STATE OF MINNESOTA

IN SUPREME COURT

C2-95-1476

MINNESOTA SUPREME COURT

ADVISORY COMMITTEE ON OPEN HEARINGS IN

JUVENILE PROTECTION MATTERS

INTRODUCTION TO FINAL REPORT
OF NATIONAL CENTER FOR STATE COURTS

August 2001

MINNESOTA SUPREME COURT
STATE COURT ADMINISTRATION
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I. INTRODUCTION

A. ACKNOWLEDGEMENTS

The members of the Minnesota Supreme Court Advisory Committee on Open Hearings in Juvenile Protection Matters thank all who participated in the three-year pilot project and assisted the Committee and the National Center for State Courts in their endeavors. In particular:

- We are truly grateful to those judicial officers, court administrators, county attorneys, social workers, public defenders, guardians ad litem, and media personnel from the twelve pilot project counties who responded to surveys soliciting their comments about the impact of making court records and hearings accessible to the public.

- We express our appreciation to the child protection system stakeholders in the twelve pilot project counties who participated in local focus group meetings conducted by the National Center for State Courts.

- We are especially thankful to the court administration personnel from the twelve pilot project counties who collected and maintained data regarding requests for access to their county's juvenile protection files.

- Finally, we express our gratitude to the judicial officers and courtroom personnel from the twelve pilot project counties who collected and maintained data regarding the number and the nature of the circumstances leading to the partial or complete closing of hearings to the public.

Without the dedication and participation of each of these individuals, the Committee and the National Center for State Courts would have been unable to fulfill the Supreme Court charge to conduct an evaluation of the Open Hearings Pilot Project.

B. COMMITTEE MEMBERSHIP

Committee Chair

Hon. Heidi Schellhas, District Court Judge, Hennepin County Juvenile Court

Committee Members

Mark Anfinson, Attorney at Law , Media Representative
Candace Barr, Attorney at Law; Guardian Ad Litem
Kate Fitterer, President, Minnesota Association of Guardians Ad Litem
Hon. Donovan Frank,[1] District Court Judge, St. Louis County
Susan Harris, Assistant Washington County Attorney
Mary Jo Brooks Hunter, Professor, Hamline University School of Law
Tom Hustvet, Director, Houston County Social Services
Hon. Gregg Johnson, District Court Judge, Ramsey County
Marieta Johnson, St. Louis County Deputy Court Administrator
Deb Kempi, Hennepin County Juvenile Court Administrator
Anna Lamb,[2] Hennepin County Juvenile Court Administrator
Hon. Thomas McCarthy, District Court Judge, Sibley County
Hon. Gary Meyer, District Court Judge, Wright County
Richard Pingry, Child Protection Supervisor, St. Louis County Social Services
Hon. Warren Sagstuen,[3] District Court Judge, Hennepin County
Dr. David Sanders, Director, Hennepin County Dept. of Children and Family Services
Hon. Terri Stoneburner,[4] Minnesota Court of Appeals
Erin Sullivan Sutton, Asst. Commissioner, Children's Services, Dept. of Human Services
Mark Toogood,[5] Hennepin County Guardian Ad Litem

Committee Staff

Judith Nord, Staff Attorney, State Court Administrator's Office

[1] Judge Frank resigned from the Committee upon his appointment to the federal bench for the District of Minnesota.
[2] Ms. Lamb succeeded Deb Kempi as Hennepin County Juvenile Court Administrator and as that agency's representative on the Committee.
[3] Judge Sagstuen was originally appointed to the Committee in his capacity as a Hennepin County Public Defender, although he has since been appointed as District Court Judge.
[4] Judge Stoneburner was originally appointed to the Committee in her capacity as District Court Judge in Brown County, although she has since been elevated to the Minnesota Court of Appeals.
[5] Although he began his term of service on the Committee as a Hennepin County Guardian Ad Litem, Mr. Toogood is now employed as Children's Services Assistant Manager, Dept. of Human Services.

II. BACKGROUND LEADING TO PILOT PROJECT

A. MINNESOTA SUPREME COURT TASK FORCE ON FOSTER CARE AND ADOPTION

1. Task Force Charge

In October 1995, the Minnesota Supreme Court issued an Order establishing the Task Force on Foster Care and Adoption[6] [hereinafter "Foster Care Task Force]. The Court directed the Foster Care Task Force to:

1. Identify court rules, standards, procedures, and policies and state and federal laws designed to achieve safe, timely, and permanent placements for abused and neglected children;
2. Evaluate the performance of the judicial system in delivering the services provided in the identified rules, standards, procedures, policies, and laws;
3. Assess the quality and adequacy of the information available to courts in child welfare cases;
4. Assess the extent to which existing rules, standards, procedures, policies and laws facilitate or impede achievement of permanent and safe placements of children and the extend to which requirements imposed on the courts impose significant administrative burdens on the courts; and
5. Examine the cooperation between the state court system and tribal court systems and compliance with the Indian Child Welfare Act.[7]

The Foster Care Task Force also "took on" the charge of assessing the desirability of opening child protection hearings to the public.[8]

2. Task Force Data Collection Methods and Analysis

In assessing the desirability of opening child protection hearings to the public, the Foster Care Task Force analyzed federal and state statutes, court rules, and case law regarding public access to juvenile court hearings and records.[9] The Foster Care Task Force also solicited input from child protection system stakeholders through various data collection efforts, including focus groups, public hearings, site visits, file reviews of child protection cases in six counties, statistical analysis of information contained in the State Judicial Information System, and distribution of attitudinal surveys to judicial officers, state and tribal social services agencies, tribal attorneys, county attorneys, and public defenders.[10] Based upon its data collection efforts, the Foster Care Task Force learned that "[t]he vast majority of those surveyed are opposed to opening CHIPS and TPR hearings to the public."[11]

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[6] Order Establishing Minnesota Task Force on Foster Care and Adoption, File No. C2-95-1476 (Minn. S. Ct. filed Oct. 1995).

[7] *Id*. at 1; *see also* Minnesota Supreme Court Foster Care and Adoption Task Force *Final Report* 4 (January 1997) [hereinafter "Foster Care Task Force Report"].

[8] Foster Care Task Force Report, *supra* note 7, at 4.

[9] *Id*. at 115-20.

[10] *Id*. at 5, 120.

[11] *Id*. at 120.

3. Recommendation of Task Force Majority to Open Hearings to the Public

While the Foster Care Task Force recognized the "controversial" nature of, and opposition to. publicly accessible juvenile protection hearings, in its January 1997 report to the Court a majority of the members recommended that hearings involving child in need of protection or services (CHIPS) matters and termination of parental rights (TPR) matters should be presumed open to the public in the same manner as criminal proceedings are accessible to the public.[12] Specifically, the Foster Care Task Force recommended that "[t]there should be a presumption that hearings in juvenile protection matters will be open absent exceptional circumstances."[13] It was also recommended that, with the exception of certain information, juvenile protection court files should be accessible to the public.[14]

The Task Force majority based its recommendation on several reasons. First, the majority argued that "the juvenile protection system lacks accountability because it is a closed system."[15] The majority opined:

> Although the purpose of a closed system is to provide a protective rehabilitative environment for both parents and children by shielding them from public scrutiny and stigmatization, a closed system allows abuses to exist uncorrected and lack of funding for children's services to go unnoticed by the public. In effect, the very confidentiality that was meant to protect children ends up harming them by keeping abuses in the system and the effects of lack of funding a secret.[16]

Second, the Task Force majority believed that "because the juvenile protection system is a closed system, child abuse and neglect decisions are not truly based on a set of 'community standards.'"[17] The majority stated:

> Arguably, one of the benefits of having a county-based system of funding juvenile protection services and foster care is that each county may make decisions according to its own community standards guided by the Minnesota Department of Human Services guidelines. But where the community is not cognizant of the perils children face or the types of services or lack of services available to those children, the community cannot respond to or comment on the practices or funding of the juvenile protection system.[18]

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[12] *Id*.
[13] *Id*. at 123.
[14] *Id*. The Foster Care Task Force recommended that certain information should not be made accessible to the public, including "information which is protected by law from public access," as well as information that "might (1) cause emotional or psychological harm to children due to the intensely personal nature of the information included about either the children or their families; or (2) discourage potential reports of neglect [and abuse] by revealing confidential information about reporters." *Id*. at 123-25.
[15] *Id*. at 120.
[16] *Id*.
[17] *Id*. at 121.
[18] *Id*.

Third, the Task Force majority believed that "the closed nature of CHIPS and TPR proceedings is largely unnecessary" on the grounds that "[a] number of proceedings already open to the public deal with issues which are at the heart of CHIPS and TPR proceedings."[19] For example, adult criminal proceedings involving malicious punishment of a child or criminal sexual conduct involving a child victim "are open to the public with certain protections for the child victim witness."[20] The majority also cited dissolution and custody matters that "often contain the very same allegations which form the bases of CHIIPS petitions."[21] The majority also stated that "the press is already free to print any information it lawfully obtains from sources outside the juvenile courtroom and juvenile court records, such as by interviewing witnesses."[22]

Finally, the Task Force majority cited the favorable experience reported by Michigan, which has for several years authorized public access to juvenile protection hearings and records. The majority noted that in Michigan juvenile protection hearings and termination of parental rights hearings are "presumptively open but may be closed to the public under the standards set forth in *Globe Newspaper*[23] with regard to closure of criminal cases."[24] They also noted that in Michigan juvenile court records are also accessible to the public, and those records that must remain inaccessible to the public are placed in a confidential file to which only persons with a "legitimate interest" may be allowed access.[25] Several members of the Foster Care Task Force conducted a site visit to Michigan to see first hand the workings of that state's open hearings system. The majority reported that in talking with some of Michigan's system's stakeholders, "[o]ne judge commented that before the hearings were opened, everyone thought the 'sky would fall,' but 'it didn't'."[26] During their site visit, "others reported that the public and the press are not usually in attendance at hearings; family members and foster parents are."[27] Finally, the majority Task Force members noted that "[a]lthough children's names can be published, the news media in Michigan has been very sensitive and has rarely published children's names."[28]

