

Opening Family Court to the Public

by Carol E. Tracy, Terry L. Fromson and Seth F. Kreimer

There is considerable excitement among public interest and family law practitioners as plans for construction of a new consolidated Philadelphia Family Court building unfold. The building, as conceived thus far, will accommodate public access to both Family Court and Domestic Relations (custody, support, divorce, protection from abuse) courtrooms.

Public access to both the building and to Domestic Relations court proceedings represents a marked departure from practice at the current Domestic Relations Branch at 34 S. 11th St. For many years, Domestic Relations proceedings in Philadelphia were closed to anyone but litigants and their lawyers. Even access to the building was restricted to those with business in the court, forcing litigants to enter the building without family and friends to support them as they sought the court's assistance to address emotionally charged matters relating to the custody of their children and safety of their families. Only recently has this policy been slightly relaxed to allow some access to Domestic Relations proceedings. Closure was motivated in part by the private nature of the matters addressed by the court and in part by the capacity limitations and security constraints posed by the building. However well-meaning, a uniform policy of closing these proceedings violates both constitutional and common law.

It may seem counterintuitive that protecting the public interest forbids routine closures of proceedings involving private family matters. But, for centuries, the practice of holding Anglo-American judicial proceedings in courts open to the public has been a hallmark of legitimacy and a guarantor of fairness. Public access to court proceedings is an essential tool to avoid bias and insure that the public can see that courts comply with the letter and spirit of applicable legal rules.

Nowhere are these mandates more important than in Domestic Relations proceedings, where an estimated 85 to 90 percent of the litigants are without legal representation, where the stakes are so high, and where profound and life-altering decisions are made about the future of families.

The Pennsylvania Protection From Abuse Act illustrates this point well. It was adopted in 1976 as a public policy response to a significant problem that had been long neglected under the rubric of "family privacy." This vanguard legislation recognized domestic violence as a major social issue and, along with other measures, established protection of victims of domestic abuse as the public policy of the Commonwealth, bringing to it both public attention and public resources. Closing protection from abuse proceedings harkens back to the ignominious past when victims were forced to acquiesce to abuse in private, because the "familial" nature of domestic violence compelled a policy of public nonintervention. Protection from abuse proceedings, as a public response to a societal problem, warrant public access to insure that such proceedings, conducted in the public interest, result in protection orders when appropriate, and work to the benefit of all participants in the proceedings. Closure of protection from abuse courtrooms prevents the public from insuring that its interest in deterring domestic violence and protecting its victims is diligently carried out.



Photo by Anthony Sinagoga

When legislation was enacted providing for civil protection orders, it was assumed and expected that there would be public scrutiny through open courtrooms that would function to monitor and improve the public response to domestic violence. According to noted legal scholar Elizabeth Schneider, “By giving battered women remedies in court there is, at least theoretically, public scrutiny, public control and the possibility of public sanction.”

A gender and race bias study performed by the Pennsylvania Supreme Court in 2003 found ongoing concern that Pennsylvania courts improperly failed to find credible the victims of domestic violence. Such bias is easy to hide when the only ones who know of decisions are the parties, while a decision-maker whose pattern of behavior is open to the public has less leeway to overlook the seriousness of domestic violence. In *Richmond Newspapers vs. Va.*, the court found public access “has long been recognized as an indispensable attribute of an Anglo-American trial,” as “it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” The common law of Pennsylvania reflects this high regard for the crucial importance of open courts, and our courts have always carefully safeguarded the presumptive right of access to judicial proceedings. Exclusion of the press and public from trials is presumptively unconstitutional under related First Amendment principles in both civil and criminal cases.

The organic law of Pennsylvania, moreover, has included a specific constitutional guarantee of open judicial proceedings since the founding of the Commonwealth. Article I, Section 11 of the Pennsylvania Constitution that today provides, “All courts shall be open,” has been an unbroken part of the law of our Commonwealth since colonial days. Pennsylvania’s courts have recognized the specific right of the parties and the public under Article I, Section 11 to open trials in both civil and criminal cases based upon the “plain language of our Constitution ... our courts have not distinguished among types of proceedings in interpreting this provision.”

The Philadelphia Bar Association’s Board of Governors move to have Philadelphia Domestic Relations proceedings open to the public began with the adoption of a resolution in August 2000. The Bar’s Delivery of Legal Services Committee, with the support of the Family Law Section, sought the adoption of this resolution in light of the historical legal mandate for open courts as well as the benefits that open court provides to litigants and the public. Thus, the Board of Governors’ resolution recognizes the presumption of open court proceedings embodied in Pennsylvania common law and the First Amendment to the U.S. Constitution, and enumerates the benefits, declaring that public access to courts:

- “Enhances the quality of justice dispensed by officers of the court, thus contributing to the fair administration of justice and to greater public understanding and confidence in the judicial system;”
- Allows “parties to proceedings to benefit from having the assistance of other persons accompany them to a court hearing;”
- Benefits litigants by providing “essential training to lawyers” through “the opportunity to observe courtroom proceedings in which they do not represent a party.”

The Board of Governors also recognized that public oversight is even more pressing in a court in which the majority of litigants are without legal representation and appear pro se.

