



Court Access in Georgia: Records, Proceedings & Gag Orders

University of Georgia School of Law First Amendment Clinic
Lindsey Floyd, Jack Beaman, Clare Norins
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Today's Roadmap

01

Access to Court Proceedings

Attending and Recording Proceedings

02

Access to Court Records

Georgia State Courts & Federal Courts

03

Gag Orders

As Applied to Media, Third-Party Challenges & Family Law Cases

Disclaimers:

- ★ This training provides general information
- ★ Does not form an attorney-client relationship
- ★ Information accurate as of today, but law is subject to change



Court Access & The First Amendment

“No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.”

- *Georgia Const., Art. 1, Sec. 1, Para. IV*

“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

- Chief Justice Burger, *Richmond Newspapers, Inc. v. Virginia* (1980)



Three Legal Sources

I. Common Law

historical custom and court decisions

II. Federal First Amendment

freedom of speech and press

III. Georgia State Constitution

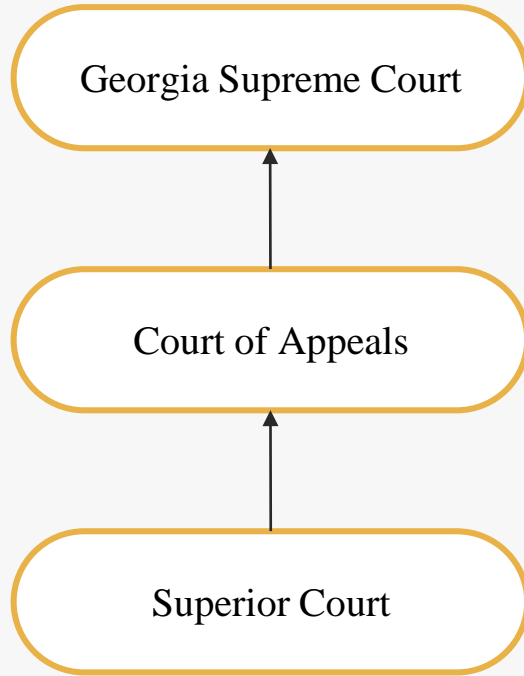
right to speak, write and publish



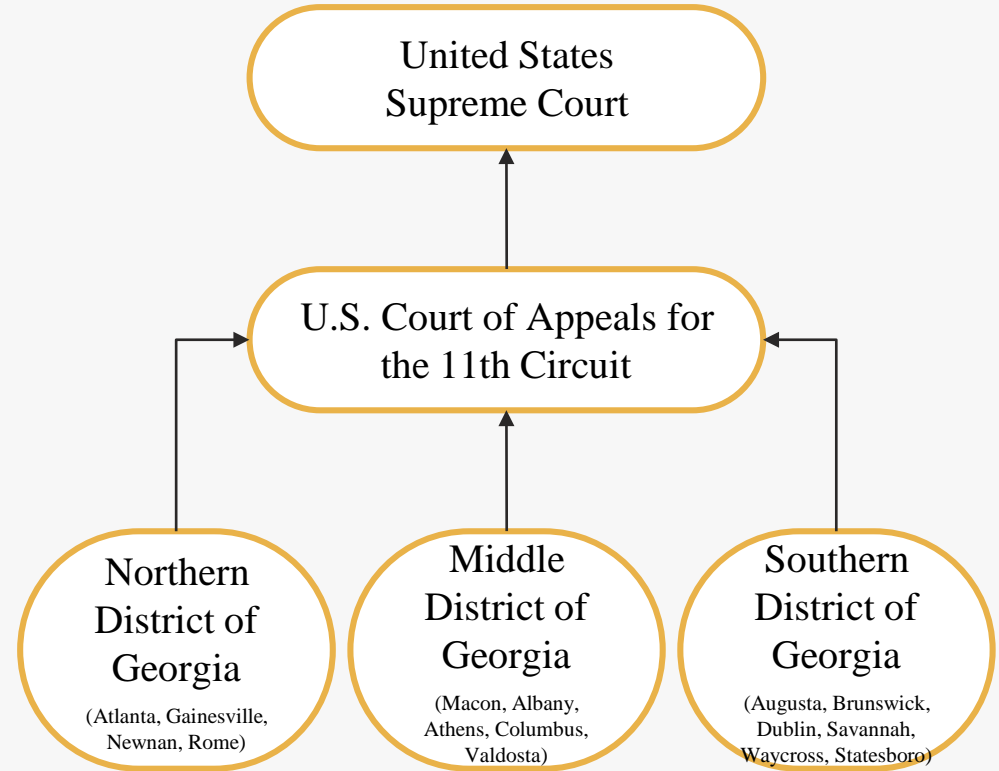
01

Access to Court Proceedings

State Court



Federal Court



Which court proceedings are open to the public?