4. Majority's Caveats to Recommending Open Hearings

Acknowledging concerns raised by other child protection system stakeholders, including those Task Force members opposed to open hearings, the Foster Care Task Force majority placed several caveats on its recommendation to open juvenile protection hearings and records to the public. First, recognizing that opening hearings to the public "may chill admissions to CHIPS petitions," the Task Force recommended that "'no contest' answers should be allowed so that parents will not have to enter public admissions."[29] The Task Force added that allowing "'no

[19] *Id*.
[20] *Id*. (citing Minn. Stat. §§ 631.045; 595.02, subd. 4; and 609.3471 (1996)).
[21] *Id*.
[22] *Id*.
[23] *See infra* Section IV(A)(2) (summarizing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982)).
[24] Foster Care Task Force Report, *supra* note 7, at 121.
[25] *Id*. at 122.
[26] *Id*. (citing "Representative Wes Skoglund, Erin Sullivan Sutton, and Heidi S. Schellhas *Site Visit to Wayne County Juvenile Court in Detroit Michigan: Summary of Observations and Information Gathered* (September 6, 1996)).
[27] *Id*.
[28] *Id*.
[29] Id. at 122-23.

contest' answers will have the added benefit of allowing children to be adjudicated CHIPS more quickly and without a trial where the parents are not willing to admit."[30]

Second, the Task Force majority also "recognized that practitioners will need clear guidance as to what should be placed in the file accessible to the public and what should be placed in the non-public file."[31] For that reason, the Task Force compiled and recommended a list of accessible documents and a list of inaccessible documents.[32]

Finally, the majority recommended that "the media be trained regarding the new openness of the court," including "an emphasis on journalistic ethics."[33]

5. Recommendation of Task Force Minority to Maintain Confidentiality

Five members of the Foster Care Task Force who opposed opening juvenile protection proceedings to the public submitted a minority report explaining their concerns.[34] The minority stated:

> Opening child protection proceedings in Juvenile Court to the public and media is not in the best interests of children. We agree with the majority's goal of improving the system and making it more accountable, however the benefits of opening the hearings and court records to the public do not outweigh the risks of emotional harm and embarrassment to the children who are the subjects of these proceedings. The goal of the child protection system is to rehabilitate and reunite families. The majority of these children will continue to be part of their communities long after the case has closed. Exposing their families' dysfunctions to the public will not serve, and may actually deter, this goal.[35]

"One of the greatest concerns" to the minority "are the cases where the media will attend the hearings with cameras and reporters."[36] They stated:

> Although the majority feels that this will reveal and correct faults in the system, it will be the children that will suffer from the media sensationalizing their most personal family secrets. A child who is the victim of incest will now be even more reluctant to report abuse for fear of her family, friends and everyone in her school, church, and neighborhood learning of her most shameful experience, marking her for life.[37]

[30] *Id*. at 123.
[31] *Id*.
[32] *Id*. at 123, 124-25.
[33] *Id*. at 123, 125.
[34] *Id*. at Appendix D.
[35] *Id*. at D-1.
[36] *Id*.
[37] *Id*.

While acknowledging the majority's recommendation to provide training to the media to temper this concern, the minority stated that "the reality is that there are no means to ensure that children's names, pictures or other identifying information are not published and broadcast for all the world to see."[38] The minority also stated:

> It is not reasonable to expect the media to fully report all the cases or even to fully report on each case. Without full reporting, an accurate picture of the case and system is unlikely. Therefore families and the system will be judged by the aberrant cases involving well-known individuals or other cases where the media believes the story will appeal to the prurient interests of the public. Opening these hearings will make it easy for special interest groups and disenfranchised family members to use the media to further their purpose at the expense of the children that we are trying to protect.[39]

Another concern expressed by the minority was that "open hearings may chill admissions in child protection cases when the press and other non-parties are present."[40] With respect to the majority's recommendation to allow "no contest" admissions to temper this concern, the minority stated:

> This troubling solution flies in the face of the goal of holding the adults accountable. The first step in any successful reunification is for parents to acknowledge and admit the problems [that] led to the initiation of child protection proceedings. Public disclosure will do nothing to increase the likelihood of parents acknowledging their issues and is likely to discourage admissions. We have already learned from therapists that when defendants make similar pleas in what is known in criminal court as *Alford-Goulette* pleas, therapy and treatment is rarely successful because defendants continue to deny any criminal behavior. There is no reason to believe this result would be any different in juvenile court. By giving the parents an option to plead no contest, children will suffer the consequences when their parents fail at therapy by stating that they did nothing wrong because they did not have to admit any wrong doing or negligence in court.[41]

A third concern raised by the minority related to potential abuse of the option to close hearings under "exceptional circumstances." With respect to the majority's proposal that hearings be closed except under "exceptional circumstances," the minority stated "this may also be abused to protect prominent members of the community. At best these exceptional circumstances will result in further mistrust of the system."[42]

[38] *Id*.
[39] *Id*. at D-2.
[40] *Id*. at D-1.
[41] *Id*. at D-2.
[42] *Id*.

The minority recognized that "there are people who have a legitimate need and right to have information about individual child protection cases."[43] They stated, however, that "[i]f the court process is opened only to these people with a genuine interest in the best interest of the child, it is more likely the child's privacy and dignity will be protected."[44]

Finally, the minority stated that "[o]ne of the goals of open hearings is to increase public awareness and generate public response, but there are other more effective and accurate ways of informing the public of the nature and degree of child maltreatment in our communities."[45] As alternatives to opening hearings to the public, the minority suggested that the other recommendations proposed by the Task Force, specifically including appointing attorneys for each child and appointing a guardian ad litem for each child, are "a far better means with which to keep an eye on the system than through the media whose role is to inform the public, possibly at the expense of the child."[46]

B. LEGISLATURE'S RESPONSE TO TASK FORCE RECOMMENDATIONS

Following is an excerpt from a law review article written by Hon. Heidi Schellhas[47] describing the Legislature's response to the recommendations of the Foster Care Task Force:

> The Task Force issued its recommendations to the supreme court [in January 1997][48] and bills were introduced in the House and Senate.[49] The House Judiciary Committee, chaired by Rep. Wes Skoglund, DFL-Minneapolis, heard

[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*. at D-3.
[47] Hon. Heidi S. Schellhas, *Open Child Protection Proceedings in Minnesota*, 26 WM. MITCHELL L. REV. 631 (2000) (Judge Schellhas was a member of the Foster Care and Adoption Task Force and Chair of the Open Hearings Advisory Committee).
[48] In her law review article Judge Schellhas writes:

> The timing of the final report of the Task Force, January 1997, is noteworthy, especially for the purpose of dispelling what appears to be a widespread erroneous belief that the impetus to open child protection proceedings resulted from the death of a three-year old girl, Desi Irving. Prior to her death, a child protection proceeding involving Desi had been dismissed. Desi died at the hands of her mother on February 7, 1997. At the time of her death, she was covered with cuts and cigarette burn marks and had a bruised forehead. According to a neighbor who tried to resuscitate Desi, she was so thin, her ribs could be seen. *See* Jim Adams, *Mother is Held in Slaying of 3-Year-Old Girl*, STAR TRIB. (Minneapolis-St. Paul), Feb. 8, 1997, at B1. The Task Force issued its final report in January 1997, before Desi's death, and without any knowledge of her circumstances. However, it might be true that "Desi's murder [in 1997] and unanswered questions about whether the system had failed her, whether social workers should have known about the failures of a mother who had failed before, became a catalyst for [the open child protection hearings pilot project]." Chris Graves, *A Child's Death Opens Window to Child Protection*, STAR TRIB. (Minneapolis-St. Paul), June 14, 1998, at A1.

Schellhas, *supra* note 47, at n.213.
[49] *See* JOURNAL OF THE HOUSE, 80th Legis. Sess. 89 (Minn. 1997) (introducing H.F. 254, 80th Legis. Sess (Minn.1997)); JOURNAL OF THE SENATE, 80th Legis. Sess. 371 (Minn. 1997) (introducing S.F. 855, 80th Legis. Sess. 329-30 (Minn. 1997)).

> testimony and recommended a pilot project.[50] Although the House [Judiciary Committee] passed a bill by a substantial majority to include all [judicial] districts in a pilot project, the Senate passed a bill allowing only limited access.[51] Before the . . . bill passed [the full House], the Conference of Chief Judges voted to recommend against a pilot project opening child protection hearings to the public. Ultimately, the legislature did not pass legislation authorizing open child protection hearings on a permanent basis or through a pilot project.[52]

While the Legislature did not pass a bill authorizing an open hearings pilot project, it did enact legislation specifying juvenile protection records that would be accessible and inaccessible to the public.[53]

C. CONFERENCE OF CHIEF JUDGES' RESPONSE TO TASK FORCE RECOMMENDATIONS

The Conference of Chief Judges (CCJ) is the policy making body for Minnesota's trial court system. It is comprised of the Chief Judges and Assistant Chief Judges from each of Minnesota's ten judicial districts. In November 1997, at the request of the Minnesota Supreme Court, the CCJ revisited the issue of implementing an open hearings pilot project.[54] Following significant subcommittee and committee deliberations, on January 16, 1998, the full CCJ ultimately recommended that "the Supreme Court establish rules for a pilot project in certain limited jurisdictions whereby juvenile protection (CHIPS) proceedings would be presumed open."[55] This recommendation was made subject to the following conditions:

1) Hennepin County would be included in the pilot project and other jurisdictions to be included would be representative of urban, rural, metro and out-state, with the advice of the Conference of Chief Judges;
2) the pilot project would last three years with an independent evaluation to commence after one year;
3) the independent evaluation would focus on whether the pilot project succeeds in greater accountability and public awareness, whether children have been adversely affected by the open CHIPS proceedings or public access to court files, and whether the media have been responsible in reporting CHIPS files in the name of parent, not the children;
4) names, contents and public accessibility of files would be dealt with in certain defined ways; and

[50] *See* JOURNAL OF THE HOUSE, 80th Legis. Sess. 329-30 (Minn. 1997).
[51] *See* JOURNAL OF THE HOUSE, 80th Legis. Sess. 3451-52, 3929 (Minn. 1997); JOURNAL OF THE SENATE, 80th Legis. Sess. 1718 (Minn. 1997).
[52] Schellhas, *supra* note 47, at 659.
[53] Minn. Stat. § 260C.171, subd. 2 (1999).
[54] *See Report and Recommendations,* Subcommittee on Open CHIPS, Conference of Chief Judges (filed December 4, 1997, by Hon. Gary J. Meyer, Chair, Open CHIPS Subcommittee).
[55] *Id*. at 2.

