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PUBLIC ACCESS AND MEDIA RULES FOR ADMINISTRATIVE ADJUDICATORS IN HIGH-PROFILE  
HEARINGS

Many courts have rules in place designed to strike the right balance between access and a fair trial in high-profile cases. What's needed are rules for when the proceedings are conducted by an administrative agency.

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JUD -- Judicial Management, Process & Selection

When a case of great public interest arises, many courts have rules in place designed to strike the right balance between a litigant's right to due process and a fair trial with First Amendment rights of access to judicial proceedings. But what happens when the tribunal is part of the executive branch of government? Do the rules change when the proceedings are conducted by an administrative agency instead of a judicial-branch court?

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

In many respects, media policies developed by judicial-branch courts would seem to serve as appropriate templates for executive-branch adjudicators. There are, however, some differences to consider. Agency hearings are conducted without juries, so an agency media policy can be crafted without standards for how the media will interact with prospective or impaneled jurors. Agency adjudicators generally lack the power to enforce a contempt citation, raising questions of whether an agency can hold media representatives accountable for acts that violate the agency's media policies.

Administrative hearings, further, tend to be civil in nature. To the extent an agency bases its media policies on models implemented by trial courts (models that likely accommodate interests of persons charged with crimes), the agency's policies may need to be adjusted to grant greater access than that of the trial court. Despite these differences, the question remains: how can we balance First Amendment interests in an open hearing against the tendency of executive adjudicators to operate in a relatively controlled and oftentimes closed environment?

### Applying the First Amendment

It is true that most of the case law describing the rights of access under the First Amendment arises in the context of judicial proceedings, not proceedings conducted by executive-branch adjudicators. This distinction was not lost on the Department of Justice when it argued in post-9/11 deportation proceedings that “the political branches of government are completely immune from the First Amendment guarantee of access.” [FN1] The argument failed both times it was used, [FN2] but the fact that such a claim was raised suggests some care needs to be taken when applying judicial trial-access doctrine to executive-branch hearings.

First Amendment access doctrine is the appropriate starting point when crafting any media relations policy, whether for a judicial-branch court or for proceedings conducted by administrative agencies. Whether the public’s “qualified right of access” [FN3] may be restricted requires an analysis articulated in cases that started in 1980 with *Richmond Newspapers* [FN4] (guaranteeing under the First Amendment the right to attend criminal trials) and ended in 1986 with *Press-Enterprise II*, [FN5] in which the Court extended the right of access to preliminary proceedings in addition to trials, and introduced a two-part test considering whether “the place and process have historically been open to the press and the general public,” and whether “public access plays a significant positive role in the functioning of the particular process in question.” [FN6]

In between these benchmarks, the Court held in *Globe Newspaper* [FN7] that a court’s restrictions on public access to criminal proceedings can be justified only upon proof of a “compelling governmental interest,” and such restrictions could impose only those restrictions that are “narrowly tailored to serve that interest.” [FN8] It also extended the doctrine beyond the criminal trial per se, applying First Amendment media access rights in *Press Enterprises I*, [FN9] in the context of the voir dire segment of criminal proceedings. [FN10]

Media policies that restrict public access in the context of judicial-branch proceedings thus are subject to four tests: First, when evaluating restrictive media policies the court must determine whether an open proceeding is “substantially likely to prejudice another transcendent value.” [FN11] Second, if the court is satisfied that such prejudice is likely, it must determine “whether any alternative exists to avoid that prejudice without limiting public access.” [FN12] Third, if no such alternative exists the court must determine “whether the limitation of access is narrowed (in scope and time) to the minimum necessary.” [FN13] Fourth, the court must determine “whether the limitation of access effectively avoids the prejudice it is intended to address.” [FN14]

### Creating effective policies

To be effective, media policies must not only anticipate the tests courts will use when those policies are challenged, they also need to squarely address the practical concerns likely to be raised by the media and the public. Those concerns are not static: they change with the public’s interest in a given proceeding. Media policies thus tend to provide one set of rules for day-to-day business, and another for use with high-profile cases. For example, when planning on the needs of the public and the media in federal criminal proceedings against I. Lewis Libby, the district court recognized that the trial “has generated widespread public and media interest,” in part due to the possibility that Vice President Cheney and commentator Tim Russert might be called as witnesses. [FN15]

