; and 5) information that presents a risk to personal security and privacy, or the impartial administration of justice.

Q. How does the Public Access Policy treat confidential information and documents?

A. Under the Public Access Policy the following is “confidential information”: social security numbers, financial account numbers, driver’s license numbers, state identification numbers, minors’ names and addresses except when the minor is charged in a criminal matter, and abuse victims’ addresses and other contact information. Confidential information must be filed separately on a Confidential Information Form

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¹The Public Access Policy is attached as an addendum.

EXECUTIVE SUMMARY OF THE RIGHT OF ACCESS

contemporaneous with the original filing. The policy also permits courts to accept two separate filings of a document, with one redacting the confidential information.

The Public Access Policy further requires that certain “Confidential Documents” be filed under a cover sheet designated “Confidential Document Form.” This includes financial source documents, minors’ educational records, medical and psychological records, children and youth services’ records, marital property inventories and pre-trial statements in divorce proceedings, income and expense statements in support proceedings, and marital settlement agreements.

Q. What happens if a judicial filing is not properly redacted?

A. Under the Public Access Policy, it is the responsibility of parties and their attorneys to redact or omit confidential information and confidential documents from the public filing. The court records’ custodians are not responsible to check filings. Therefore, you can obtain the filing in full even if it was not properly redacted.

Q. Are decisions under the Public Access Policy appealable?

A. Under the Public Access Policy, if a custodian improperly denies a request for case records, relief can be sought by filing a motion with the court that controls the records in question.

Q. What should I do if I have been denied access to a judicial proceeding or judicial record?

A. The Pennsylvania Supreme Court has held that the proper means for asserting the right of access is to file a petition to intervene in the case. As representatives of the general public, the press has standing to intervene and assert the right of access on its behalf. Intervention is typically granted at which time a hearing is held on the question. The United States Court of Appeals for the Third Circuit has applied this principle in federal court.²

Q. What if I am covering a trial and the court closes the proceeding?

A. You should note your objection on the record and ask to be heard with your counsel on your objection. Remember, the burden is on the party seeking to close the proceeding. Case law requires that your objection must be heard.

Q. Is there a procedure a court must follow when closing a proceeding?

A. If you make an objection to the closure, the court must halt the proceeding and afford you an opportunity to be heard. When closing a proceeding, a trial court must both articulate a countervailing interest and make findings sufficient for a reviewing court to determine whether closure was proper.

Q. Are decisions denying or granting access appealable?

A. Yes, decisions granting or denying the press the right of access to proceedings or records are appealable to the Pennsylvania Superior Court and the United States Court of Appeals for the Third Circuit.

²The Third Circuit has jurisdiction over the Pennsylvania Federal District Courts.

CASE LAW ON THE RIGHT OF ACCESS

Included here is important case law regarding the right of access.

Civil Proceedings and Records

Application of Presumptive Right of Access

The presumptive right of access applies equally to civil and criminal proceedings. *In re J.B.*, 39 A.2d 421 (Pa. Super. 2012); *Storms v. O'Malley*, 779 A.2d 548 (Pa. Super. 2001) appeal denied, 808 A.2d 573 (2002). Because parties to a civil trial are often private litigants, however, the right of access is somewhat more limited than in the criminal context. *Stenger v. Lehigh Valley Hosp. Ctr.*, 554 A.2d 954 (Pa. Super. 1989).

Court Filings

There is a presumptive right of access to all documents considered a "public judicial document." Documents that are filed with the court and are used by the court to render a decision are generally classified as public judicial documents. Thus, this would include pleadings, motions, and other court filings. *Commonwealth v. Long*, 922 A.2d 892, 899 (Pa. 2007). Note: the Public Access Policy imposes restrictions on access in Pennsylvania state court proceedings.

Transcripts

The press and public have a presumptive right of access to trial, sidebar, and chambers conference transcripts. *Stenger v. Lehigh Valley Hosp. Ctr.*, 554 A.2d 954 (Pa. Super. 1989).

Divorce Proceedings

The press and public have a limited common law right of access to divorce proceedings. The Pennsylvania Superior Court in *Katz v. Katz* recognized that often in equitable distribution hearings highly personal subjects and matters of privacy are on display. Further, the details involved in divorce proceedings generally lack any useful, public purpose. For these reasons, the *Katz* Court held that closure may be warranted where disclosure will work a clearly defined and serious injury to the party. *Katz v. Katz*, 514 A.2d 1374 (Pa. Super. 1986) *appeal*, 527 A.2d 542 (1987). In *Zdrok v. Zdrok*, 829 A.2d 697 (Pa. Super. 2003), however, the Superior Court qualified the *Katz* decision noting that the trial court must determine whether there is good cause for excluding the public from the civil proceeding by weighing the personal interest in secrecy against the public's interest in access to the proceeding. Note: under the Public Access Policy divorce proceedings are public although certain divorce filings like marital property inventories are not.

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CASE LAW ON THE RIGHT OF ACCESS

Mental Health Proceedings

There is presumptive right of access to mental health hearings. The Mental Health Procedures Act of Pennsylvania provides that a hearing shall be public unless a request is made for a private hearing. Closure may be justified if medical records and other private information would be disclosed, or if the doctor-patient privilege prevents disclosure of evidence to be presented. *R.W. v. Hampe*, 626 A.2d 1218 (Pa. Super. 1993).

Discovery Materials

There is no presumptive right of access to discovery materials because they are not considered "public judicial documents." *Stenger v. Lehigh Valley Hosp. ctr.*, 554 A.2d 954 (Pa. Super. 1989). These materials can be accessed only if they are included in a motion or filing with the court.