5) child protection hearings would be presumed open and could be closed or partially closed by a judge only in exceptional circumstances with a request by all parties to close a hearing to be a factor to be used by presiding judges in determining whether exceptional circumstances exist.[56]

[56] *Id*. at 2-3.

III. OVERVIEW OF PILOT PROJECT

A. INITIATION OF OPEN HEARINGS PILOT PROJECT

1. Supreme Court Order Establishing Pilot Project

Following the Conference of Chief Judges' approval of the Open Hearings Pilot Project concept, on January 22, 1998, the Minnesota Supreme Court filed an "Order Establishing Pilot Project on Open Hearings in Juvenile Protection Matters"[57] [hereinafter "Pilot Project Order"], set forth as Appendix A to this *Introduction*. Based upon its "inherent power and statutory authority"[58] to "regulate public access to records and proceedings of the judicial branch,"[59] the Court authorized the chief judge of each judicial district to designate one or more counties to participate in a pilot project in which hearings in juvenile protection proceedings "shall be presumed open and may be closed or partially closed by the presiding judge only in exceptional circumstances."[60] The Court specifically directed that "child in need of protection or services proceedings" be accessible to the public, as well as "permanent placement proceedings, termination of parental rights proceedings, and subsequent state ward reviews."[61] The court directed that the project begin June 1, 1998, and continue for three years.[62] The pilot project was later extended through December 31, 2001, to allow time for a public hearing regarding the evaluation of the pilot project (see section "C" below) without disruption of the pilot project.[63]

2. Counties Participating in Pilot Project

Twelve counties were designated by their respective Chief Judges to participate in the pilot project: Goodhue and LeSueur (First Judicial District); Houston (Third Judicial District); Hennepin (Fourth Judicial District); Watonwan (Fifth Judicial District); St. Louis – Virginia (Sixth Judicial District); Clay (Seventh Judicial District); Stevens (Eighth Judicial District); Marshall, Pennington, and Red Lake (Ninth Judicial District); and Chisago (Tenth Judicial District).[64]

B. ACCESS TO RECORDS RELATING TO OPEN HEARINGS PILOT PROJECT

In January 1998, the Court established an Open Hearings Advisory Committee[65] to "consider and recommend rules regarding public access to records relating to open juvenile protection

[57] Order Establishing Pilot Project on Open Hearings in Juvenile Protection Matters, File No. C2-95-1476 (Minn. S. Ct. filed Jan. 22, 1998) [hereinafter "Pilot Project Order"].
[58] *Id*. at 1.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 2.
[63] Order Extending Pilot Project on Open Hearings in Juvenile Protection Matters, File No. C2-95-1476 (Minn. S. Ct. filed June 19, 2001).
[64] *Request for Revised Proposals: Evaluation of Open Hearings in Juvenile Protection Matters*, State Ct. Admin. Office, Minn. Sup. Ct. 6 (Dec. 12, 1998).
[65] Pilot Project Order, *supra* note 57, at 2. The initial list of Committee members is identified in the Pilot Project Order set forth as Appendix A to this *Introduction*. The Court later amended it's order to include additional Committee members so that each of the twelve pilot project counties was represented. *See* "Amended Order

hearings" and directed the Committee to submit its recommendations by April 15, 1998.[66] After significant deliberation, the Committee submitted its recommendations to the Court. In May 1998, the Court issued an Order[67] promulgating a "Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings" [hereinafter "Public Access Rule"]. The Order and Public Access Rule are set forth as Appendix B to this *Introduction*.

The Rule is divided into nine subdivisions, each of which includes an explanatory comment by the Committee:

- Subdivision 1 of the Public Access Rule establishes a presumption of public access to juvenile protection records and provides that "[e]xcept as otherwise provided in this Rule, all case records relating to the pilot project on open juvenile protection proceedings are presumed to be accessible to any member of the public for inspection, copying, or release."[68]
- Subdivision 2 of the Public Access Rule provides that the Rule relates only to records filed on or after June 22, 1998, and that records filed prior to that date are not accessible to the public.[69]
- Subdivision 3 provides that except as otherwise inconsistent, the Rules of Public Access to Records of the Judicial Branch apply to records relating to open juvenile protection proceedings.[70]
- Subdivision 4 identifies records that are not accessible to the public.[71]
- Subdivision 5 provides that case records received into evidence as exhibits shall be accessible to the public unless subject to a protective order.[72]
- Subdivision 6 provides that "there shall be no direct public access to juvenile court case records maintained in electronic format in court information systems."[73]
- Subdivision 7 authorizes the court to "issue an order prohibiting public access to juvenile court case records that are otherwise accessible to the public when the court finds that there are exceptional circumstances supporting issuance of the order."[74]
- Subdivision 8 provides that all juvenile protection files opened in the pilot project counties on and after June 22, 1998, "shall be captioned in the name of the parent(s) or the child's legal custodian or legal guardian,"[75] rather than in the name of the child as is the current practice.
- Subdivision 9 provides that the Rule supercedes Minnesota statutes as they apply to public access to records.[76]

Establishing Pilot Project on Open Hearings in Juvenile Protection Matters, File No. C2-95-1476 (Minn. S. Ct. filed Feb. 6, 1998).

[66] Pilot Project Order, *supra* note 57, at 2.

[67] Order promulgating Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings, File No. C2-95-1476 (Minn. S. Ct. filed May 29, 1998) [attached as Appendix B to this *Introduction*].

[68] Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings, subd. 1 (1998) [hereinafter "Public Access Rule"] [attached as Appendix B to this *Introduction*].

[69] *Id*. at subd. 2.

[70] *Id*. at subd. 3.

[71] *Id*. at subd. 4.

[72] *Id*. at subd. 5.

[73] *Id*. at subd. 6.

[74] *Id*. at subd. 7.

[75] *Id*. at subd. 8.

[76] *Id*. at subd. 9 (referencing Minn. Stat. § 260C.171, subd. 2, discussed *supra* at the text accompanying note 53).

C. EVALUATION OF OPEN HEARINGS PILOT PROJECT

The Court's Pilot Project Order directed the State Court Administrator, in consultation with the Conference of Chief Judges, to "contract with an independent research organization to conduct an evaluation of the pilot project."[77] In Summer 1998, the Court asked the Open Hearings Advisory Committee to assist in selecting the independent evaluator and to serve as consultant to the chosen evaluator.[78] In February 1999, the National Center for State Courts (NCSC) was chosen to conduct the evaluation.[79]

Although jurisdictions in 16 other states[80] have adopted statutes or court rules that require or permit public access to juvenile protection hearings, the NCSC evaluation is the first of its kind to be conducted in the nation.

The NCSC gathered data during the period from April 1999 through May 2001. Details regarding the various data collection methods employed by the NCSC, as well as the NCSC's key findings regarding the impact of open hearings, are set forth in Volumes 1 – 3 of the NCSC's Final Report which accompanies this *Introduction*.

[77] Pilot Project Order, *supra* note 57, at 2.
[78] Schellhas, *supra* note 47, at 661.
[79] *See* Order Authorizing Access to Records and Proceedings of Open Hearings Pilot Project, File No. C2-95-1476 (Minn. S. Ct., filed Jul 6, 1999) (stating that the State Court Administrator has contracted with the National Center for State Courts to evaluate the pilot project).
[80] Arizona, Arkansas, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Michigan, Nebraska, New York, North Carolina, Ohio, Oregon, Texas and Washington. *See* James Walsh, *Open Juvenile Court Raises Concern*, STAR TRIB. (Minneapolis-St. Paul), June 21, 1998, at B1.

IV. CASE LAW REGARDING OPEN AND PUBLIC TRIALS

SECTION IV OF THIS *INTRODUCTION* IS EXCERPTED IN ITS ENTIRETY FROM A LAW REVIEW ARTICLE[81] WRITTEN BY HON. HEIDI SCHELLHAS, CHAIR OF THE OPEN HEARINGS ADVISORY COMMITTEE. THE PURPOSE OF THIS SECTION IS TO PROVIDE A SUMMARY OF U.S. SUPREME COURT AND MINNESOTA CASE LAW REGARDING OPEN AND PUBLIC TRIALS.

The First Amendment to the U.S. Constitution guarantees public access to most court proceedings under its free speech and press clauses.[82]

A court proceeding is presumed open if it traditionally has been public and if public access would benefit its operation.[83] In applying this test, most courts have denied the public the right of access to court proceedings involving child protection matters.[84] States are obliged to reunify parents and children, but when reunification fails, states have the power to terminate parental rights.[85] The U.S. Supreme Court has stated "[f]ew forms of state action are both so severe and so irreversible,"[86] yet the public and media are generally excluded from the court proceedings in which these "severe and irreversible" actions occur.[87] Some legal scholars argue that laws that mandate closing dependency court proceedings violate the First Amendment.[88] If true, the public and the media have a constitutional right to attend dependency court proceedings and any party seeking to close such a proceeding would bear the burden of demonstrating that closure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[89]

The U.S. Supreme Court in four cases in the 1980s, defined the public's right to attend criminal court proceedings.[90] The Court held that the public has a right to attend all criminal trials,

[81] Schellhas, *supra* note 47, at 641-656.
[82] *See* U.S. CONST. Amend. I (stating "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .").
[83] *See* Jack B. Harrison, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1310-12 (1992) (discussing the evolution of the presumption in America that all should have access to the courts and that court proceedings should be open to the public).
[84] *See* Jan. L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System*, 16 B.C. THIRD WORLD L.J. 359, 373-74 (1995) ("The vast majority of states have statutes within their juvenile codes that grant the juvenile court judge the discretion to admit or exclude the public from juvenile proceedings").
[85] *See* Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (holding that states must show more than a fair preponderance of evidence to terminate parental rights).
[86] *Id*. at 759.
[87] *See* Samuel Broderick Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 883 (1998) (describing the extent to which courts are closed in various states).
[88] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (striking down a statute that excluded the general public from a trial involving a minor victim of a sexual offense).
[89] *Id*. at 607.
[90] Sokol, *supra* note 87, at 884 n. 13.

including jury selection,[91] preliminary hearings,[92] and witness testimony.[93] [These cases are summarized on the following pages.]