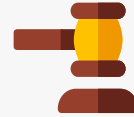
Pre-trial Proceedings

Meetings between the parties & judge to decide on issues before trial



Civil and criminal trials

The formal examination of evidence before a judge (bench trial) and jury (jury trial) to determine liability or guilt



Post-trial proceedings

Meetings after the trial has concluded to decide any outstanding issues

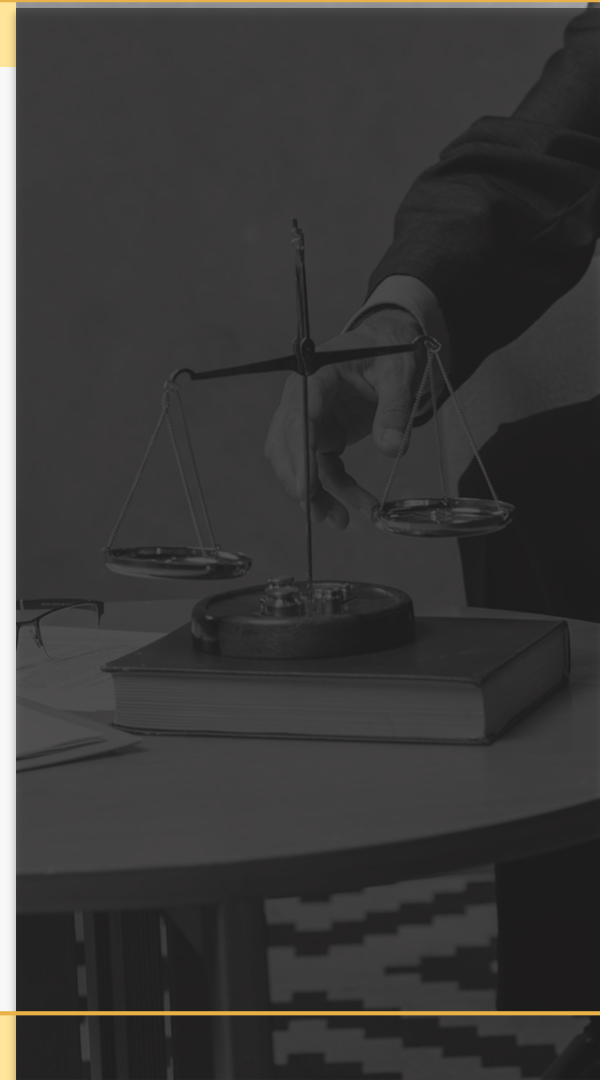


Appellate Proceedings

When the appellate court reviews the trial court judgment to assess accuracy and fairness

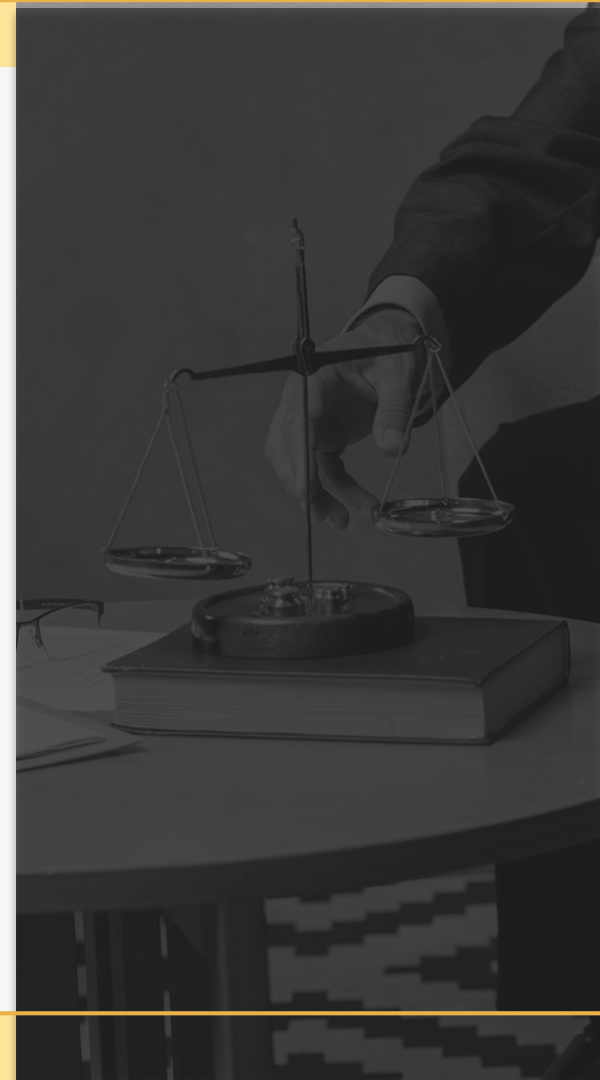
When can civil proceedings be closed to the public?