Settlement Agreements

If a settlement agreement in a civil proceeding is executed outside of court and it is not filed with the court, there is no right of access to the settlement agreement. *Enprotech Corp. v. Renda*, 983 F.2d 17 (3d Cir. 1993). If the settlement agreement becomes part of a court proceeding, the right of access applies. Under Pennsylvania's Right-to-Know Law, however, a settlement agreement to which a public agency is a party is presumptively accessible as a "public record" even if the parties sealed the agreement. *See Newspaper Holdings, Inc. v. New Castle Area School Dist.*, 911 A.2d 644, 648 (Pa. Cmwlth. Ct. 2006) (holding that a settlement agreement between a student and a school district regarding a school dress code violation was a "public record" even though it was sealed).

Attorney Disciplinary Hearings

There is no presumptive right of access to Pennsylvania attorney disciplinary proceedings. *McLaughlin v. Philadelphia Newspapers, Inc.*, 348 A.2d 376 (Pa. 1975).

Procedure for Closing a Proceeding

In *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984), the United States Court of Appeals for the Third Circuit held that a trial court closing a proceeding must articulate the countervailing interest that justifies closure and make findings on the record sufficient for a reviewing court to determine whether closure was in fact justified. If the press objects to closure, courts typically will provide an opportunity for the press to be heard on the matter.

Criminal Proceedings and Records

Right to a Fair Trial

In the criminal context, the right of access is considered with the right of the accused to a fair trial. Historically, the right to a fair trial was the primary justification for the right of access to criminal trials: to allow the public to observe that the government is not violating an accused's rights. Publicity can, in some cases, cut against the accused if publicity would cause society to assume his guilt or innocence. Trial courts are thus faced with the difficult task of weighing these competing interests to ensure a fair trial. *Com. v. Buehl*, 462 A.2d 1316 (Pa. Super. 1983); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

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CASE LAW ON THE RIGHT OF ACCESS

Transcripts

The press and public have a presumptive right of access to trial, sidebar, and chambers conference transcripts. *Com. v. Buehl*, 462 A.2d 1316 (Pa. Super. 1983); *United States v. Smith*, 787 F.2d 111 (1986).

Pretrial Suppression, Due Process, and Entrapment Hearings

In *United States v. Criden*, 675 F.2d 550, 554 (3d Cir. 1982), the United States Court of Appeals for the Third Circuit held that the public and press have a First Amendment right to access pretrial suppression, due process, and entrapment hearings. The Pennsylvania Supreme Court held in *Com. v. Hayes*, 414 A.2d 218 (Pa. 1980) that the Pennsylvania Constitution guarantees a right of access to pretrial suppression hearings. *Compare with Phila. Newspapers, Inc. v. Jerome*, 387 A.2d 425 (Pa. 1978) (denying access to a pretrial suppression hearing where rules and orders were closely tailored to protect the constitutional right of defendants to a fair trial and the public's interests in efficient administration of justice).

Testimony Preservation Hearings (under Pennsylvania Rule of Criminal Procedure 500, 501)

There is no right of access to attend testimony preservation hearings under Pennsylvania Rule of Criminal Procedure 500 or 501. In *Com. v. Selenski*, 996 A.2d 494 (Pa. Super. 2010), the Pennsylvania Superior Court held that there is no historical basis to support the right of the public and press to attend any testimony preservation hearing. The *Selenski* Court concluded that the Pennsylvania Supreme Court, in promulgating Rules 500 and 501, did not intend to alter the historical practice of denying the press and public access to testimony preservation hearings. Rule 500(1) does permit the press and public access to the transcript once it becomes part of the record or is otherwise admitted at trial.

Notice and Opportunity to be Heard Before Closure

Courts have held that notice and an opportunity to be heard must be given before a proceeding is closed. In *United States v. Criden*, 675 F.2d 550, 554 (3d Cir. 1982), the United States Court of Appeals for the Third Circuit held that motions for closure of pretrial criminal proceedings must be posted on the docket to give notice to the public, followed by an opportunity to be heard. Finally, a court must consider alternatives to closure and explain the reasons for its decision. The holding in *Criden* was adopted by the Pennsylvania Superior Court in *Com. v. Buehl*, 462 A.2d 1316 (Pa. Super. 1983).

Search Warrants and Arrest Warrant Affidavits

Under the common law, the public and press have a right of access to copy and inspect affidavits of probable cause for arrest warrants after they have been issued, but not before an indictment has been issued by a grand jury. *Com. v. Fenstermaker*, 530 A.2d 414 (Pa. 1987).

Trial Documents

In *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), the United States Court of Appeals for the Third Circuit held that materials introduced at trial are judicial records and are therefore subject to the right of access. This includes materials that were not admitted into evidence. *See also United States v. Martin*, 746 F.2d 964 (3d Cir. 1984). The Pennsylvania Superior Court has held, however, that proffer letters regarding *in camera* testimony that were never docketed, filed with the court, or required by any rule of criminal procedure were not public judicial documents subject to the right of access. *Com. v. Curley*, 189 A.3d 467 (Pa. Super. 2018).

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CASE LAW ON THE RIGHT OF ACCESS

Grand Jury Proceedings

There is no right of access to grand jury proceedings or material. The Pennsylvania Superior Court has held that a primary function of grand jury proceedings is maintaining secrecy, which secrecy is also mandated by statute. Thus, the presumption of openness does not apply. *In re 2014 Allegheny County Investigating Grand Jury*, 181 A.3d 349 (Pa. Super. 2018). Under Pennsylvania statutory law, however, a witness in an investigating grand jury is not prohibited from disclosing his testimony except for cause shown in a hearing before the supervising judge.