A. FEDERAL CASE LAW

1. Richmond Newspapers v. Virginia

In *Richmond Newspapers, Inc., v. Virginia*,[94] the public's First and Fourteenth Amendment rights to attend criminal trials outweighed the defendant's concern about adverse effect. The case involved a trial court's order to close a murder trial to the public and press.[95] The defendant argued that publicity of the case would adversely affect the trial process.[96] Richmond Newspapers brought mandamus and prohibition petitions, but the Virginia Supreme Court dismissed them.[97] The U.S. Supreme Court reversed, holding that the First and Fourteenth Amendments guarantee the presumptive right of the public and the press to attend criminal trials.[98]

In justifying its holding, the Court listed several benefits to the public of public attendance at criminal trials: community catharsis, education, increased public understanding of the rule of law, increased comprehension of the functioning of the entire criminal justice system and public confidence in the administration of justice.[99] The Court also described several benefits to the proceeding itself: enhanced performance, protection of the judge, and possibly bringing a proceeding to the attention of persons who might be able to furnish relevant evidence or contradict evidence already admitted.[100]

Tracing the history of the public's right to attend criminal trials, Chief Justice Burger approvingly quoted Jeremy Bentham's proposition that "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."[101] The Chief Justice also emphasized Bentham's idea that "open proceedings enhanc[e] the performance of all involved, protec[t] the judge from imputations of dishonesty, and serv[e] to educate the public."[102] Burger's opinion pointed out that public trials have a "significant community therapeutic value"[103] and provide "an opportunity both for understanding the system in general and its

[91] *See* Press Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984) [hereinafter *Press I*].
[92] *See* Press Enter. Co. v. Superior Court, 478 U.S. 1, 10 (1986).
[93] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 575-81 (1980); Globe Newspaper, 457 U.S. at 610 (striking down a statute excluding the general public from minor sex victim trials).
[94] 448 U.S. 555 (1980).
[95] *See id.* at 560.
[96] *See id.* at 561.
[97] *See id.* at 562.
[98] *See id.* at 581.
[99] *See id.* at 569-72.
[100] *See id.* at 569.
[101] *Id*. at 569 (quoting 1 Jeremy Bentham, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).
[102] *Id*. at 569 n. 7.
[103] *Id.* at 570.

workings in a particular case."[104] He noted that public exposure to trials, even through the media, "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."[105] The Chief Justice stated:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated . . . . [N]o community catharsis can occur if justice is "done in a corner [or] in any covert manner."[106]

Justice Brennan agreed with the Chief Justice, noting that "debate on public issues should be uninhibited, robust, and wide-open," as well as "informed."[107] Justice Brennan, however, expressed concern that the logic of his argument might be used to require public access to any judicial proceeding, and he warned that "access to a particular government process" depends on the function of the particular proceeding.[108] To Justice Brennan, the relevant issue was not the benefit of access for a particular citizen, but rather the benefit of access to the proceeding itself.[109]

2. Globe Newspaper Co. v. Superior Court

Globe Newspaper Co. v. Superior Court[110] further expanded *Richmond Newspapers* to allow the public into a trial even when minor rape victims testify. The Massachusetts Supreme Judicial Court held that a state statute required closing sex-offense trials during the testimony of juvenile sex crime victims. The statute in question provided an automatic bar to all cases in which minor victims of sex offenses testified, even if the victim, defendant, and prosecutor raised no objections to an open trial.[111] Representatives of the Globe sought to attend a rape trial in which two minor rape victims were expected to testify.[112] The U.S. Supreme Court ruled that closing the court proceeding for even a limited time during testimony of a very sensitive nature violated the First Amendment.[113] Writing for the majority, Justice Brennan stated that "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."[114]

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[104] *Id.* at 572.
[105] *Id.* at 573 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976)).
[106] *Id.* at 571 (citations omitted).
[107] *Id*. at 587 (Brennan, J., concurring) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
[108] *Id* at 589 (noting that access to a government process must be "important in terms of that process").
[109] *See id.* (comparing *In re* Winship, 397 U.S. 358, 361-62 (1970)).
[110] 457 U.S. 596 (1982).
[111] *See id.* at 611 (O'Connor, J., concurring).
[112] *See id*. at 598.
[113] *See id.* at 610-11. "We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm." *Id.* at 611 n. 27.
[114] *Id*. at 606.

Richmond Newspapers made clear that the right of access to criminal court proceedings could be restricted only upon a showing that the restriction was "necessitated by a compelling governmental interest and [was] narrowly tailored to serve that interest."[115] *Globe Newspaper* extended the analysis and provided an important qualification. Massachusetts argued that safeguarding the physical and psychological well being of testifying minor rape victims was a compelling interest necessitating a restriction of the public's access to the proceeding.[116] Though a majority of the justices agreed that this interest was "potentially compelling," the Court held that the statute mandating closure whenever such minors testified was not "narrowly tailored."[117] In order to meet the requirement that the restriction be "narrowly tailored," Massachusetts trial courts were required to decide on a case-by-case basis whether a minor actually would be harmed by testifying in public and whether any available alternatives to restricting public access to the proceeding existed.[118] Massachusetts also claimed that closing the proceedings would encourage minor victims of sex crimes to come forward and provide accurate testimony and that this result constituted a compelling interest sufficient to justify the restriction on the public's right of access.[119] Because the state provided no support for its claim, however, the Court did not decide this question.[120]

3. Press-Enterprise Co. v. Superior Court

Press-Enterprise Co. v. Superior Court (Press I)[121] presented compelling issues -- protecting jurors' right to privacy and sealing a transcript from a preliminary hearing for murder -- but compelling issues alone are not sufficient. The courts also must consider alternatives to closing a hearing that address both the compelling issues and the public's right to know. A California trial court closed to the public all but three days of a six-week voir dire of a capital jury.[122] The trial court asserted two interests to justify the closure: the defendant's right to a fair trial and the jurors' right to privacy.[123] Noting that the public right of access to jury selection was common practice in the United States when the Constitution was adopted, the Court restated the applicable standard that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[124] The Court found California's asserted interest to be insufficient to justify closure because the trial court failed to make adequate findings and did not consider alternatives to closure.[125]

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[115] *Id*. at 607.
[116] *See id*. at 607 n. 19.
[117] *See id*. at 609.
[118] *See id*. at 608. The court listed factors to be weighed in determining harm. The factors included the minor victim's age, psychological maturity, the crime, the victim's desires, and the interests of parents and relatives. *See id.*
[119] *See id*. at 609.
[120] *See id*. at 609-10.
[121] 464 U.S. 501 (1984).
[122] *See id*. at 503.
[123] *See id.*
[124] *Id*. at 510.
[125] *See id*. at 510-11.

In *Press-Enterprise Co. v. Superior Court (Press II)*,[126] the Supreme Court reversed a magistrate's order sealing the transcript of a forty-one day preliminary hearing in a capital murder trial.[127] The hearing was a recent development of the California criminal law, making historical analysis difficult for the Court. Seven of the justices likened the proceeding to preliminary hearings for criminal trials, which historically were open to the public;[128] two of the justices likened it to a grand jury, which historically was closed to the public.[129] Because the California courts had not considered alternatives to closure, the Supreme Court held that the order was neither "essential to preserve higher values" nor "narrowly tailored to serve that interest."[130]

4. Lower Court Rulings

The U.S. Supreme Court has not considered the First Amendment beyond its application to criminal proceedings,[131] but some lower courts have considered the issue. In *Publicker Industries, Inc. v. Cohen*,[132] the Third Circuit held that "the First Amendment embraces a right of access to [civil] trials" and that "public access to civil trials 'enhances the quality and safeguards the integrity of the fact finding process.'"[133] The Second, Sixth and Seventh Circuits likewise approved this reasoning.[134] The Fifth Circuit Court of Appeals has not addressed the issue but a Fifth Circuit district court has held that the First Amendment guarantees public access to civil trials.[135] By implication, the Fourth Circuit has approved the existence of the right of access to civil trials.[136] The First, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have not specifically addressed the issue.[137]

[126] 478 U.S. 1 (1986).
[127] *See id*. at 4-6.
[128] *See id*. at 15.
[129] *See id*. at 26.
[130] *Id*. at 13-14 (quoting *Press I*, 464 U.S. 501, 510 (1984)).
[131] *See* Sokol, *supra* note 87, at 895.
[132] 733 F.2d 1059 (3d Cir. 1984).
[133] *Id*. at 1070 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).
[134] *See* Westmoreland v. Columbia Broad Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984); In re Continental Ill. Sec. Litig., 732 F2d 1302, 1308 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983).
[135] *See* Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647, 651 (S.D. Tex. 1996) (stating, upon review of other circuits, that closed trials are a "serious impairment of the public's ability to scrutinize governmental activity . . . .").
[136] *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (affirming a right of access to documents filed in a summary judgment motion in a civil defamation case, baring compelling government interest).
[137] *See* Sokol, *supra* note 87, at 897.

