

1-B-8 | JUDICIARY

The open meetings provision found in Art. I, s. 24, Fla. Const., does not include meetings of the judiciary. In addition, separation of powers principles make it unlikely that the Sunshine Law, a legislative enactment, could apply to the courts established pursuant to Art. V, Fla. Const. AGO 83-97. Thus, questions of access to judicial proceedings usually arise under other constitutional guarantees relating to open and public judicial proceedings, Amend. VI, U.S. Const., and freedom of the press, Amend. I, U.S. Const.

However, a circuit conflict committee established by the Legislature to approve attorneys handling conflict cases is subject to the Sunshine Law, even though the chief judge or his or her designee is a member, because the "circuit conflict committees are created by the Legislature, subject to its dominion and control." AGO 83-97. And see *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973) (Sunshine Law applies to quasi-judicial functions; a board exercising quasi-judicial functions is not a part of the judicial branch of government).

a. Criminal Proceedings

A court possesses the inherent power to control the conduct of proceedings before it. *Miami Herald Publishing Company v. Lewis*, 426 So. 2d 1 (Fla. 1982); and *State ex rel. Miami Herald Publishing Company v. McIntosh*, 340 So. 2d 904 (Fla. 1976). A three-pronged test for closing criminal proceedings has been developed to provide "the best balance between the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury." *Lewis*, supra at 7. And see *Morris Publishing Group, LLC v. State*, 136 So. 3d 770, 779 (Fla. 1st DCA 2014); and *Miami Herald Media Company v. State*, 218 So. 3d 460 (Fla. 3d DCA 2017).

The factors to be considered are whether:

- 1) closure is necessary to prevent a serious and imminent threat to the administration of justice;
- 2) no alternatives are available, other than change of venue, which would protect the defendant's right to a fair trial; and



- 3) closure would be effective in protecting the defendant's rights without being broader than necessary to accomplish that purpose.

b. Civil Proceedings

Stressing that all trials, civil and criminal, are public events and that there is a strong presumption of public access to these proceedings, the Supreme Court in *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988), set forth the following factors which must be considered by a court in reviewing a request for closure of civil proceedings:

- 1) a strong presumption of openness exists for all court proceedings;
- 2) both the public and news media have standing to challenge any closure order with the burden of proof being on the party seeking closure;
- 3) closure should occur only when necessary
 - a) to comply with established public policy as set forth in the Constitution, statutes, rules or case law;
 - b) to protect trade secrets;
 - c) to protect a compelling governmental interest;
 - d) to obtain evidence to properly determine legal issues in a case;
 - e) to avoid substantial injury to innocent third parties; or
 - f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.
- 4) whether a reasonable alternative is available to accomplish the desired result and if none exists, the least restrictive closure necessary to accomplish its purpose is used;
- 5) the presumption of openness continues through the appellate review process and the party seeking closure continues to have the burden to justify closure.



And see Amendments to the Florida Family Law Rules of Procedure, 723 So. 2d 208, 209 (Fla. 1998), reiterating support for the Barron standards and stating that “public access to court proceedings and records [is] important to assure testimonial trustworthiness; in providing a wholesome effect on all officers of the court for purposes of moving those officers to a strict conscientiousness in the performance of duty; in allowing nonparties the opportunity of learning whether they are affected; and in instilling a strong confidence in judicial remedies, which would be absent under a system of secrecy;” and *Lake v. State*, 193 So. 3d 932, 934 (Fla. 4th DCA 2016) (trial court did not depart from essential requirements of law by refusing to close Jimmy Ryce Act civil commitment review proceeding; statutory provision requiring that certain treatment records introduced into evidence be maintained under seal unless opened by the judge “does not require that the press and public be barred from any discussion of treatment or treatment records during a review hearing”).

c. Depositions

While the courts have recognized that court proceedings are public events and the public generally has access to such proceedings, the general public and the press do not have a right under the First Amendment or the rules of procedure to attend discovery depositions. See *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378, 380 (Fla. 1987), cert. denied, 108 S.Ct. 346 (1987), stating that while discovery depositions in criminal cases are judicially compelled for the purpose of allowing parties to investigate and prepare, they are not judicial proceedings. Accord *Post-Newsweek Stations, Florida, Inc. v. State*, 510 So. 2d 896 (Fla. 1987) (media not entitled to notice and opportunity to attend pretrial discovery depositions in criminal cases); and *SCI Funeral Services of Florida, Inc. v. Light*, 811 So. 2d 796 (Fla. 4th DCA 2002) (upholding protective order closing depositions to the media based on privacy concerns). Cf. *Lewis v. State*, 958 So. 2d 1027 (Fla. 5th DCA 2007) (while *Burk* applied to unfiled depositions made during an ongoing, active criminal prosecution, materials related to defendant’s prosecution, including depositions, are subject to disclosure after the case becomes final).