Jury Selection Proceedings

There is a presumptive right of access to jury selection proceedings. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

Jurors Names and Addresses

There is no common law right of access to either jurors' names or addresses, as neither falls under the definition of a "public judicial document." There is, however, a right to access jurors' names under the right of access granted by the Pennsylvania Constitution and the First Amendment. Significantly, the Pennsylvania Supreme Court held that jurors' addresses are never accessible. *Com. v. Long*, 922 A.2d 892 (Pa. 2007).

Juvenile Matters

Juvenile Proceedings and Records

Access to juvenile proceedings and records is restricted. Juvenile hearings are not open to the public unless it concerns contempt, a delinquency proceeding where the child is over the age 14 and the conduct would be a felony if the child were an adult, or if the child is over the age of 12 and the conduct would constitute one of the enumerated serious offenses (e.g., murder, voluntary manslaughter, and rape). Juvenile records are subject to very similar restrictions.

In weighing the foregoing statutory considerations, courts will weigh the government's interest in closure and the press' interest in access. *In re M.B.*, 819 A.2d 59 (Pa. Super. 2003). This applies equally to juvenile dependency and criminal hearings. *In re J.B.*, 39 A.3d 421 (Pa. Super. 2012).

Process to Obtain Access

Intervention

The Pennsylvania Supreme Court has held the proper manner by which the press may assert the public's right of access is to file a petition to intervene. *Com. v. Long*, 592 Pa. 42, 47, 922 A.2d 892, 895 n.1 (2007). Access rights of the press, and of the general public, are identical in scope.

Accordingly, as representatives of the general public, the press has standing to intervene in judicial proceedings and seek access. This principle was applied in the United State Court of Appeals for the Third Circuit in *Pansy v. Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) allowing a newspaper to intervene to seek access to protective and confidential orders. See also *United States v. Wecht*, 484 F. 3d 194, 202-03 (3d Cir. 2007).

FURTHER BACKGROUND ON THE RIGHT OF ACCESS

The right of access of the press and public to judicial proceedings has a unique history in Pennsylvania. Its foundation can be traced to almost 100 years before the founding of our nation.

Pennsylvania courts have distinguished between a common law and a constitutional law right of access to judicial proceedings. Our analysis therefore begins by considering each in turn.

Common Law

The right of access to judicial public documents was first recognized by the Pennsylvania Supreme Court in *Com. v. Fenstermaker*, 530 A.2d 414 (Pa. 1987), where the common law right of access was applied to allow a newspaper to inspect and copy affidavits of probable cause supporting arrest warrants. *Id.* at 417. In *Com. v. Long*, 922 A.2d 892, 898-99 (Pa. 2007), the Pennsylvania Supreme Court re-examined the right formulated in *Fenstermaker* and developed a structure for determining which documents are subject to access. The *Long* Court noted that a presumption exists in favor of public access to judicial records. *Id.* at 899. The right to access judicial documents depends, however, on whether the documents constitute “public judicial documents.” *Id.* Documents that are filed with the court and are used by the court to render a decision are generally classified as public judicial documents. *Id.* Documents such as bench conferences and working notes held by counsel are generally not considered public judicial documents. *Id.* The *Long* Court held that jurors’ names and addresses fall under the latter category and are therefore not subject to the common law right of access. *Id.* Thus, the *Long* Court ultimately held that there is no right of access under the common law to jurors’ names and addresses but found that the First Amendment and Section 11 permit access to the jurors’ names, thus exemplifying the higher constitutional right of access.

Courts will attempt to avoid a constitutional issue, if possible, when grounds exist to rule otherwise. *Com. v. Kennedy*, 604 A.2d 1036, 1039-40 (Pa. 1982). The common law right of access is therefore significant because it is generally the first argument considered. Furthermore, while there is some overlap between the common law and constitutional approaches, there are differences between the inquires, as Section 11 and the First Amendment provide a greater right of access than the common law. *See Long*, 922 A.2d at 897-98.

The common law right of access applies to both civil and criminal proceedings and records, *R.W. v. Hampe*, 626 A.2d 1218, 1220 (Pa. Super. 1993) but it is not absolute. The common law right of access can be rebutted by showing that the interest in secrecy outweighs the presumption. *Id.*

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FURTHER BACKGROUND ON THE RIGHT OF ACCESS

Constitutional Tests

Under the constitutional approach, a court asks whether a party seeking to keep proceedings closed can rebut the presumption of openness by demonstrating: (1) denial of access serves a compelling governmental interest, and that (2) there is no less restrictive means of achieving the interest. Further, a party seeking closure must demonstrate that the material is: (1) the kind of material that courts will protect, and (2) there is good cause for protecting it. *In re M.B.*, 819 A.2d at 63. Requests for closure are therefore subject to strict scrutiny, requiring a compelling government interest and a narrowly tailored solution.

The Pennsylvania Supreme Court has adopted the United States Supreme Court's test, adopted under the First Amendment in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). *Long*, 922 A.2d at 900. Termed the "experience and logic" test, a court asks whether experience instructs that the place and process have historically been open to the press and public. *Id.* The logic inquiry then asks whether access will benefit the process in question. *Id.*

The application of this test was made in *Long*, where the Pennsylvania Supreme Court undertook the "experience and logic" test and determined that jurors' names, but not addresses, were accessible. *Id.* at 904-05. This conclusion, the Court reasoned, provided the public with enough information to confirm the identity of the jurors, thereby furthering the objective of a fair trial to the defendant and an assurance to society as a whole. *Id.* at 905. By refusing to furnish jurors' addresses, it limited the possibility that the press will harass the jurors by "camp[ing] out on their front lawn," and it alleviated the concern for the fear of physical harm. *Id.* Juror addresses, the Court held, are not a constitutional imperative that will further the functioning of the judiciary. *Id.* at 904.