B. STATE CASE LAW

1. Minnesota Adult Court Cases

The Minnesota Supreme Court has held that excluding the public from adult criminal proceedings violates the defendant's constitutional right to a public trial.[138] In *State v. Schmit,*[139] a sodomy case, the trial judge excluded over the defendant's objections all but members of the bar and press and the defendant's relatives and friends.[140] Reversing the trial court decision, the supreme court offered numerous arguments for the importance and necessity of public trials. The court stated that "the right to a public trial can scarcely be regarded as less fundamental and essential to a fair trial than the right to assistance of counsel, also granted by the Sixth Amendment."[141] The court explained that right to a public trial is a "limited privilege" subject to the court's power to exclude persons "for the preservation of order and decorum in the courtroom and to protect the rights of parties and witnesses."[142] The court added that:

> Where it appears that minors are unable to testify competently and coherently before an audience because of embarrassment or fright, temporary exclusion of the public is permissible. Our prior decisions hold that an adult witness may also be protected by temporary exclusion of the public when it appears that embarrassment prevents a full recital of the facts.[143]

The *Schmit* court observed that a majority of jurisdictions defined a "public trial" to mean "a trial which the general public is free to attend."[144] Noting that "[t]he doors of the courtroom are expected to be kept open," the court referenced cases from other states that "reversed convictions obtained at trials where the public was excluded solely on account of the salacious nature of the crime or testimony likely to be given."[145] Though the exclusion orders made exceptions for friends, designated reporters or members of the bar, the orders were struck down in each case.[146] Addressing the case at hand, the supreme court noted that the presence of reporters at the trial would not guarantee "such complete, accurate, and impartial reporting as is necessary to safeguard defendant's rights or protect against judicial oppression . . . ."[147] Moreover, the court was not persuaded that "members of the bar, relatives, and friends can assume either to represent or speak for the entire community interest in securing that kind of judicial administration which is fair both to the accused and the prosecution."[148]

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[138] *See* State v. Schmit, 273 Minn. 78, 80-81, 139 N.W.2d 800, 802 (1966).
[139] 273 Minn. 78, 139 N.W.2d 800 (1966).
[140] *See* id. at 79, 139 N.W.2d at 802.
[141] *Id.* at 80, 139 N.W.2d at 803.
[142] *Id.*
[143] *Id*. at 81-82, 139 N.W.2d at 803-04 (footnotes omitted).
[144] *Id*. at 83-84, 139 N.W.2d at 84.
[145] *Id*.
[146] *See id*. at 83-84, 139 N.W.2d at 804-05; s*ee also* Davis v. United States, 247 F. 394 (8th Cir. 1917).
[147] *Schmit*, 273 Minn. At 83-83, 139 N.W.2d at 804-05.
[148] *Id*. at 85-86, 139 N.W.2d at 806.

The *Schmit* court stated that "there is a vast difference between a trial from which everyone but a special class of persons is excluded and one which everyone except a designated few is free to attend."[149] The court noted that:

> [The Constitution] contemplates that an accused be afforded all possible benefits that a trial open to the public is designed to assure. Unrestricted public scrutiny of judicial action is a meaningful assurance to an accused that he will be dealt with justly, protected not only against gross abuses of judicial power but also petty arbitrariness. The presence of an audience does have a wholesome effect on trustworthiness since witnesses are less likely to testify falsely before a public gathering. Further, the possibility that some spectator drawn to the trial may prove to be an undiscovered witness in possession of critical evidence cannot be ignored.[150]

In *State v. McRae*,[151] the Minnesota Supreme Court reversed a trial court order closing an adult criminal trial during testimony of a teenage complainant.[152] The complainant was a fifteen-year-old girl who was sexually assaulted after she left a bus in Minneapolis and tried to find a friend's apartment.[153] The trial judge had based the order on Minnesota Statutes section 631.045,[154] which permitted exclusion of the public when the minor is victim and "closure is necessary to protect a witness or ensure fairness in the trial."[155] It held that closing the courtroom was "appropriate in these circumstances, given the fact that she's 15 years old and that she did appear to the court [in an off-the-record hearing] to be extremely apprehensive about her appearance here today."[156] In overturning the trial court, the supreme court noted that the trial court did not record its interview of the minor and thus "[t]he record does not disclose evidence or findings of a showing that closure was necessary to protect the witness or ensure fairness in the trial."[157]

In *State v. Fageroos*,[158] the defendant was convicted of first degree burglary and first degree criminal sexual conduct. The trial court closed the courtroom during the testimony of the complainant and her sister, both minors.[159] The defendant appealed contending that the trial court committed error.[160] The Minnesota Court of Appeals affirmed on all other issues but remanded to the trial court for "findings to support the closure" of the trial.[161] After the trial

[149] *Id*. at 84, 139 N.W.2d at 804.
[150] *Id*. at 806-07 (footnotes omitted).
[151] 494 N.W.2d 252 (Minn. 1992).
[152] *See id*. at 259.
[153] *See id*. at 253.
[154] *See id*. at 258.
[155] Minn. Stat. § 631.045 (1990). The language of this statutory section has not changed except to update statutory sections referenced therein. *See* Minn. Stat. § 631.045 (1998).
[156] *McRae*, 494 N.W.2d at 258.
[157] *Id*. at 259.
[158] 531 N.W.2d 199 (Minn. 1995)
[159] *See id*. at 201.
[160] *Id*. at 200.
[161] *See* State v. Fageroos, No. C0-92-1896, at *1 (Minn. Ct. App. July 20, 1993).

court made findings, the defendant again appealed contending that the findings were inadequate to support closure.[162] The court of appeals affirmed.[163] The defendant appealed to the Minnesota Supreme Court, which held that the findings were inadequate to support closure but also decided that the case should be remanded to the trial court so that the state could have the opportunity to try to establish that closure was necessary.[164] If the state could not establish that closure was necessary, the court stated that the defendant would be entitled to a new trial.[165] Justice Tomljanovich dissented, stating that she would have remanded the case for a new trial.[166] She wrote: "I can appreciate that it will be embarrassing and awkward for the alleged victim and her sister to testify with spectators present at the trial; however, that alone is not a sufficient basis on which to deny a public trial."[167]

In *State v. Biebinger*,[168] the defendant appealed from a conviction for criminal sexual conduct in the first degree and sentence as a patterned sex offender. The court of appeals reversed and remanded the case for a new trial holding that the closure had occurred without adequate findings of necessity and availability of other, better alternatives to closure.[169] Citing *State v. Fageroos*,[170] the Minnesota Supreme Court held that the appropriate remedy for the defendant was a remand for an evidentiary hearing regarding the necessity of closure because this hearing might remedy the violation.[171]

The courts have been more restrictive in otherwise open court proceedings when juveniles testify. In *Austin Daily Herald v. Mork*,[172] the Minnesota Court of Appeals upheld an order excluding the public from a criminal trial during the testimony of juveniles, even though reporters were permitted to attend on condition that they not report the names of juveniles or information about previous confidential juvenile proceedings.[173] Mower County District Court Judge James L. Mork ruled that during cross-examination the defendant would be given wide latitude to inquire into the juveniles' prior contacts with the juvenile court system,[174] and thus the cross-examination would result in disclosure of information not generally accessible to the public. The court of appeals held that "[t]he state's interest in protecting the confidentiality of juvenile records and proceedings, while not unlimited, is 'important and substantial.'"[175] Further, the court held "[c]oupled with the compelling governmental interest in safeguarding the

[162] *See* State v. Fageroos, No. C1-93-2453, at *1 (Minn. Ct. App. May 17, 1994).
[163] *See id*.
[164] *See State v. Fageroos*, 531 N.W.2d 199, 203 (Minn. 1995).
[165] *See id.*
[166] See *id*. (Tomljanovich, J., dissenting).
[167] *Id*.
[168] 585 N.W.2d 384 (Minn. 1998).
[169] *See id*. at 385.
[170] 531 N.W.2d 199 (Minn. 1995).
[171] *See Biebinger*, 585 N.W.2d at 385.
[172] 507 N.W.2d 854 (Minn. Ct. App. 1993) (order denying writ of prohibition).
[173] *See id*. at 858.
[174] *See id*. at 856.
[175] *Id*. at 858 (citing Minneapolis Star & Tribune Co. v. Lee, 353 N.W.2d 213, 215 (Minn. Ct. App. 1984)).

physical and psychological well-being of juvenile witnesses, this interest supports the decision to limit access."[176]

In *State v. Bashire*,[177] the state moved for closure of the courtroom during the testimony of two juvenile victims. The defendant did not object and instead agreed to a limited closure.[178] The trial court made no findings of necessity for closure but the court of appeals held that the defendant's failure to object and his agreement waived any error that could be predicated on the lack of findings.[179]

2. Minnesota Juvenile Court Cases

The Minnesota Supreme Court considered public access to a juvenile court proceeding in *In re R.L.K., Jr.* and *T.L.K. v. Minnesota*.[180] Petitions to terminate parental rights of G.T.K. and R.L.K, Sr., were filed in December 1997 and February 1978. [181] A reporter for the Minneapolis Star and Tribune attended the start of the juvenile court proceeding.[182] When the parents questioned the reporter's presence, the court replied that "the rules of court allow the press to observe any hearings of that court and . . . that the reporter had agreed not to identify the children in any story."[183] The court added that "the public has a right to know how this Court conducts its business, especially in a Court having as much power as this one."[184]

The parents' attorney objected to the reporter's presence and requested that the hearing be private because "what might come out of this trial might be rather difficult for certain people in this courtroom emotionally."[185] The children's attorney took no position on the reporter's presence but the assistant Hennepin County attorney said that the hearing should be private.[186] The juvenile court responded that the proceedings "should be private but not secret," and the reporter promised on the record not to use the name of anyone and to mask all addresses.[187] The court overruled the parents' objection "on the basis of the 'public's right to know its business' which 'overrides the potential injury that's been mentioned to me.'"[188]

[176] *Id*.
[177] 606 N.W.2d 449 (Minn. Ct. App. 2000).
[178] *See id*. at 450.
[179] *See id*. at 454-55.
[180] 269 N.W.2d 367 (Minn. 1978).
[181] *See id*. at 368.
[182] *See id*.
[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *See id*.
[187] *See id*.
[188] *Id*.