- In **state court** and **federal court**, civil proceedings may be closed to the public only when the closure is **narrowly tailored** to serve a **compelling interest**.
 - Strict scrutiny is the highest standard of review! It is hard to overcome.
- In **federal court**, partial closures require only that there is a **substantial interest** to justify closure of the courtroom.
 - Substantial closure is less than the compelling interest required by strict scrutiny.
 - Ex. preventing injury to the dignity of a witness



When can criminal proceedings be closed to the public?

- In **state court**, criminal proceedings may be closed to the public if closure is the *only* way to avoid a “clear and present danger” to their right to a fair trial.
- In **federal court**, a closure of proceedings is only justified if there is a “compelling” justification, considering whether the moving party has an overriding interest likely to be prejudiced, that closure is no broader than necessary, and the court has considered reasonable alternatives.
- Before closing a criminal proceeding, a judge should consider:
 - Isolating the jury from the public
 - Change of trial location
 - Postponement of the trial
 - Rigorous jury selection
 - Clear and emphatic jury instructions



Can I record a state court proceeding?

Rule 22 of the Georgia Uniform Superior Court Rules provides:

- Jurors & Witnesses: may **not** record proceedings; phones and electronic devices must be turned off
- Attorneys & Self-Represented Parties: may make audio recordings of the court proceedings as long as they have announced their intent to record to the parties/court and do so in a non-disruptive manner
- Parties & Spectators (including the media): may only use recording devices when submission of request is approved by the judge



Request to Record State Court Proceedings

- **Timing:** Spectators (including representatives of news media) must submit an application to record **at least 24 hours before** the court proceeding to be recorded (when practicable).
- **Notice & Hearing:** The court will **notify parties, witnesses, and victims** about the non-party request to record and will hold a hearing if someone objects to the request.
 - Objection must be done before the start of the proceeding to be recorded
- **Denial:** A judge must abide by a **three-step process** to deny or limit a recording request.

C. Sample Rule 22 Request to Use Recording Device in Superior Court

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

(STYLE OF CASE/CALENDAR)
NO. _____

CASE
NO. _____

REQUEST TO USE A RECORDING DEVICE PURSUANT TO RULE 22 ON RECORDING OF JUDICIAL PROCEEDINGS.

Pursuant to Rule 22 of the Uniform Rules for Superior Court regarding Use of Electronic Devices in Courtrooms and Recording of Judicial Proceedings, the undersigned hereby requests permission to use a recording device in Courtroom ____ in order to record images and/or sound during (all) (the following portions) of the proceedings in the above captioned case/calendar.

Consistent with the provisions of the rule, the undersigned desires to use the following described recording device(s): _____. The proceedings that the undersigned desires to record commence on (date) _____. Subject to direction from the court regarding possible pooled coverage, the undersigned wishes to use this device in the courtroom on (date) _____. The personnel who will be responsible for the use of this recording device are: (identify appropriate personnel).

The undersigned hereby certifies that the device to be used and the locations and operation of such device will be in conformity with Rule 22 and any guidelines issued by the court.

The undersigned understands and acknowledges that a violation of Rule 22 and any guidelines issued by the court may be grounds for removal or exclusion from the courtroom and a willful violation may subject the undersigned to penalties for contempt of court.

This ____ day of ____, 20__.

(Individual Signature)
(Representing/Firm)
(Position)

APPROVED: _____

Judge, Superior Court
Judicial Circuit

Denial of Request to Record Requirements

Denial:

- (1) The judge must make specific findings that there is **substantial harm**;
 - Factors include:
 - The nature of the particular proceeding;
 - The consent or objection of the parties, witnesses, and victims;
 - The promotion of increased public access to the courts;
 - The impact upon due process and the truth-finding function of the court;
 - The impact upon the integrity and dignity of the court; etc.
- (2) The **harm must outweigh the benefit** of recording; and
- (3) The judge must **consider more narrow restrictions or limitations** than outright denial of the recording request in its entirety.