After receiving over 100 requests for press credentials, the trial court permitted only two journalists to be present in the courtroom during voir dire. The court, however, also created a media center, where credentialed journalists could view the proceedings in their entirety (including jury selection) through live closed circuit

video and audio feeds (although recording was not permitted). [FN16] The court denied a request for audio recordings of the daily proceedings, stating that it historically has made no audio recordings of any of the proceedings of such trials, and noting the restrictions applicable under the Judiciary Policies of the Judicial Conference of the United States. [FN17]

The court's approach was thus consistent with the Commentary supplementing the "Cameras in the Courtroom" policy found in the General Management and Administration section of the Guide to Judiciary Policies and Procedures used by federal judges. The Commentary notes a distinction between the use of cameras during ceremonial proceedings (where cameras are generally permitted), and during non-ceremonial proceedings. During non-ceremonial proceedings, cameras may be utilized "only for the limited purposes specified in the policy statement: presentation of evidence, perpetuation of the record, security, other purposes of judicial administration, and the photographing, recording, or broadcasting of appellate arguments." [FN18]

Except with respect to ceremonial proceedings and appellate proceedings, the Conference policy does not authorize the contemporaneous photographing, recording, or broadcasting of proceedings from the courtroom to the public beyond the courthouse walls. The Judicial Conference remains of the view that it would not be appropriate to require all non-ceremonial proceedings to be subject to media broadcasting. [FN19]

#### The high-profile case

A survey of state media access policies bears out a similar practice: courts frequently establish standards for day-to-day media access to judicial proceedings, while often creating a second-tier set of protocols for use in high-profile cases. [FN20] One example comes from Lake County, Ohio, which has a Media Relations and Public Access Plan. [FN21] In this plan, the court defined "special interest" or "high profile" cases as involving one or more of the following: the interest of a fair trial for the litigants "is jeopardized in any way;" the "security and decorum of the court are in jeopardy;" "the news media directly or indirectly interferes with the court's daily function and purpose;" the court's facilities "are, or foreseeably will be, overburdened;" the "administration of the court and of justice" would be served by implementing the plan; or "it appears to the public that the court is not being administered fairly and efficiently." [FN22]

It's not always easy to predict, however, when a case will become "high profile," nor is it necessarily essential to define with real precision what constitutes a high-profile case. Administrative hearings generally attract very little media attention. As such, if a reporter shows up at an administrative hearing, that by itself may suggest the case is, or could become, of great public interest, warranting the use of procedures designed to ensure reasonable access to the proceedings. While the draft model that follows includes a definition of a "high-profile case," the policies themselves need not be limited to the case that attracts national attention. Rather, the policies should be available whenever there's abnormal interest on the part of the public--interest that may be indicated by the presence of the press or simply by members of the public who have decided to spend their time attending an agency's evidentiary hearing.

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

these controls over the presumptively public hearing, and who within the agency will decide whether those conditions exist in a particular case.

#### Essential elements of a plan

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

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

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

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

#### Applying models

If one were to draw from judicial-branch courts the best practices in use, intending to apply them to help create media policies for use by administrative agencies, some care would need to be taken. First, we need to recognize that agencies may lack a solid understanding of the need to balance due process and free speech rights. Courts are very familiar with these terms, but agencies encounter them only when they engage in adjudication

(which in some agencies may happen only rarely). Second, we should understand that due process protections are fluid, not fixed. A licensee facing the revocation of his or her license is not entitled to a jury, nor in many cases to discovery. While judicial-branch courts must safeguard a criminal defendant's right to empanel a qualified jury, no such right extends to the licensee. As a result, media access plans need to take into account the nature of the rights at stake in an administrative hearing.