Subsequent to this discussion, the attorneys and court addressed Minnesota Statute section 260.155, subdivision 1.[189] The court stated that "one of the very basic cornerstones of American democracy is the public's right to know how governmental power is being exercised."[190] The court added that "the press, as representative of the general public, does have a direct interest in the work of the Court. It would seem to me the press is clearly under the intent of the Legislature."[191] The court then denied a further motion by the parents to exclude the reporter and the matter was continued so that the parents' attorney could apply for a writ of prohibition with the Minnesota Supreme Court.[192] The day after the above-noted hearing, an article appeared in the newspaper describing the events at the hearing. The article did not identify the children or parents' names or addresses.[193]

On appeal, the Assistant County Attorney took no position on the issue; the children's attorney for the first time argued in favor of excluding the reporter.[194] The newspaper was allowed to proceed *amicus curiae* and participate in oral argument before the supreme court.[195] The issue presented to the court was "whether the juvenile court erred pursuant to Minn. St. 260.155, subd. 1, in denying petitioners' motion to exclude the news media from the juvenile proceeding."[196] Petitioners argued that "the cornerstone of juvenile court policy of protecting family ties is the privacy accorded juvenile records and proceedings."[197] They claimed that "to allow news media representatives to attend a juvenile proceeding over the objections of the parties would render the Minnesota juvenile court system indistinguishable from the adult criminal adjudicative process."[198] Petitioners also argued that the juvenile proceedings should be private unless the permission of everyone concerned was obtained.[199]

The Minnesota Supreme Court noted that the juvenile court possessed discretion to admit those who "have a direct interest [in the case] or in the work of the court."[200] It held that "[t]he weight of authority is that the news media have a 'direct interest' in the work of a juvenile court and it is not an abuse of discretion to allow a reporter to be present at a juvenile proceeding."[201] The court noted that:

> The news media have a strong interest in obtaining information regarding our legal institutions and an interest in informing the public about how judicial power

[189] *See* Minn. Stat. § 260C.163, subd. 1(c) (1998) (formerly codified as Minn. Stat. § 260.155, subd. 1(c)) (permitting exclusion of all individuals without a direct interest in the case).
[190] *In re Welfare of R.L.K, Jr., and T.L.K.,* 269 N.W.2d at 369.
[191] *Id*. at 369.
[192] *See id*.
[193] *See id*.
[194] *See id*.
[195] *See id*.
[196] *Id*.
[197] *Id*.
[198] *Id*.
[199] *See id*. at 370.
[200] *Id*..
[201] *See id.*

> in juvenile court is being exercised. The news media thus clearly have "a direct interest . . . in the work of the court" within the meaning of Minn. St. 260.155, subd. 1 . . . .[202]

In 1993, the Minnesota Court of Appeals issued an unpublished opinion denying a writ of mandamus sought by Northwest Publications against the district court judge Anne V. Simonett.[203] The petitioner sought to compel the trial court "to admit a reporter to a hearing on the termination of parental rights, where the reporter's attendance was requested by the mother whose rights were at issue."[204] Ruling against the petition, the court held that the trial court possessed discretion to admit or deny reporters to termination hearings,[205] and that "mandamus may not be used to control judicial discretion."[206]

In *Minneapolis Star and Tribune Co. v. Schmidt*,[207] the Minnesota Court of Appeals granted a writ of prohibition in a case in which the juvenile court: 1) denied the newspaper's motion to open the pending proceedings; 2) denied the newspaper's access to juvenile court records about the pending proceeding; 3) prohibited the news media generally from publishing information about the matter; and 4) forbade trial participants from discussing or releasing information about the matter to the media.[208] The Star Tribune contested only the third portion of the juvenile court's order, which stated:

> [N]o representatives of the news media shall identify in any story or any news report in any way the identities of any juvenile connected with this case, whether a party or as a witness; nor, the identity of the Respondent parents involved in this case. That this shall include prohibition on the disclosure or identification of any such person or minor by name, residence, occupation, place of school attendance, foster placement, photographs, sketches, or any reference to previously identified characteristics.[209]

Subsequently, the juvenile court amended this provision to include "'the names of all attorneys of record in this case among those persons whose identity shall not be revealed in any story or news report.'"[210]

The issue before the court of appeals was whether the juvenile court erred in prohibiting the news media from publishing information about a pending juvenile court matter when the

[202] *Id*. at 371.
[203] *See* Northwest Publications, Inc. v. The Honorable Anne V. Simonett, Judge of District Court, No. C7-93-1968 (Minn. Ct. App. Oct. 6, 1993) (order denying petition for write of mandamus) (citing Minn. Stat. § 586.01 (1992)).
[204] *See id*. at 1.
[205] *Id*. (citing *In re Welfare of R.L.K., Jr. and T.L.K.*, 269 N.W.2d 367, 370 (Minn. 1978)).
[206] *Id*. (citing Minn. Stat. § 586.01 (1992)).
[207] 360 N.W.2d 433 (Minn. Ct. App. 1985).
[208] *See id* at 434.
[209] *Id*.
[210] *Id*.

information was obtained legally from "public records and independent sources."[211] The Minnesota Court of Appeals began its analysis by noting that "the main purpose of the first amendment guarantee of freedom of the press was 'to prevent previous restraints upon publication.'"[212] The court emphasized that "[a]ny prior restraint of speech is reviewed 'bearing a heavy presumption against its constitutional validity.'"[213] Though the juvenile court justified its order by the compelling interest that "one of the children involved would be traumatized by further publicity,"[214] the child's psychiatrist testified that the primary causes of the child's anxiety were "recurrent interrogation and removal from the home."[215]

The court of appeals held that the juvenile court's order was an unconstitutional prior restraint of publication because it "was not 'narrowly tailored' to protect the purported compelling interest."[216] The court stated that a potential increase in a child's anxiety does not constitute a compelling state interest sufficient to justify "a restraint on the publication of information obtained from public records and independent sources."[217] The court stated:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.[218]

3. Other States' Case Law

The Ohio Supreme Court, New Jersey Supreme Court and a panel of the California Court of Appeal have considered public access to dependency court hearings. The Ohio Supreme Court[219] and a panel of the California Court of Appeals[220] considered and rejected a First Amendment right to attend dependency court proceedings. The New Jersey court, however, expressly held that the public's right to attend civil trials encompasses the qualified right to attend dependency cases.[221]

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[211] *See id*.
[212] *Id*. at 435 (citing Near v. Minnesota, 283 U.S. 697, 713 (1931)).
[213] *Id*.
[214] *Id*.
[215] *See id*.
[216] *Id*. at 436.
[217] *Id*.
[218] *Id*. (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975)).
[219] *See In re* T.R., 556 N.E.2d 439, 447 (Ohio 1990).
[220] *See* San Bernadino County Dept. of Pub. Soc. Servs. v. Superior Court, 283 Cal. Rpt. 332, 334 (Ct. App. 1991).
[221] *See* New Jersey Div. Of Youth & Family Servs. v. J.B., 576 A.2d 261, 270 (N.J. 1990).

APPENDIX A

STATE OF MINNESOTA
IN SUPREME COURT
C2-95-1476

ORDER ESTABLISHING PILOT PROJECT ON
OPEN HEARINGS IN JUVENILE PROTECTION MATTERS

WHEREAS, the Supreme Court Foster Care and Adoption Task Force recommended that hearings in juvenile protection proceedings be presumed open absent exceptional circumstances and that the corresponding juvenile file be accessible to the public, except for certain documents and reports; and

WHEREAS, the Open CHIPS Proceedings Subcommittee of the Conference of Chief Judges held a hearing on the Task Force recommendation on November 21, 1997; and

WHEREAS, the Open CHIPS Proceedings Subcommittee of the Conference of Chief Judges, the Conference of Chief Judges Administration Committee, and the full Conference of Chief Judges recommended that this Court establish an open hearings pilot project in representative metropolitan, suburban, and rural jurisdictions to be evaluated by an independent research organization; and

WHEREAS, open hearings in juvenile protection proceedings are authorized in other states, (See e.g. Michigan Rules of Juvenile Procedure 5.925(A); 22 New York Codes, Rules, and Regulations 205.4; and *Oregonian Pub. Co. v. Deiz*, 613 P.2d 23 (Or. 1980));

NOW, THEREFORE, by virtue of and under the inherent power and statutory authority of the Minnesota Supreme Court to regulate public access to records and proceedings of the judicial branch, IT IS HEREBY ORDERED that:

1. Subject to the requirements of this order and rules promulgated by this Court, each judicial district is hereby authorized to conduct a three year pilot project in one or more counties designated by the chief judge of the district, using open hearings in the following juvenile court proceedings: child in need of protection or services proceedings including permanent placement proceedings, termination of parental rights proceedings and subsequent state ward reviews.

2. Open proceedings authorized pursuant to this order shall be presumed open and may be closed or partially closed by the presiding judge only in exceptional circumstances.

3. The pilot projects shall begin June 1, 1998.

4. The State Court Administrator, in consultation with the Conference of Chief Judges and this Court, shall contract with an independent research organization to conduct an evaluation of the pilot projects authorized pursuant to this order. On or before August 1, 2001, such organization shall file with this Court a report addressing the impact of open hearings and records.

5. The Minnesota Supreme Court Advisory Committee on Open Juvenile Protection Hearings is hereby established to consider and recommend rules regarding public access to records relating to open juvenile protection hearings. The advisory committee shall file its recommendations with this Court on or before April 15, 1998. The following individuals are hereby appointed as members of the advisory committee:

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Dated: January 22, 1998

By the Court:

/S/
Kathleen A. Blatz
Associate Justice and Chief Justice Designate

APPENDIX B

STATE OF MINNESOTA
IN SUPREME COURT
C2-95-1476

ORDER PROMULGATING RULE ON
PUBLIC ACCESS TO RECORDS RELATING TO
OPEN JUVENILE PROTECTION PROCEEDINGS

WHEREAS, by order dated January 22, 1998, this Court established a three year pilot project authorizing open hearings in juvenile protection proceedings and appointed an advisory committee to consider and recommend rules regarding public access to records relating to open juvenile protection hearings; and

WHEREAS, the Advisory Committee on Open Hearings in Juvenile Protection Proceedings has filed its Final Report, dated April 15, 1998, recommending adoption of a Proposed Rule on Public Access to Records Relating to Open Juvenile Protection Hearings ("Proposed Rule"); and

WHEREAS, by order dated April 15, 1998, this Court established a May 15, 1998 deadline for submission of comments on the Proposed Rule; and

WHEREAS, the Court has reviewed the comments and is advised in the premises.