Prohibited State Court Recordings

Recordings of state court proceedings are prohibited as follows:

- When the judge is outside of the courtroom
- During jurors' conversations or statements (except when reading the verdict)
- During privileged or confidential conversations between attorneys & clients
- During bench conferences

Can I record a federal court proceeding?

- **Criminal Proceedings:** No, you may **not** photograph in or broadcast from the courtroom during federal criminal proceedings, pursuant to Rule 53 of the Federal Rules of Criminal Procedure.
- **Civil Proceedings:** Refer to the local rules for each court:
 - 11th Circuit (Appellate Proceedings): No recordings are allowed, but audio recordings of oral arguments are available to purchase for a fee.
 - Northern District of Georgia: No, unless specifically authorized by the judge (ex. naturalization or ceremonial proceedings).
 - Middle District of Georgia: No recordings or photographs are allowed, but reporters may transmit description of the proceedings via email, instant messages, Twitter, etc.
 - Southern District of Georgia: No, unless specifically authorized by the judge. Additionally, you may not record inside the building, on the courthouse steps, and in the parking lots adjacent to the courthouse.

Can I use an electronic device for non-recording purposes in state court?

- Jurors & Witnesses: must turn off devices while present in a courtroom and in a jury room during jury deliberations or discussions
- Attorneys & Self-Represented Parties: may use electronic devices for most purposes, other than receiving phone calls or other audible functions
- Parties & Spectators: may “freely” use electronic devices for non-recording purposes as long as the judge “believes such a use would not be disruptive or distracting” and is not otherwise contrary to the administration of justice”



Can I use an electronic device for non-recording purposes in federal court?


- Northern District of Georgia: No, smartphones, tablets, laptops, any device with a still or video camera, etc. are prohibited.
- Middle District of Georgia: Yes, members of the press may bring electronics into the courtroom as long as they present media credentials and the devices are on “silent.”



The background of the slide is a dark, slightly blurred photograph of several thick stacks of books, likely legal volumes, arranged on a shelf. The lighting is dramatic, highlighting the edges of the pages and the spines of the books.

02

Access to Court Records

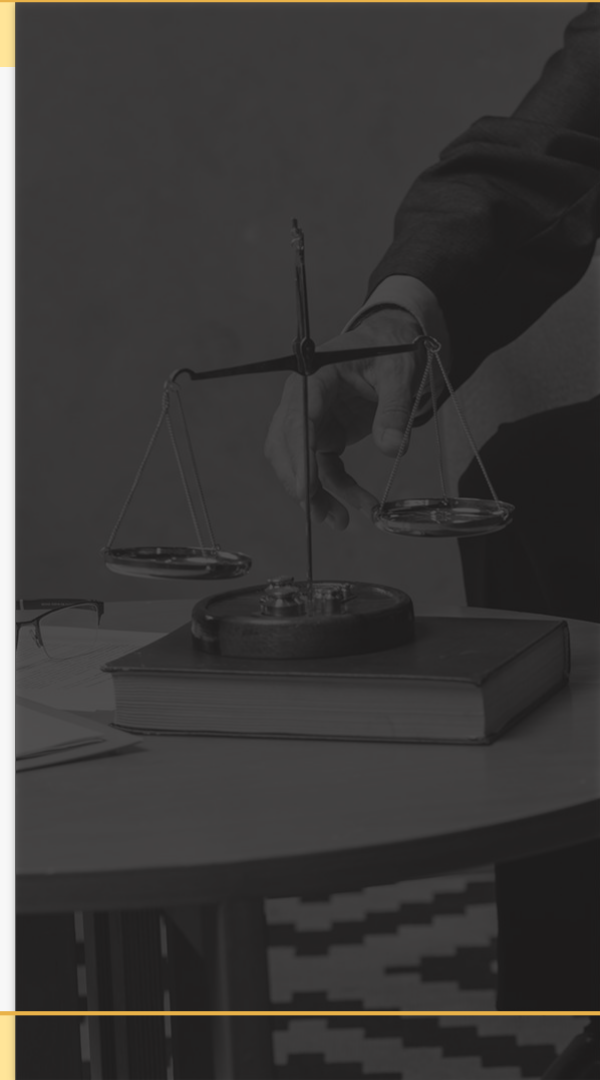
A row of lit candles is shown against a dark background. The candles are lit, and their flames are visible. The background is blurred, creating a bokeh effect with soft, out-of-focus light spots. The overall mood is warm and contemplative.