And third, we should recognize and accept the obligation to work towards keeping agency adjudications open. Even in the context of agency adjudications, the presumption is that the proceeding should be open and accessible to the public and the media. As the district court noted in deciding access rights in the context of immigration hearings, “there are two broad categories of exceptions to the practice of openness in the courtroom: those based on the need to keep order and dignity in the courtroom, and those which center on the content of the information to be disclosed to the public.” [FN23] Only “the most compelling reasons” can justify closure based on the content of the information being disclosed during an administrative hearing. [FN24] While there does not appear to be one set standard for when an administrative proceeding needs the benefit of a policy that balances due process rights with public access rights, adjudicators should be mindful of the nature and intensity of media attention when designing a policy for high-profile administrative hearings.

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

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

#### A draft plan

With these principles in mind, and guided by policies implemented by a number of courts across the county but mindful of the differences existing between judicial-branch courts and executive-branch adjudicators, consider this sample media access policy for use in high-profile cases conducted by administrative agencies. Note that it does not address the equally important rights of access to the documents and records typically associated with agency action. Thus, the policy focuses on physical, visual, and auditory access to the room where a hearing is to be conducted, but defers to state public records laws for access to transcripts, documentary evidence, and other records that play a part in administrative hearings. So too, the media access policy needs to be written so as not to conflict with existing laws requiring safe ingress and egress to public buildings for all, including persons with disabilities.

### Public Access Rules for Administrative Adjudicators in High-Profile Hearings

#### 1. Definitions

- (a) “Media coverage” means any photographing, recording, reporting, or broadcasting of administrative

hearings, and includes transmission through television, radio, photographic images, the Internet, Wi-fi and satellite transmission, and any other form of transmission outside the hearing room.

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

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

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

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

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

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

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

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

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

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

## 2. Application

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

## 3. Physical access to the hearing room

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

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

C. Admission to the public section of the hearing room shall be gained by presenting a pass that shall be issued by the media information officer on a first-come, first-served basis, unless the demand for access exceeds the space available. The media committee will determine whether the demand for space is such that the pass

shall be valid for one session only (either morning or afternoon). The hearing room will be cleared between the morning and afternoon sessions.

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

## 2. Sharing or pooling of equipment

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

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

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

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

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

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

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

## 3. Issuance of press credentials

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

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

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

## 4. Restrictions on electronic monitoring and recording

A. Media coverage of conferences between attorneys and their clients in the hearing room is prohibited, as is

focusing on or photographing any materials on counsel tables in a way that would permit the recording of non-public material, such as an attorney's notes or confidential comments to a client.

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

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

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

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

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

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

#### 5. Hearing room safety and security issues

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

#### 6. Establishment and duties of the media committee

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

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

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

D. The media committee may recommend the establishment of a media room. If recommended and approved, the media room will be designated within close proximity to the proceeding. It will be operated under the direction of the media information officer, and will be open during normal working hours to all media representatives with agency-issued media credentials. The room will accommodate monitors and other equipment provided by the media committee members, to permit coverage of the proceedings by media representatives who are unable to obtain seating in the hearing room.

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[FN1]. [Detroit Free Press v. Ashcroft](#), 303 F.3d 681, 695 (6th Cir. 2002), quoted in The Committee on Communications and Media Law of the Association of the Bar of the City of New York, “[If it Walks, Talks and Squawks . . .](#)” [The First Amendment Right of Access to Administrative Adjudications: A Position Paper](#), 23 *Car-doza Arts & Ent. L.J.* 21, 38 (2005).

[FN2]. See *id.*, see also [New Jersey Media Group, Inc. v. Ashcroft](#), 308 F.3d 198, 201, 208-09 (3d Cir. 2002).

[FN3]. *If it walks*, *supra* n. 1, at 37.

[FN4]. 448 U.S. 555 (1980).

[FN5]. [Press-Enterprise Co. v. Super. Ct. of Cal.](#), 478 U.S. 1 (1986) (Press-Enterprise II).

[FN6]. *Id.*, at 8, quoted in [N. Jersey Media Group, Inc. v. Ashcroft](#), 308 F.3d at 209.

[FN7]. [Globe Newspaper Co. v. Super. Ct. for the County of Norfolk](#), 457 U.S. 596 (1982).

[FN8]. 457 U.S. at 606-07, quoted in *If it Walks*, *supra* n. 1, at 33-34.