NOW, THEREFORE, by virtue of and under the inherent power and statutory authority of the Minnesota Supreme Court to regulate public access to records and proceedings of the judicial branch, IT IS HEREBY ORDERED that:

1. The attached Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings, be, and the same hereby is, prescribed and promulgated to be effective as directed therein.

2. The inclusion of Advisory Committee comments is made for convenience and does not reflect court approval of the comments made therein.

Dated: May 28, 1998

By the Court:

/S/
Kathleen A. Blatz
Chief Justice

RULE ON PUBLIC ACCESS TO RECORDS RELATING TO OPEN JUVENILE PROTECTION PROCEEDINGS

Subdivision 1. Presumption of Public Access to Records.

Except as otherwise provided in this rule, all case records relating to the pilot project on open juvenile protection proceedings are presumed to be accessible to any member of the public for inspection, copying, or release. For purposes of this rule, "open juvenile protection proceedings" are all matters governed by the juvenile protection rules promulgated by the Minnesota Supreme Court.

Subdivision 2. Effective Date.

All case records deemed accessible under this rule and filed on or after June 22, 1998, shall be available to the public for inspection, copying, or release. All case records deemed accessible under this rule and filed prior to June 22, 1998, shall not be available to the public for inspection, copying, or release.

Subdivision 3. Applicability of Rules of Public Access to Records of the Judicial Branch.

Except where inconsistent with this rule, the Rules of Public Access to Records of the Judicial Branch promulgated by the Minnesota Supreme Court shall apply to records relating to open juvenile protection proceedings. Subdivisions 1(a) and 1(c) of Rule 4 of the Rules of Public Access to Records of the Judicial Branch, which prohibit public access to domestic abuse restraining orders and judicial work products and drafts, are not inconsistent with this rule.

Subdivision 4. Records That Are Not Accessible to the Public.

Except for exhibits identified in subdivision 5 of this rule, the following case records relating to open juvenile protection proceedings shall not be accessible to the public:

(a) transcripts, stenographic notes and recordings of testimony of anyone taken during portions of proceedings that are closed by the presiding judge;

(b) audio tapes or video tapes of a child alleging or describing physical abuse, sexual abuse, or neglect of any child;

(c) victim's statements;

(d) portions of juvenile court records that identify reporters of abuse or neglect;

(e) HIV test results;

(f) medical records and chemical dependency evaluations and records, psychological evaluations and records, and psychiatric evaluations and records;

(g) sexual offender treatment program reports;

(h) portions of photographs that identify a child;

(i) application for ex parte emergency protective custody order, and any resulting order, until the hearing where all parties have an opportunity to be heard on the custody issue, provided that, if the order is requested in a CHIPS petition, only that portion of the petition that requests the order shall be deemed to be the application for purposes of this section (i);

(j) records or portions of records that specifically identify a minor victim of an alleged or adjudicated sexual assault;

(k) notice of pending court proceedings pursuant to 25 U.S.C. □ 1912 (the I
Welfare Act);

(l) records or portions of records which the court in exceptional circumstances has deemed inaccessible to the public; and

(m) records or portions of records that identify the home or institution in which a child is placed pursuant to a foster care placement, pre-adoptive placement, or adoptive placement.

Subdivision 5. Access to Exhibits.

Case records received into evidence as exhibits shall be accessible to the public unless subject to a protective order.

Subdivision 6. Access to Court Information Systems.

Except where authorized by the district court, there shall be no direct public access to juvenile court case records maintained in electronic format in court information systems.

Subdivision 7. Protective Order

Upon motion and hearing, a court may issue an order prohibiting public access to juvenile court case records that are otherwise accessible to the public when the court finds that there are exceptional circumstances supporting issuance of the order. The court may also issue such an order on its own motion and without a hearing pursuant to subdivision 4(l) of this rule, but shall schedule a hearing on the order as soon as possible at the request of any person.

Subdivision 8. Case Captions.

All juvenile protection files opened in a pilot project county on and after June 22, 1998, shall be captioned in the name of the parent(s) or the child's legal custodian or legal guardian as follows: "In the matter of child(ren) of _____, parent/legal guardian/legal custodian."

Subdivision 9. Statutes Superseded.

Minnesota Statutes, section 260.161, subdivision 2, as amended by 1998 Minn. Laws, chapter 406, article 1, section 28 and 1998 Minn. Laws chapter 407, article 9, section 27, and all other statutes inconsistent or in conflict with this rule are superseded insofar as they apply to public access to records of open juvenile protection proceedings.

Advisory Committee Comment-1998

Under subdivision 1, application of this rule is limited to case records of the pilot project on open juvenile protection proceedings, which includes all proceedings identified in Rule 37 of the Minnesota Rules of Juvenile Procedure (1997) and any successor provision. *See Order Establishing Pilot Project On Open Hearings In Juvenile Protection Matters*, #C2-95-1476 (Minn. S. Ct. filed Jan. 22, 1998). Rule 37 as currently written does not include adoption proceedings. Thus, this rule would not apply to any case records relating to adoption proceedings. The Committee is aware that the juvenile protection rules are in the process of being updated by another advisory committee. To the extent that there are substantive changes made to Rule 37, those changes would effect the pilot project.

Subdivision 1 establishes a presumption of public access to juvenile court case records, and exceptions to this presumption are set forth in the remaining subdivisions. Subdivision 2 specifies the effective date of the pilot project as the cut off for public access. Case records deemed accessible under this rule and filed on or after June 22, 1998, shall be available to the public for inspection, copying, or release. Case records filed prior to June 22, 1998, shall not be available to the public for inspection, copying, or release under this rule; public access to these records is governed by existing rules and statutes.

Subdivision 3 incorporates the provisions of the Rules of Public Access to Records of the Judicial Branch promulgated by the Minnesota Supreme Court ("Access Rules"), except to the extent that the Access Rules are inconsistent with this rule. The Access Rules establish the procedure for requesting access, the timing and format of the response, and an administrative appeal process. The Access Rules also define "case records" as a subcategory of records maintained by a court. Thus, "case records" would not include items that are not made a part of the court file, such as notes of a social worker or guardian ad litem. Aggregate statistics on juvenile court cases that do not identify any participants or a particular case are included in the "administrative records" category and are accessible to the public under the Access Rules. Such statistics are routinely published by the courts in numerous reports and studies. These procedures and definitions are consistent with this rule.

One significant aspect of both this rule and the Access Rules is that they govern public access only. Participants in a juvenile protection case may have greater access rights than the general public. *See, e.g.*, Minn.R.Juv.P. 64.02, subdivision 2 (1997).

Subdivision 3 preserves the confidentiality of domestic abuse restraining orders issued pursuant to Minn. Stat. § 518B.01 (1996). The address of a petitioner for a restraining order under section 518B.01 must not be disclosed to the public if nondisclosure is requested by the petitioner. Minn. Stat. § 518B.01, subd. 3b (1996). All other case records regarding the restraining order must not be disclosed until the temporary order made pursuant to subdivision 5 or 7 of section 518B.01 is served on the respondent. Access Rule 4, subdivision 1(a) (1998).

Subdivision 3 prohibits public access to judicial work products and drafts. These include notes, memoranda and drafts prepared by a judge or court employed attorney, law clerk, legal assistant or secretary and used in the process of preparing a decision or order, except the official court minutes prepared pursuant to Minn. Stat. § 564.24-.25 (1996). Access Rule 4, subd. 1(c) (1998).

The court services provision of Rule 4, subdivision 1(b) of the Access Rules, is inconsistent with this rule. The advisory committee is of the opinion that public access to reports and recommendations of social workers and guardians ad

litem, which become case records, is an integral component of the increased accountability that underlies the pilot project. Court rulings will necessarily incorporate significant portions of what is set forth in those reports, and similar information is routinely disclosed in family law cases.

Subdivision 4(a) prohibits public access to testimony of anyone taken during portions of a proceeding that are closed by the presiding judge. The Supreme Court has directed that hearings under the pilot project may be closed or partially closed by the presiding judge only in exceptional circumstances. *Order Establishing Pilot Project On Open Hearings In Juvenile Protection Matters*, #C2-95-1476 (Minn. S. Ct. filed Jan. 22, 1998).

Subdivision 4(b) prohibits public access to audio tapes and video tapes of a child alleging or describing physical abuse, sexual abuse, or neglect of any child. This includes all tapes made pursuant to Minn. Stat. § 626.561, subd. 3 (1996) during the course of a child abuse assessment, criminal investigation, or prosecution. This is consistent with Minn. Stat. § 13.391 (1996), which prohibits an individual who is a subject of the tape from obtaining a copy of the tape without a court order. *See also In re Application of KSTP Television v. Ming Sen Shiue*, 504 F.Supp. 360 (D.Minn. 1980) (television station not entitled to view and copy 3 hours of video tapes received in evidence in criminal trial). Similarly, subdivision 4(c) prohibits public access to victims' statements, and this includes written records of interviews of victims made pursuant to Minn. Stat. ə 626.561, subd. 3 (1996). This is consistent with Minn. Stat. §§ 609.115, subds. 1, 5; 609.2244; 611A.037 (1996 and 1997 Supp.) (pre-sentence investigations to include victim impact statements; no public access; domestic abuse victim impact statement confidential).

Although victims' statements and audio tapes and video tapes of child alleging or describing abuse or neglect are inaccessible to the public under subdivisions 4(b) and 4(c), this does not prohibit the attorneys for the parties or the court from including information from the statements or tapes in the petition, court orders, and other documents that are otherwise accessible to the public. In contrast, subdivision 4(d) prohibits public access to "information identifying reporters of abuse or neglect." By precluding public access to "information" identifying reporters of abuse or neglect, the advisory committee did not intend to preclude public access to any other information included in the same document. Thus, courts and court administrators must redact identifying information from otherwise publicly accessible documents and then make the edited documents available for inspection and copying by the public. Similarly, subdivision 4(e) requires that courts and court administrators redact from any publicly accessible juvenile court record any reference to HIV test results, and subdivision 4(h) requires administrators to redact the face or other identifying features in a photograph of a child.