Pursuant to the Bar Association resolution, a joint committee of the Bar Association and the court was appointed to seek solutions for opening the courtrooms to the public. Because of the small size of the courtrooms and the limited court security, this committee achieved limited success, gaining access to Domestic Relations courtrooms for only a few categories of individuals. In addition to litigants and subpoenaed witnesses, only domestic violence advocates and individuals who self-identify as “observers” and register as such with the court are admitted to courtrooms and only at the discretion of the trial judge. Witnesses without subpoenas who voluntarily accompany a litigant to court, support persons, and the public

Proceedings in a public forum can have educational benefits for society, providing litigants with information about available remedies and procedures, and educating the public about family law matters, which affect thousands of Philadelphia families each year.

at large, including the press, are not allowed into the courthouse much less the courtrooms. Getting into the courthouse remains a problem for anyone without a court summons or intention to file. A *Philadelphia Bulletin* reporter who made an unannounced visit to the court to observe proceedings was required to wait 30 minutes while security called administrators and then escorted him to the office of a court administrator who gave him a tour of the building before escorting him out.

The Bar's concern with the limited progress in opening Family Court is noted in its 2003 Resolution on Improving the Delivery of Justice in the Domestic Relations Division of Philadelphia Family Court, in which the Board of Governors calls for fulfillment of the constitutional mandate of open court.

Despite legal principles clearly mandating open courts, some members of the bar and the judiciary are uncomfortable with the allowing of public access to proceedings in which personal matters are discussed. However, family law proceedings are not unique in involving personal or intimate details. Accounts of domestic violence and sexual assault are routinely heard in open court in criminal cases. Unlike Philadelphia, most, if not all, other Pennsylvania counties regularly permit public access to Domestic Relations courtrooms.

Individualized decision-making procedures can legitimately be crafted to protect those who demonstrate a need for privacy that outweighs the presumption of open court. But the baseline must be public access. In the First Amendment or constitutional analysis the court wrote in *Publicker Industries Inc.*, "to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." A party seeking to override the common law presumption of open court by closing proceedings must bear the burden of showing that disclosure will work "a clearly defined and serious injury to the party seeking it."

To be sure, the threshold for closing a courtroom is high. Closure is rarely permitted over the objection of other parties. In a malpractice suit (*R.W. v. Hampe*), the court rejected the plaintiff's request for partial closure based on her fear of embarrassment due to the intimate sexual nature of the evidence, finding this reason insufficient to close the case in the face of an objection by the opposing party. Other cases demonstrate the court's reluctance to close proceedings.

The few family law cases in Pennsylvania involving public access to judicial proceedings relate to the dissolution of marriage. In the 1986 *Katz v. Katz* decision involving the equitable distribution proceedings in the divorce of a well-known businessman, the Superior Court of Pennsylvania recognized divorce hearings as "the type of proceedings which courts may close to protect the rights of parties," due to the private nature of the matters involved, but remanded the case to the trial court for a determination of whether the party seeking closure had met its burden of proof.

In *Zdrok*, a more recent case involving a marital property agreement distribution, the Superior Court found that the appellant did not show good cause for closure. The appellee forced the appellant to sign the agreement and then sought revenues from the appellant's work as a Playboy Playmate. The court stated that the appellant's "celebrity" status did not entitle her to a closed trial and that her claims regarding embarrassment and stalking were "spurious." The court determined that under the common law analysis, the appellant "did not establish that her personal interest in secrecy outweighs the traditional presumption of openness."

Litigants in Domestic Relations proceedings will benefit from open court. The absence of legal representation heightens the responsibility of the public to monitor such proceedings and insure that justice is dispensed appropriately so that all parties can have confidence in these proceedings. Proceedings in a public forum can have educational benefits for society, providing litigants with information about available remedies and procedures, and educating the public about family law matters, which affect thousands of Philadelphia families each year.

Pamela Casey, in *Defining Optimal Court Performance: The Trial Court Performance Standards*, wrote, "The judicial system derives its power and legitimacy from the public's trust. Thus it is critical that the public 'see and know' that justice is being done." This certainly includes Family Court and Domestic Relations matters. ■

Carol E. Tracy (ctracy@womenslawproject.org) is executive director of the Women's Law Project. Terry L. Fromson (tfromson@womenslawproject.org) is managing attorney of the Women's Law Project. Seth F. Kreimer (skreimer@law.upenn.edu) is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School.

Trapped?

In this economic climate, keeping your clients is *more important than ever*. For partners and practice groups, the right firm is crucial. We know the Greater Philadelphia legal market. We will find you the right firms that have the practice areas, support and billable hour rates to enable you to keep and cultivate clients and practice law the way that you want to.

**We've been there.
We get it!**



Susan M. Rubinovitz, Esq.



Stephanie A. Ristvey

- Lateral Partner Placements
- Lateral Associate Placements
- In-House Counsel
- Mergers
- Practice Group Moves

Follow us on Twitter 

<http://twitter.com/smrlegalsearch>

SMR
LEGAL SEARCH

*Engaged Exclusively
in Permanent
Attorney Placement*

(215) 665-0800

www.smrlegalsearch.com