d. Florida Bar Grievance Proceedings

An attorney's claim that the Florida Bar violated the Sunshine Law by refusing to allow him to attend a grievance committee meeting of the Bar was rejected in *Florida Bar v. Committee*, 916 So. 2d 741, 744-745 (Fla. 2005): "The grievance committee meetings of the Bar are private, and therefore the Bar is justified in prohibiting [the attorney] from attendance." The Court reiterated its statement from *The Florida Bar: In re Advisory Opinion*, 398 So. 2d 446, 447 (Fla. 1981), that "[n]either the legislature nor the governor can control what is purely a judicial function."

e. Grand Juries

Section 905.24, F.S., provides that "[g]rand jury proceedings are secret"; thus, these proceedings are not subject to s. 286.011, F.S. See *Clein v. State*, 52 So. 2d 117, 120 (Fla. 1950) (it is the policy of the law to shield the proceedings of grand juries from public scrutiny); and *In re Getty*, 427 So. 2d 380, 383 (Fla. 4th DCA 1983) (public disclosure of grand jury proceedings "could result in a myriad of harmful effects"). The grand jury has also been referred to as a "coordinate branch of the judiciary, and as an arm, appendage, or adjunct of the circuit court." *State ex rel. Christian v. Rudd*, 302 So. 2d 821, 828 (Fla. 1st DCA 1974). Cf. *Butterworth v. Smith*, 110 S.Ct. 1376 (1990), striking down a Florida statute to the extent that it prohibited a witness from disclosing his own testimony before a grand jury after the grand jury's term has ended.

In addition, hearings on certain grand jury procedural motions are closed. The procedural steps contemplated in s. 905.28(1), F.S., for reports or presentments of the grand jury relating to an individual which are not accompanied by a true bill or indictment, are cloaked with the same degree of secrecy as is enjoyed by the grand jury in the receipt of evidence, its deliberations, and final product. Therefore, a newspaper has no right of access to grand jury procedural motions and to the related hearing. *In re Grand Jury*, Fall Term 1986, 528 So. 2d 51 (Fla. 2d DCA 1988). And see *Palm Beach Newspapers, Inc., v. Doe*, 460 So. 2d 406 (Fla. 4th DCA 1984) (hearing ancillary or related to a grand jury session constitutes a proceeding which comes within the protection of s. 905.24); and *In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559 (11th Cir.



1989) (while a court must hold a hearing and give reasons for closure of criminal court proceedings, a court is not required to give newspapers a hearing and give reasons for closure of grand jury proceedings).

f. Judicial Nominating Commissions/Judicial Qualifications Commission

Judicial nominating commissions for the Supreme Court of Florida, the district courts of appeal, or for a judicial circuit for the trial courts within the circuit are not subject to the Sunshine Law. *Kanner v. Frumkes*, 353 So. 2d 196 (Fla. 3d DCA 1977). Article V, s. 11(d), Fla. Const., however, requires that except for its deliberations, the proceedings of a judicial nominating commission and its records are open to the public. While the deliberations of a commission are closed, such a limitation appears to be applicable to that point in the proceedings when the commissioners are weighing and examining the reasons for and against a choice. Inf. Op. to Russell, August 2, 1991.

The statewide judicial nominating commission for workers' compensation judges, however, is not a judicial nominating commission as contemplated by the Constitution; thus, such a commission created pursuant to the workers' compensation law is subject to s. 286.011, F.S. AGO 90-76.

proceedings of the Judicial Qualifications Commission are confidential. However, upon a finding of probable cause and the filing of formal charges against a judge or justice by the commission with the Clerk of the Supreme Court, all further proceedings of the commission are public. Article V, s. 12(a)(4), Fla. Const.

g. Mediation Proceedings

(1) Court-Ordered Mediation

Court-ordered mediation and arbitration are to be conducted according to the rules of practice and procedure adopted by the Florida Supreme Court. Sections 44.102(1) and 44.103(1), F.S. And see rule 10.360(a), Florida Rules For Certified and Court-Appointed Mediators ("A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties."). (e.s.) Cf. Everglades Law Center,



Inc. v. South Florida Water Management District, 290 So. 3d 123 (Fla. 4th DCA 2019), noting that written mediation communications are confidential pursuant to ss. 44.103(3) and 44. 405(1), F.S., and must be redacted from the full transcript of a closed litigation session when it becomes public pursuant to s. 286.011(8), F.S.

Public access to court-ordered mediation proceedings between two cities and a county was raised in News-Press Publishing Company, Inc. v. Lee County, Florida, 570 So. 2d 1325 (Fla. 2d DCA 1990). Initially, the judge required the parties to have present a representative "with full authority to bind them"; however, after the media objected to the closure of the mediation proceeding, the judge amended the order to limit the representatives' authority so that no final settlement decisions could be made during the mediation conference. On appeal, the district court noted that no two members of any of the public boards would be present at the mediation proceedings and that the mediation's narrow scope did not give rise to a substantial delegation affecting the boards' decision-making function so as to require the mediation to be open to the public. 570 So. 2d at 1327. Cf. Brown v. Denton, 152 So. 3d 8 (Fla. 1st DCA 2014) (closed-door federal mediation sessions which resulted in changes to pension benefits of city employees in certain unions constituted collective bargaining negotiations which should have been held in the Sunshine; "[w]e cannot condone hiding behind federal mediation, whether intentionally or unintentionally, in an effort to thwart the requirements of the Sunshine Law.").