[FN9]. [Press-Enterprise Co. v. Super. Ct. of Cal. For the County of Riverside](#), 464 U.S. 501 (1984) (Press-Enterprise I).

[FN10]. *Id.*, cited in *If it Walks*, *supra* n. 1, at 34.

[FN11]. *If it Walks*, *supra* n. 1, at 36, citing [Globe Newspaper](#), 457 U.S. at 606-07, and [Press-Enterprise I](#), 464 U.S. at 510.

[FN12]. *If it Walks*, *supra* n. 1, at 36, citing [Press-Enterprise II](#), 478 U.S. at 14; and [Publicker Indus., Inc. v. Cohen](#), 733 F.2d 1059, 1070 (3d Cir. 1984).

[FN13]. *If it Walks*, *supra* n. 1, at 36, citing [Press-Enterprise I](#), 464 U.S. at 510; [United States v. Antar](#), 38 F.3d 1348, 1363 (3d Cir. 1994).

[FN14]. *If it Walks*, *supra* n. 1, at 36, citing [Globe Newspaper](#), 457 U.S. at 609-10; [In re Charlotte Observer](#), 882 F.2d 850, 854-55 (4th Cir. 1989); [Nebraska Press Ass'n v. Stuart](#), 427 U.S. 539 (1976); and [Smith v. Daily Mail Publ'g Co.](#), 443 U.S. 97 (1979).

[FN15]. [United States v. I. Lewis Libby, ABC, Inc. Movants](#), Misc. No. 07-0002 (RBW), Order, at 1, 6.

[FN16]. *Id.* at 2.

[FN17]. *Id.*

[FN18]. [Guide to Judiciary Policies and Procedures](#), Chapter 3, General Management and Administration, Part E, Cameras in the Courtroom.

[FN19]. *Id.*

[FN20]. Media policies considered for this analysis were from the following courts: United States District Court District of Alaska Media Guide, available at [http://www.akd.uscourts.gov/reference/general/media\\_guide.pdf](http://www.akd.uscourts.gov/reference/general/media_guide.pdf) (last visited October 22, 2007); “California Rule 980: photographing, recording, and broadcasting in the courtroom,” available at <http://www.courtinfo.ca.gov/reference/cameras-toc.htm> (last visited October 22, 2007); Executive Officer and Clerk of Courts Media Plan for Superior Court High Profile Cases, the Superior Court of the State of California, County of Kings, available at <http://www.kings.courts.ca.gov/News%20and%20Media/NM%20Docs/PressMediaPlan%20Rev%207.05.pdf> (last visited October 22, 2007); the Circuit Court of Florida, Seventh Judicial Circuit, available at <http://www.circuit7.org/Community%20Information/MediaGuideline.htm>, (last visited October 22, 2007); Procedures for Special Interest/High Profile Proceedings, Admin. Order No. 1-19.0, in the Circuit Court of the Tenth Judicial Circuit in and for Hardee, Highlands, and Polk Counties, Florida, available at <http://www.jud10.org/AdministrativeOrders/orders/Section1/1-19.0.htm> (last visited October 22, 2007); Media Relations and Public Access Plan for Special Interest/High Profile Proceedings in the General Division of the Court of Common Pleas of Lake County, Ohio (April 1, 2005) <http://www2.lakecountyohio.org/courts/images/Lake%20County%20Common%20Pleas%20Court%20Media%20Plan%20Eff%4-1-05.pdf> (last visited October 22, 2007).

[FN21]. Media Relations and Public Access Plan for Special Interest/High Profile Proceedings in the General Division of the Court of Common Pleas of Lake County, Ohio (April 1, 2005) <http://www2.lakecountyohio.org/courts/images/Lake%20County%20Common%20Pleas%20Court%20Media%20Plan%20Eff%4-1-05.pdf> (last visited October 22, 2007).

[FN22]. *Id.* at section 5 (Definitions).

[FN23]. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 945 (E.D. Mich. 2002), quoted in *Freitas v. Admin. Dir. of the Courts, State of Hawai'i* 92 P.3d 993, 998 (Haw. 2004).

[FN24]. *Id.*

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