The prohibition of public access to the identity of reporters of abuse or neglect under subdivision 4(d) is consistent with state law governing access to this information in the hands of social services, law enforcement, court services, schools and other agencies. Minn. Stat. § 626.556 (1996 and Supp. 1997). Subdivision 4(d) is also intended to help preserve federal funds for child abuse prevention and treatment programs. *See* 42 U.S.C. §§ 5106a(b)(2)(A); 5106a(b)(3) (1998); 45 C.F.R. §§ 1340.1 to 1340.20 (1997). Subdivision 4(d) does not, however, apply to testimony of a witness taken during a proceeding that is open to the public.

Subdivision 4(e) prohibits public access to HIV test results. This is consistent with state and federal laws regarding court ordered testing for HIV. Minn. Stat. § 611A.19 (1996) (defendant convicted for criminal sexual conduct; no reference to the test, the motion requesting the test, the test order, or the test results may appear in the criminal record or be maintained in any record of the court or court services); 42 U.S.C. § 14011 (1998) (defendant charged with crime; test result may be disclosed to victim only). The Committee is also aware that federal funding for early intervention services requires confidential treatment of this information. 42 U.S.C. §§ 300ff-61(a); 300ff-63 (1998).

Subdivisions 4(f) and 4(g) prohibit public access to medical records, chemical dependency evaluations and records, psychological evaluations and records, psychiatric evaluations and records and sex offender treatment program reports, unless admitted into evidence (see subdivision 5). This is consistent with public access limitations in criminal and juvenile delinquency proceedings that are open to the public. *See, e.g.,* Minn. Stat. § 609.115, subd. 6 (1996) (presentence investigation reports). Practitioners and the courts must be careful not to violate applicable federal laws. Under 42 U.S.C. § 290dd-2 (1998), records of all federally assisted or regulated substance abuse treatment programs, including diagnosis and evaluation records, and all confidential communications made therein, except information required to be reported under a state mandatory child abuse reporting law, are confidential and may not be disclosed by the program unless disclosure is authorized by consent or court order. Thus, practitioners will have to obtain the relevant consents or court orders, including protective orders, before disclosing certain medical records in their reports and submissions to the court. *See* 42 C.F.R. §§ 2.1 to 2.67 (1997) (comprehensive regulations providing procedures that must be followed for consent and court-ordered disclosure of records and confidential communications).

Although similar requirements apply to educational records under the Federal Educational Rights and Privacy Act (FERPA), 20 U.S.C. §§ 1232g, 1417, and 11432 (1998); 34 C.F.R. §§ 99.1 to 99.67 (1997), FERPA allows schools to disclose education records without consent or court order in certain circumstances, including disclosures to state and local officials under laws in effect prior to November 19, 1974. 20 U.S.C. § 1232g(b)((1)(E)(i) (1998); 34 C.F.R. § 99.31(a)(5)(i)(A) (1997). Authorization to disclose truancy to the county attorney,

for example, was in effect prior to that date and continues under current law. See Minn. Stat. § 120.12 (1974) (superintendent to notify county attorney if truancy continues after notice to parent); 1987 Minn. Laws ch. 178, § 10, (repealing section 120.12 and replacing with current section 120.103, which adds mediation process before notice to county attorney); *see also* Minn. Stat. § 260A.06-.07 (1996) (referral to county attorney from school attendance review boards; county attorney truancy mediation program notice includes warning that court action may be taken). Practitioners will have to review the procedures under which they receive education records from schools and, where necessary, obtain relevant consents or protective orders before disclosing certain education records in their reports and submissions to the court. Additional information regarding FERPA may be found in *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile justice Programs* (U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C. 20531, June 1997) (includes hypothetical disclosure situations and complete set of federal regulations).

Subdivision 4(h) requires administrators to redact the face or other identifying features in a photograph of a child before permitting public access. Any appropriate concern regarding public access to the remaining portions of such a photograph can be addressed through a protective order (see Subdivision 7).

Subdivision 4(i) precludes public access to an ex parte emergency protective custody order, until the hearing where all parties have an opportunity to be heard on the custody issue. This provision is designed to reduce the risk that a parent, guardian, or custodian would try to hide a child before the child can be placed in protective custody or to take the child from custody before the court can hear the matter. *See. e.g.*, Minn.R.Juv.P. 51 (1997) (order must either direct that child be brought immediately before the court or taken to a placement facility designated by the court; parent, guardian and custodian, if present when child is taken into custody, shall immediately be informed of existence of order and reasons why child is being taken into custody). Subdivision 4(i) also precludes public access to the application or request for the protective custody order, except that if the request is made in a CHIPS petition, only that portion of the petition that requests the order is inaccessible to the public.

Subdivision 4(j) precludes public access to portions of records that specifically identify a minor victim of sexual assault. This will require court administrators to redact information from case records that specifically identifies the minor victim, including the victim's name and address. Subdivision 4(j) does not preclude public access to other information in the particular record. This is intended to parallel the treatment of victim identities in criminal and juvenile delinquency proceedings involving sexual assault charges under Minn. Stat. § 609.3471 (1996). Thus, the term "sexual assault" includes any act described in Minnesota Statutes, §§ 609.342, 609.343, 609.344, and 609.345. The Committee considered using the term "sexual abuse" but felt that it was a limited subcategory

of "sexual assault." *See* Minn. Stat. § 626.556, subd. 2(a) (1996) ("sexual abuse" includes violations of 609.342-.345 committed by person in a position of authority, responsible for child's care, or having a significant relationship with the child). Subdivision 4(j) does not require a finding that sexual assault occurred. An allegation of sexual assault is sufficient.

Subdivision 4(k) precludes public access to the notice of pending proceedings given to an Indian child's tribe or to the Secretary of the Interior pursuant to 25 U.S.C. § 1912(a) (1998). The notice includes extensive personal information on the child, including all known information on direct lineal ancestors, and requires parties who receive the notice to keep it confidential. 25 C.F.R. § 23.11(d), (e) (1997). Notices are routinely given in doubtful cases because lack of notice can be fatal to a state court proceeding. See 25 U.S.C. § 1911 (1998) (exclusive jurisdiction of tribes; right to intervene; transfer of jurisdiction). The Committee felt that public access to information regarding the child's tribal heritage is appropriately given whenever a tribe intervenes or petitions for transfer of jurisdiction. Subdivision 4(k) does not preclude public access to intervention motions or transfer petitions.

Subdivision 4(l) recognizes that courts may, in exceptional circumstances, issue protective orders precluding public access to certain records or portions of records. Exceptional circumstances is the standard promulgated by the Supreme Court for closure of portions of proceedings. *See Order Establishing Pilot Project On Open Hearings In Juvenile Protection Matters*, #C2-95-1476 (Minn. S. Ct. filed Jan. 22, 1998) Records of closed proceedings are inaccessible to the public under subdivision 4(a). Procedures for issuing protective orders are set forth in Subdivision 7.

Subdivision 4(m) prohibits public access to identifying information (i.e., names, addresses, etc.) of foster parents, foster care institutions, and adoptive parents, and other persons and institutions providing pre-adoptive care of the child. This is consistent with the confidentiality accorded adoption proceedings. It is also designed to reduce the risk of continuing contact by someone whose parental rights have been terminated or who is a potentially dangerous family member.

Notwithstanding the list of inaccessible case records in subdivision 4(a) through 4(m), many case records of the pilot project will typically be accessible to the public. Examples include: petitions other than petitions for paternity; summons; affidavits of publication or service; certificates of representation; orders; hearing and trial notices; subpoenas; names of witnesses; motions and supporting affidavits and legal memoranda; transcripts; and reports of a social worker or guardian ad litem. With the exception of information that must be redacted under subdivisions 4(d), 4(e) and 4(h), these records will be accessible to the public notwithstanding that they contain a summary of information derived from another record that is not accessible to the public. For example, a social services or court services report

recommending placement might discuss the results of a chemical dependency evaluation. Although the chemical dependency evaluation is not accessible to the public, the discussion of it in the social services or court services report need not be redacted prior to public disclosure of the report. Finally, it must be remembered that public access under this rule would not apply to records filed with the court prior to the effective date of the pilot project (see subdivision 2) or to reports of a social worker or guardian ad litem that have not been made a part of the court file (see subdivision 3).

Subdivision 5 of this rule permits public access to records that have been received in evidence as an exhibit, unless the records are subject to a protective order (see subdivision 7). Thus, any of the records identified in subdivisions 4(b) through 4(k) that have been admitted into evidence as an exhibit are accessible to the public, unless there is a protective order indicating otherwise. An exhibit that has been offered, but not expressly admitted by the court, does not become accessible to the public under subdivision 5. Exhibits admitted during a trial or hearing must be distinguished from items attached as exhibits to a petition or a report of a social worker or guardian ad litem. Merely attaching something as an "exhibit" to another filed document does not render the "exhibit" accessible to the public under subdivision 5.

Subdivision 6 prohibits direct public access to case records maintained in electronic format in court information systems unless authorized by the court. Subdivision 6 intentionally limits access to electronic formats as a means of precluding widespread distribution of case records about children into larger, private databases that could be used to discriminate against children for insurance, employment, and other purposes. This concern also led the Committee to recommend that case titles in the petition and other documents include only the names of the parent or other guardian, and exclude the names or initials of the children (see subdivision 8). Subdivision 6 allows the courts to prepare calendars that identify cases by the appropriate caption. To the extent that court information systems can provide appropriate electronic formats for public access, subdivision 6 allows the court to make those accessible to the public, for example, by order of the chief judge of the judicial district.

Subdivision 7 establishes two categories of protective orders. One is made on motion of a party after a hearing, and the other is made on the court's own motion without a hearing, subject to a later hearing if requested by any person, including representatives of the media. In any case, a protective order may issue only in exceptional circumstances. *See Order Establishing Pilot Project On Open Hearings In Juvenile Protection Matters*, #C2-95-1476 (Minn. S. Ct. filed Jan. 22, 1998). The advisory committee felt that these procedures would provide adequate protection and flexibility during the pilot project.

The change in case captions under Subdivision 8 is designed to minimize the stigma to children involved in open juvenile protection proceedings. It is more appropriate to label these cases in the name of the adults involved, who are often the perpetrators of abuse or neglect.