Similarly, in O'Connell v. Board of Trustees, 1 F.L.W. Supp. 285 (Fla. 7th Cir. Ct. Feb. 9, 1993), the court noted that as to public agencies, mediation is subject to the Sunshine Law; thus, no more than one member of a collegial body should attend the mediation conference. And see Fla. R. Civ. P. 1.720(d), stating that "[i]f a party to mediation is a public entity required to operate in compliance with chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to



recommend settlement to the appropriate decision-making body of the entity.” Accord Fla. R. App. P. 9.720(a).

(2) Other Mediation Proceedings

Mediation meetings conducted pursuant to the Florida Governmental Conflict Resolution Act, ss. 164.101-164.1061, F.S., which involve officials or representatives of local governmental entities who have the authority to negotiate on behalf of that governmental entity are subject to the Sunshine Law. Inf. Op. to McQuagge, February 13, 2002. Similarly, a closed attorney-client session may not be held to discuss settlement negotiations on an issue that is the subject of ongoing mediation pursuant to a partnership agreement between a water management district and others which is not in litigation. AGO 06-03.

h. Statutes Providing for Closed Court Proceedings

Certain court proceedings may be closed in accordance with Florida Statutes as follows:

(1) Adoption:

Hearings held under the Florida Adoption Act are closed. Section 63.162(1), F.S. See *In re Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984) (statute providing that all adoption hearings shall be held in closed court is not unconstitutional).

(2) Dependency:

Except as provided in s. 39.507, F.S., dependency adjudicatory hearings are open to the public unless, by special order, the court determines that the public interest or welfare of the child is best served by closing the hearing. Section 39.507(2), F.S. And see *Mayer v. State*, 523 So. 2d 1171 (Fla. 2d DCA), review dismissed, 529 So. 2d 694 (Fla. 1988) (former version of statute requiring hearings to be closed did not violate First Amendment).

(3) Guardian Advocate Appointments:

Hearings for appointment of guardian advocates are confidential. Section 39.827(4), F.S.



(4) HIV Test Results:

Court proceedings in cases where a person is seeking access to human immunodeficiency virus (HIV) test results are to be conducted in camera unless the person tested agrees to a hearing in open court or the court determines that a public hearing is necessary to the public interest and proper administration of justice. Section 381.004(2)(e)9., F.S.

(5) Pregnancy Termination Notice Waiver:

Hearings conducted in accordance with a petition for a waiver of the notice requirements pertaining to a minor seeking to terminate her pregnancy shall remain confidential and closed to the public, as provided by court rule. Section 390.01114(6)(f), F.S.

(6) Termination of Parental Rights:

Hearings involving termination of parental rights are confidential and closed to the public. Section 39.809(4), F.S. See *Natural Parents of J.B. v. Florida Department of Children and Family Services*, 780 So. 2d 6 (Fla. 2001), upholding the constitutionality of the statute. And see *J.I. v. Department of Children and Families*, 922 So. 2d 405 (Fla. 4th DCA 2006) (Sunshine Law does not apply to Department of Children and Families permanency staffing meetings conducted to determine whether to file petition to terminate parental rights). Cf. *Stanfield v. Florida Department of Children and Families*, 698 So. 2d 321 (Fla. 3d DCA 1997) (trial court may not issue "gag" order preventing a woman from discussing a termination of parental rights case because "[t]he court cannot prohibit citizens from exercising their First Amendment right to publicly discuss knowledge that they have obtained independent of court documents even though the information may mirror the information contained in court documents").



(7) Victim and Witness Testimony in Certain Circumstances:

Except as provided in s. 918.16(2), F.S., if any person under 16 years of age or any person with an intellectual disability is testifying in any civil or criminal trial concerning any sex offense, the judge shall clear the courtroom, except for listed individuals. Section 918.16(1), F.S. If the victim of a sex offense is testifying concerning that offense, the court shall clear the courtroom, except for listed individuals, upon request of the victim, regardless of the victim's age or mental capacity. Section 918.16(2), F.S. Cf. Pritchett v. State, 566 So. 2d 6 (Fla. 2d DCA), review denied, 570 So. 2d 1306 (Fla. 1990) (where a trial court failed to make any findings to justify closure, application of s. 918.16, F.S., to the trial of a defendant charged with capital sexual battery violates the defendant's constitutional right to a public trial). Accord Kovalski v. State, 854 So. 2d 282 (Fla. 4th DCA 2003), cause dismissed, 860 So. 2d 978 (Fla. 2003).

For a more complete listing of statutory exemptions, please see Appendix D and the Index.

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