In *Publiker*, the Third Circuit acknowledged that the United States Supreme Court had not granted a right of access to civil trials under the First Amendment. *Id.* at 1067-72. Nevertheless, after analyzing the history behind the civil and criminal systems and the right of access historically available to each, it held that a presumption of openness applies to civil proceedings. *Publiker*, 733 F.3d at 1072.

The presumption of openness can be rebutted, and the right of access limited, when an important countervailing interest is shown. *Id.* "Substantively, the record before the trial court must demonstrate an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (citing *Press-Enterprise Co.*, *supra*). The Third Circuit's holding in *Publiker* was adopted by the Pennsylvania Superior Court in *Katz*. *Katz*, 514 A.2d at 1381.

Accordingly, the right of access under the Constitutional approach is a broad one. It protects the press and public's inherent right to access judicial proceedings and records. Its principles are almost identical to that of the First Amendment, and the Pennsylvania Supreme Court has applied United States Supreme Court precedent to guide its way in most instances.

The Constitution of the Commonwealth of Pennsylvania

The open court mandate, now embodied in Section 11 of the Pennsylvania Constitution, was included in its first version ratified in 1776. *Richmond Newspapers*, 448 U.S. at 568. The open court mandate is the critical foundation of the right of access of the press to judicial proceedings, and it has been the law in Pennsylvania since long before it was first ratified in the Pennsylvania Constitution. The Pennsylvania Frame of Government of 1682, authored by William Penn, initially pronounced "that all courts shall be

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FURTHER BACKGROUND ON THE RIGHT OF ACCESS

open.” *Id.* See also *Com. v. Contakos*, 453 A.2d 578, 581 (Pa. 1982). William Penn’s pronouncement in turn formed the basis for its inclusion in the first version of Pennsylvania Constitution, and later, Section 11. See *id.* The right of access of the public and press to judicial proceedings is therefore a bedrock principle of Pennsylvania and United States law supporting our free and fair judicial process over the past three-and-a-half centuries.

In *Commonwealth v. Contakos*, the Pennsylvania Supreme Court considered the historical foundations of the right of access outlined above. It reasoned that the United States Supreme Court had set forth the core rationale behind the right of access in *Richmond Newspapers and Gannett*, *supra*:

Generally, to assure the public that justice is done even-handedly and fairly; to discourage perjury and the misconduct of participants; to prevent decisions based on secret bias or partiality; to prevent individuals from feeling that the law should be taken into the hands of private citizens; to satisfy the natural desire to see justice done; to provide for community catharsis; to promote public confidence in government and assurance that the system of judicial remedy does in fact work; to promote the stability of government by allowing access to its workings, thus assuring citizens that government and the courts are worthy of their continued loyalty and support; to promote an understanding of our system of government and courts.

Id. at 580. The *Contakos* Court concluded that the foregoing considerations apply equally to the open court mandate of the Pennsylvania Constitution. *Id.*

Contakos considered the right of the public to access a criminal trial during testimony by the Commonwealth’s chief witness. *Id.* at 578-79. The trial judge ordered the court closed after being notified that a threat was made on the witness’ life. *Id.* at 579. While the record was somewhat unclear, it was understood by the Pennsylvania Supreme Court that some press was allowed to be present during the witness’ testimony. *Id.* Otherwise, the trial was closed. *Id.* The Pennsylvania Supreme Court held that this was reversible error. It recognized the strong presumption of openness in criminal trials imbued by the common law and the First Amendment. Before reaching either of those principles, it held that, foremost, the Pennsylvania Constitution specifically mandates that the courts shall be open: “In other words, the public shall not be excluded from trials, the courts shall not be closed.” *Id.* at 580. It made no difference that some press was allowed in the courtroom during the testimony, as “[t]he public and representatives of the press alike enjoy the constitutional right in Pennsylvania to attend trials.” *Id.* at 582.

Appeal Of Access Decisions

Standard of Review

The decision to grant or deny access to a judicial proceeding rests in the sound discretion of the trial court. On appeal, the standard of review for decisions concerning the right of access is abuse of discretion. *In re M.B.*, 819 A.2d 59, 61 (Pa. Super. 2003); *Publiker Industries, Inc. v. Cohen*, 733 F.3d 1059, 1071 (3d Cir. 1984). An abuse of discretion will only be found where there is an overriding misapplication of the law, an exercise of judgment that is manifestly unreasonable, or a decision that is the result of bias, prejudice, or ill-will, as shown by the evidence of record. *Com. v. Santos*, 176 A.3d 877 (Pa. Super. 2017).



PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA

Case Records of the Appellate and Trial Courts

Section 1.0 Definitions

- A. "Abuse Victim"** is a person for whom a protection order has been granted by a court pursuant to Pa.R.C.P. No. 1901 et seq. and 23 Pa.C.S. § 6101 et seq. or 42 Pa.C.S. § 62A01 et seq.
- B. "Case Records"** are (1) pleadings, documents and other legal papers for any unique case filed with and maintained by the applicable court or custodian; (2) dockets, orders, opinions, judgments, decrees, and other legal papers for any particular case created and maintained by the applicable court or custodian. This term does not include notes, memoranda, correspondence, drafts and work product of judges or court personnel. Unless otherwise provided, this definition applies equally to case records maintained in paper and electronic formats.
- C. "Court"** includes the Supreme Court, Superior Court, Commonwealth Court, Courts of Common Pleas, and Philadelphia Municipal Court, excluding the Traffic Division of Philadelphia Municipal Court.
- D. "Court Facility"** is the location or locations where case records are filed or maintained.
- E. "Custodian"** is any person responsible for maintaining case records or for processing public requests for access to case records.
- F. "Docket"** is a chronological index of filings, actions, and events in a particular case, which may include identifying information of the parties and counsel, and a brief description or summary of the filings, actions, and events.
- G. "Financial Account Numbers"** are financial institution account numbers, debit and credit card numbers, and methods of authentication used to secure accounts such as personal identification numbers, user names and passwords.
- H. "Financial Source Documents"** are:
1. Tax returns;
 2. W-2 forms and schedules;
 3. Wage stubs, earning statements, or other similar documents;
 4. Credit card statements;
 5. Financial institution statements;
 6. Check registers;
 7. Checks or equivalent; and
 8. Loan application documents.

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PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA: CASE RECORDS OF THE APPELLATE AND TRIAL COURTS

I. "Minor" is a person under the age of eighteen.

J. "Party" is one who commences an action or against whom relief is sought in a matter.

K. "Public" is any person, member of the media, business, non-profit entity, organization or association. The term does not include a party to a case; the attorney(s) of record in a case; Unified Judicial System officials or employees if acting in their official capacities; or any federal, state, or local government entity, and employees or officials of such an entity if acting in their official capacities.

L. "Remote Access" is the ability to electronically search, inspect, print or copy information in a case record without the need to physically visit the court facility.

COMMENTARY

Regarding Subsection J, *amicus curiae* are not parties. See Pa.R.A.P. 531.

Regarding Subsection K, Unified Judicial System officials or employees include: judicial officers and their personal staff, administrative staff and other central staff, prothonotaries, clerks of the courts, clerks of the orphans' court division, sheriffs, prison and correctional officials, and personnel of all the above.

Section 2.0 Statement of General Policy

- A.** This policy shall govern access by the public to case records.
- B.** Security, possession, custody, and control of case records shall generally be the responsibility of the proper custodian and designated staff.
- C.** Facilitating access by the public shall not substantially impede the orderly conduct of court business.
- D.** A court or custodian may not adopt more restrictive or expansive access protocols than provided for in this policy. Nothing in this policy requires a court or custodian to provide remote access to case records. However, if a court or custodian chooses to provide remote access to any of its case records, access shall be provided in accordance with Section 10.0.
- E.** This policy shall apply to all case records created on or after the effective date of this policy.

COMMENTARY

The Supreme Court of Pennsylvania has adopted other policies governing public access to Unified Judicial System case records: the *Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania* that provides for access to the statewide case management systems' web docket sheets and requests for bulk data and the *Public Access Policy of the Unified Judicial System of Pennsylvania: Official Case Records of the Magisterial District Courts* that provides for access to case records of the magisterial district courts maintained in a paper format.

Section 3.0 Access to Case Records

All case records shall be open to the public in accordance with this policy.

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Section 4.0 Requesting Access to Case Records

- A.** Any person desiring to inspect or copy case records shall make an oral or written request to the proper custodian, unless otherwise provided by court order or rule. If the request is oral, the custodian may require a written request.
- B.** Written requests shall be substantially in the format designed and published by the Administrative Office of Pennsylvania Courts.
- C.** Requests shall identify or describe the records sought with specificity to enable the custodian to ascertain which records are being requested.

COMMENTARY

Public access requests to the courts and custodians are routinely straightforward and often involve a limited number of records. Therefore, artificial administrative barriers should not be erected so as to inhibit fulfilling these requests in an efficient manner.

Nonetheless, Subsection A provides a custodian with the flexibility to require that a more complex request be submitted in writing to avoid misunderstandings and errors that can often result in more time being expended to provide the requested information than is necessary. This approach is not novel; submission of a written request form has been a longstanding practice under the Unified Judicial System's Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania and Public Access Policy of the Unified Judicial System of Pennsylvania: Official Case Records of the Magisterial District Courts.

Subsection C does not require a requestor to identify a case by party or case number in order to have access to the files, but the request shall clearly identify or describe the records requested so that court personnel can fulfill the request.

Section 5.0 Responding to Requests for Access to Case Records

- A.** A custodian shall fulfill a request for access to case records as promptly as possible under the circumstances existing at the time of the request.
- B.** If a custodian cannot fulfill the request promptly or at all, the custodian shall inform the requestor of the specific reason(s) why access to the information is being delayed or denied.
- C.** If a custodian denies a written request for access, the denial shall be in writing.

COMMENTARY

Given that most public access requests for case records are straightforward and usually involve a particular case or matter, custodians should process the same in an expeditious fashion.

There are a number of factors that can affect how quickly a custodian may respond to a request. For example, the custodian's response may be slowed if the request is vague, requires compilation of a large amount of information, or involves information that is stored off-site. Ultimately, the goal should be to respond timely to requests for case records.

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In those unusual instances in which access to the case records cannot be granted in an expeditious fashion, the custodian shall inform the requestor of the specific reason(s) why access to the information is being delayed or denied, which may include:

- the request involves such voluminous amounts of information that the custodian is unable to fulfill the same without substantially impeding the orderly conduct of the court or custodian's office;
- records in closed cases are located at an off-site facility;
- a particular file is in use by a judge or court staff. If a judge or court staff needs the file for an extended period of time, special procedures should be considered, such as making a duplicate file that is always available for public inspection;
- the requestor failed to pay the appropriate fees, as established pursuant to Section 6.0 of this policy, associated with the request; and/or
- the requested information is restricted from access pursuant to applicable legal authority.

An aggrieved party may seek relief from a denial of a written request for access consistent with applicable legal authority (for example, Pa.R.A.P. 123 and pertinent motion practice at the trial court level).

Section 6.0 Fees

- A.** Reasonable fees may be imposed for providing public access to case records pursuant to this policy and in accordance with applicable legal authority.
- B.** Fees for duplication by photocopying or printing from electronic media or microfilm shall not exceed \$0.25 per page, except as provided by applicable legal authority.
- C.** A custodian shall establish a fee schedule that is (1) published in the *Pennsylvania Bulletin*, (2) posted in the court facility in an area accessible to the public, and (3) posted on the custodian's website.

COMMENTARY

To the extent that the custodian is not the court, approval of the fee schedule by the court may be necessary.

An example of applicable legal authority setting forth photocopying fees is 42 Pa.C.S. § 1725(c)(1)(ii) that provides the clerk of Orphans' Court of the First Judicial District shall charge \$3 per page for a copy of any record. In addition, the copying fees for appellate records are \$1 per page if the appellate prothonotary's office transmits the document to the requestor, or \$0.50 per page if copies are provided to the requestor in person. See 204 Pa. Code § 155. However, copies of most appellate court opinions and orders are available for free on the Unified Judicial System's website, www.pacourts.us.

Subsection B is consistent with the fee structure provided for under the Pennsylvania Right To Know Law (65 P.S. § 67.1307) and promulgated by the Office of Open Records.

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Section 7.0 Confidential Information

- A.** Unless required by applicable legal authority or as provided in Subsection C, a party shall not set forth the following information in any pleading, document, or other legal paper that is to be filed with a court or custodian, except on a Confidential Information Form to be filed contemporaneously with the pleading, document, or other legal paper:
1. Social Security Numbers;
 2. Financial Account Numbers, except an active financial account number may be identified by the last four digits when the financial account is the subject of the case and cannot otherwise be identified;
 3. Driver License Numbers;
 4. State Identification (SID) Numbers;
 5. Minors' names and dates of birth except when a minor is charged as a defendant in a criminal matter (see 42 Pa.C.S. § 6355) ; and
 6. Abuse victim's address and other contact information, including employer's name, address and work schedule, in family court actions as defined by Pa.R.C.P. No. 1931(a), except for victim's name.

This section is not applicable to cases that are sealed or exempted from public access pursuant to applicable legal authority.

- B.** The Administrative Office of Pennsylvania Courts shall design and publish the Confidential Information Form.
- C.** Instead of using the Confidential Information Form, a court may adopt a rule or order permitting the filing of any pleading, document, or other legal paper in two versions, a "Redacted Version" and "Unredacted Version." The "Redacted Version" shall not include any information set forth in Subsection A, while the "Unredacted Version" shall include the information.
- D.** Parties and their attorneys shall be solely responsible for complying with the provisions of this section and shall certify their compliance to the court. The certification that shall accompany each filing shall be substantially in the following form: "I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents."
- E.** A court or custodian is not required to review any filing for compliance with this section. A party's or attorney's failure to comply with this section shall not affect access to case records that are otherwise accessible.
- F.** If a filing fails to comply with the requirements of this section, a court may, upon motion or its own initiative, order the filing sealed and/or redacted. A court may also impose appropriate sanctions, including costs necessary to prepare a compliant filing.

COMMENTARY

There is legal authority requiring information listed in Subsection A to appear on certain court documents. For example, 23 Pa.C.S. § 6108(b) provides for the inclusion of a defendant's social

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security number on a protection from abuse order, and Pa.R.C.P. No. 1910.27 provides for inclusion of the plaintiff's and defendant's social security number on a complaint for support.

This section is not applicable to cases that are sealed or exempted from public access pursuant to applicable legal authority. For example, cases filed under the Juvenile Act that are already protected by 42 Pa.C.S. § 6307, Pa.Rs.J.C.P. 160 and 1160.

Unless constrained by applicable legal authority, court personnel and jurists are advised to refrain from inserting confidential information in court-generated documents (e.g., orders, notices) when inclusion of such information is not essential to the resolution of litigation, appropriate to further the establishment of precedent or the development of law, or necessary for administrative purposes. For example, if a court's opinion contains confidential information and, therefore, must be sealed or heavily redacted to avoid release of such information, this could impede the public's access to court records and ability to understand the court's decision.

It is recommended that when a redacted version of a document is prepared the drafter shall indicate where in the document confidential information has been omitted. For example, the drafter could insert minors' initials in the document, while listing full names on the Confidential Information Form. If more than one child has the same initials, a different moniker should be used (e.g. child one, child two, etc.).

While Pa.R.C.P. No. 1931 is suspended in most judicial districts, the reference to the rule is merely for definitional purposes.

With regard to Subsection D, the certification of compliance is required whether the documents are filed in paper form or via an e-filing system. Courts that permit e-filing should consider the development of a compliance "checkbox" whereby e-filers could indicate their compliance with this policy.

Any party may make a motion to the court to cure any defect(s) in any filing(s) that does not comport with this section.

Section 8.0 Confidential Documents

- A.** Unless required by applicable legal authority, the following documents are confidential and shall be filed with a court or custodian under a cover sheet designated "Confidential Documents Form":
1. Financial Source Documents;
 2. Minors' educational records;
 3. Medical/Psychological records;
 4. Children and Youth Services' records; and
 5. Marital Property Inventory pursuant to Pa.R.C.P. No. 1920.33.

This section is not applicable to cases that are sealed or exempted from public access pursuant to applicable legal authority.

- B.** The Administrative Office of Pennsylvania Courts shall design and publish the Confidential Documents Form.

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- C.** Confidential documents submitted with the required cover sheet shall not be accessible to the public, except as ordered by a court. However, the cover sheet or a copy of it shall be accessible to the public.
- D.** Parties and their attorneys shall be solely responsible for complying with the provisions of this section and shall certify their compliance to the court. The certification that shall accompany each filing shall be substantially in the following form “I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.”
- E.** A court or custodian is not required to review any pleading, document or other legal paper for compliance with this section. A party’s or attorney’s failure to comply with this section shall not affect access to case records that are otherwise accessible.
- F.** If confidential documents are not submitted with the required cover sheet, a court may, upon motion or its own initiative, order that any such documents be sealed. A court may also impose appropriate sanctions for failing to comply with this section.

COMMENTARY

This section is not applicable to cases that are sealed or exempted from public access pursuant to applicable legal authority, such as Juvenile Act cases pursuant to 42 Pa.C.S. § 6307, Pa.Rs.J.C.P. 160 and 1160.

Unless constrained by applicable legal authority, court personnel and jurists are advised to refrain from inserting confidential information in court-generated documents (e.g., orders, notices) when inclusion of such information is not essential to the resolution of litigation, appropriate to further the establishment of precedent or the development of law, or necessary for administrative purposes. For example, if a court’s opinion contains confidential information and, therefore, must be sealed or heavily redacted to avoid release of such information, this could impede the public’s access to court records and ability to understand the court’s decision.

With regard to Subsection D, the certification of compliance is required whether the documents are filed in paper form or via an e-filing system. Courts that permit e-filing should consider the development of a compliance “checkbox” whereby e-filers could indicate their compliance with this policy.

With regard to Subsection E, if the party or party’s attorney fails to use a cover sheet designated “Confidential Document Form” when filing the documents deemed confidential pursuant to this Section, documents which are otherwise inaccessible may be released to the public because they were not properly identified through the use of the Confidential Document Form.

Any party may make a motion to the court to cure any defect(s) in any filing(s) that does not comport with this section.

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Section 9.0 Limits on Public Access to Case Records at a Court Facility

The following information shall not be accessible by the public at a court facility:

- A.** Case records under 20 Pa.C.S. § 711(9), including but not limited to records of proceedings with regard to issues concerning recordation of birth and birth records, the alteration, amendment, or modification of such birth records, and the right to obtain a certified copy of the same, except for the docket and any court order or opinion;
- B.** Case records concerning incapacity proceedings filed pursuant to 20 Pa.C.S. §§ 5501-5555, except for the docket and any final decree adjudicating a person as incapacitated;
- C.** Transcripts in family court actions, as defined by Pa.R.C.P. No. 1931(a), lodged of record, excepting portions of transcripts when attached to a motion or other legal paper filed with the court;
- D.** Any Confidential Information Form or any Unredacted Version of any pleading, document, or other legal paper as set forth in Section 7.0;
- E.** Any document filed with a Confidential Document Form cover sheet as set forth in Section 8.0;
- F.** Information sealed or protected pursuant to court order;
- G.** Information to which access is otherwise restricted by federal law, state law, or state court rule; and
- H.** Information presenting a risk to personal security, personal privacy, or the fair, impartial and orderly administration of justice, as determined by the Court Administrator of Pennsylvania with the approval of the Chief Justice. The Court Administrator shall publish notification of such determinations in the *Pennsylvania Bulletin* and on the Unified Judicial System's website.

COMMENTARY

Unless constrained by applicable legal authority, court personnel and jurists are advised to refrain from inserting confidential information in court-generated documents (e.g., orders, notices) when inclusion of such information is not essential to the resolution of litigation, appropriate to further the establishment of precedent or the development of law, or necessary for administrative purposes. For example, if a court's opinion contains confidential information and, therefore, must be sealed or heavily redacted to avoid release of such information, this could impede the public's access to court records and ability to understand the court's decision.

While Pa.R.C.P. No. 1931 is suspended in most judicial districts, the reference to the rule is merely for definitional purposes.

With respect to Subsection G, Pennsylvania Rule of Appellate Procedure 104(a), Pa.R.A.P. 104(a), provides that the appellate courts may make and amend rules of court governing their practice. The Administrative Office of Pennsylvania Courts shall from time to time publish a list of applicable legal authorities that restrict public access to court records or information. This list shall be published on the Unified Judicial System's website and in the *Pennsylvania Bulletin*. In addition, all custodians shall post this list in their respective court facilities in areas accessible to the public and on the custodians' websites.

With respect to Subsection H, the Administrative Office of Pennsylvania Courts shall include any such determinations in the list of applicable legal authorities referenced above.

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Section 10.0 Limits on Remote Access to Case Records

- A.** The following information shall not be remotely accessible by the public:
1. The information set forth in Section 9.0;
 2. In criminal cases, information that either specifically identifies or from which the identity of jurors, witnesses (other than expert witnesses), or victims could be ascertained, including names, addresses and phone numbers;
 3. Transcripts lodged of record, excepting portions of transcripts when attached to a motion or other legal paper filed with the court;
 4. *In Forma Pauperis* petitions;
 5. Case records in family court actions as defined in Pa.R.C.P. No. 1931(a), except for dockets, court orders and opinions;
 6. Case records in actions governed by the Decedents, Estates and Fiduciaries Code, Adult Protective Services Act and the Older Adult Protective Services Act, except for dockets, court orders and opinions; and
 7. Original and reproduced records filed in the Supreme Court, Superior Court or Commonwealth Court as set forth in Pa.R.A.P. 2151, 2152, and 2156.
- B.** With respect to Subsections A(5) and A(6), unless otherwise restricted pursuant to applicable legal authority, dockets available remotely shall contain only the following information:
1. A party's name;
 2. The city, state, and ZIP code of a party's address;
 3. Counsel of record's name and address;
 4. Docket entries indicating generally what actions have been taken or are scheduled in a case; and
 5. Court orders and opinions.

COMMENTARY

Remote access to the electronic case record information residing in the Pennsylvania Appellate Court Case Management System (PACMS), the Common Pleas Criminal Court Case Management System (CPCMS) and/or the Magisterial District Judges System (MDJS) is provided via web dockets, available on <https://ujportal.pacourts.us/>, and is governed by the *Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania*.

Depending upon individual court resources, some courts have posted online docket information concerning civil matters. If a court elects to post online docket information concerning family court actions and actions governed by the Decedents,

Estates and Fiduciaries Code, Adult Protective Services Act and the Older Adult Protective Services Act, the docket may only include the information set forth in Subsection B. This information will provide the public with an overview of the case its proceedings and other pertinent details, including the court's decision. Release of such information will enhance the public's trust and confidence in the courts by increasing awareness of the procedures utilized to adjudicate the claims before the courts as well as the material relied upon in reaching determinations. For more

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information on public access to court dockets, see Hartford Courant Company v. Pelligrino, 380 F.3d 83 (2nd Cir. 2004) and Doe v. Public Citizen, 749 F.3d 246 (4th Cir. 2014). This provision does not impact what information is maintained on the docket available at the court facility.

Access to portions of transcripts when attached to a motion or other legal paper filed with the court in family court actions is governed by Subsection A(5).

Section 11.0 Correcting Clerical Errors In Case Records

- A.** A party, or the party's attorney, seeking to correct a clerical error in a case record may submit a written request for correction.
 - 1. A request to correct a clerical error in a case record of the Supreme Court, Superior Court or Commonwealth Court shall be submitted to the prothonotary of the proper appellate court.
 - 2. A request to correct a clerical error in a case record of a court of common pleas or Philadelphia Municipal Court shall be submitted to the proper custodian.
- B.** The request shall be made on a form designed and published by the Administrative Office of Pennsylvania Courts.
- C.** The requestor shall specifically set forth on the request form the information that is alleged to be a clerical error and shall provide sufficient facts, including supporting documentation, that corroborate the requestor's allegation that the information in question is in error.
- D.** The requestor shall provide copies of the request to all parties to the case.
- E.** Within 10 business days of receipt of a request, the custodian shall respond in writing to the requestor and all parties to the case in one of the following manners:
 - 1. The request does not contain sufficient information and facts to determine what information is alleged to be in error, and no further action will be taken on the request.
 - 2. The request does not concern a case record that is covered by this policy, and no further action will be taken on the request.
 - 3. A clerical error does exist in the case record and that the information in question has been corrected.
 - 4. A clerical error does not exist in the case record.
 - 5. The request has been received and an additional period not exceeding 30 business days is necessary to complete a review of the request.
- F.** A requestor may seek review of the custodian's response under Subsections E(1)-(4) within 10 business days of the mailing date of the response.
 - 1. The request for review shall be submitted on a form that is designed and published by the Administrative Office of Pennsylvania Courts.
 - 2. The request shall be reviewed by the judge(s) who presided over the case.

COMMENTARY

Case records are as susceptible to clerical errors and omissions as any other public record. The power of the court to correct errors in its own records is inherent. E.g., Jackson v. Hendrick, 746

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A.2d 574 (Pa. 2000). It is important to emphasize that this section does not provide a party who is dissatisfied with a court's decision, ruling or judgment a new avenue to appeal the same by merely alleging there is an error in the court's decision, ruling or judgment. Rather, this section permits a party to "fix" information that appears in a case record which is not, for one reason or another, correct.

Particularly in the context of Internet publication of court records, a streamlined process is appropriate for addressing clerical errors to allow for prompt resolution of oversights and omissions. For example, to the extent that a docket in a court's case management system incorrectly reflects a court's order, or a scanning error occurred with regard to an uploaded document, such clerical inaccuracies may be promptly corrected by the appropriate court staff, upon notification, without a court order. Since 2007, the *Electronic Case Record Public Access Policy of the Unified Judicial System of Pennsylvania* has provided a similar procedure for any errors maintained on the web docket sheets of the PACMS, CPCMS and MDJS. The procedure has successfully addressed clerical errors on docket entries in a timely and administratively simple manner.

A party or party's attorney is not required to utilize the procedures set forth in this section before making a formal motion for correction of a case record in the first instance. Alleged inaccuracies in orders and judgments themselves must be brought to the attention of the court in accordance with existing procedures.

This section is not intended to provide relief for a party's or attorney's failure to comply with Sections 7.0 and 8.0 of this policy. Sections 7.0 and 8.0 already provide for remedial action in the event that non-compliance occurs.

With respect to this section, a custodian includes, but is not limited to, the county prothonotaries, clerks of orphans' court, and clerks of the court.

A log of all corrections made pursuant to this section may be maintained by the proper appellate prothonotary or custodian, so that there is a record if an objection is made in the future. Such a log should remain confidential. It is suggested that custodians include a registry entry on the case docket when a request is received and a response is issued.

Section 12.0 Continuous Availability of Policy

A copy of this policy shall be continuously available for public inspection in every court and/or custodian's office and posted on the Unified Judicial System's website.



**FRANK, GALE,
BAILS & POGRASS, P.C.**