“Like a candle, court records hidden under a bushel make scant contribution to their purpose.”

– *Atlanta Journal v. Long*, 258 Ga. 410, 411 (1988)

Records Available for Public Inspection

- The right to inspect records applies in both *civil* and *criminal* cases.
- All state court records are public and available for public inspection and copying unless limited by law or Rule 21.
- Under Georgia Uniform Superior Court Rule 21, a court record includes those materials that are:
 - Pleadings;
 - Motions and objections;
 - Judicial rulings; or
 - Evidence, filed transcripts, etc.
(i.e. materials that are central to the court's ruling)

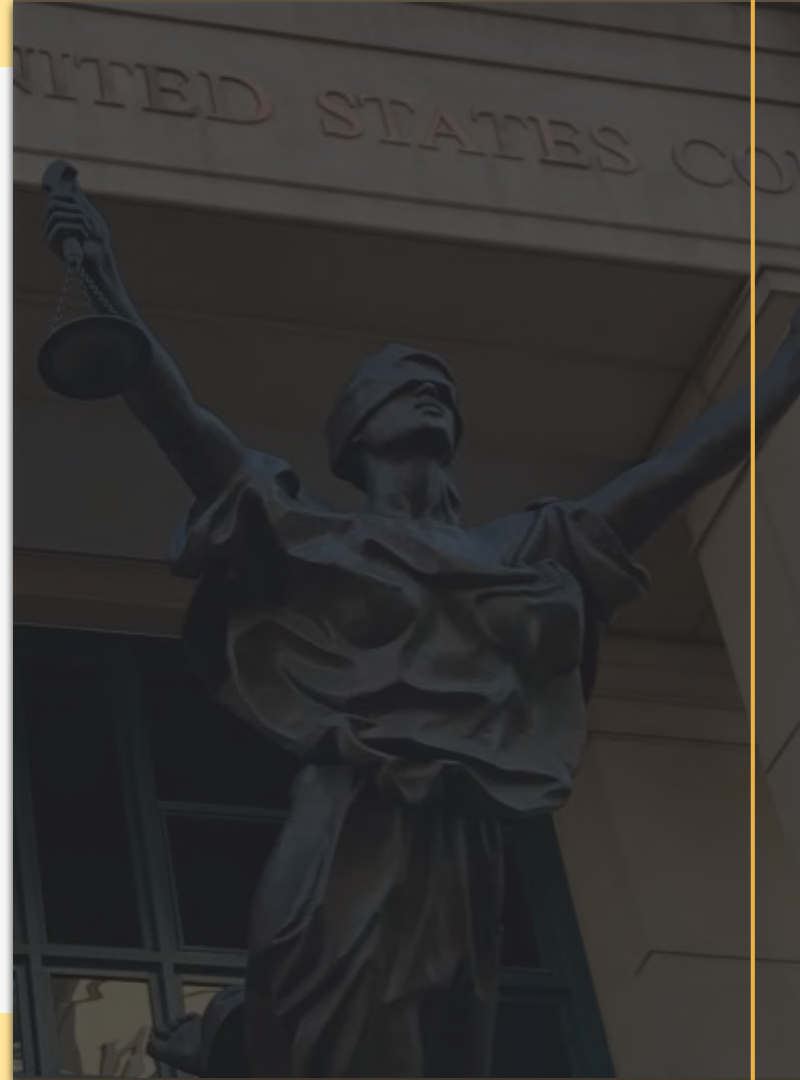


Sealed Records

- Courts can restrict or prohibit access to court records “in cases of *clear necessity*.”
- Rule 21 requires courts must follow a certain process to seal court records:
 - (1) Any party or judge in a case may **make a motion to seal court records** showing that the moving party’s privacy *clearly outweighs* the public’s interest in the record.
 - (2) The court must conduct a **public hearing** on the motion where the parties (or third parties) may be heard.
 - (3) The court may **issue an order limiting access**, which must include:
 - (a) The court files or parts of the file to which access is limited;
 - (b) The nature and duration of the limitation; and
 - (c) The justification for the limitation.

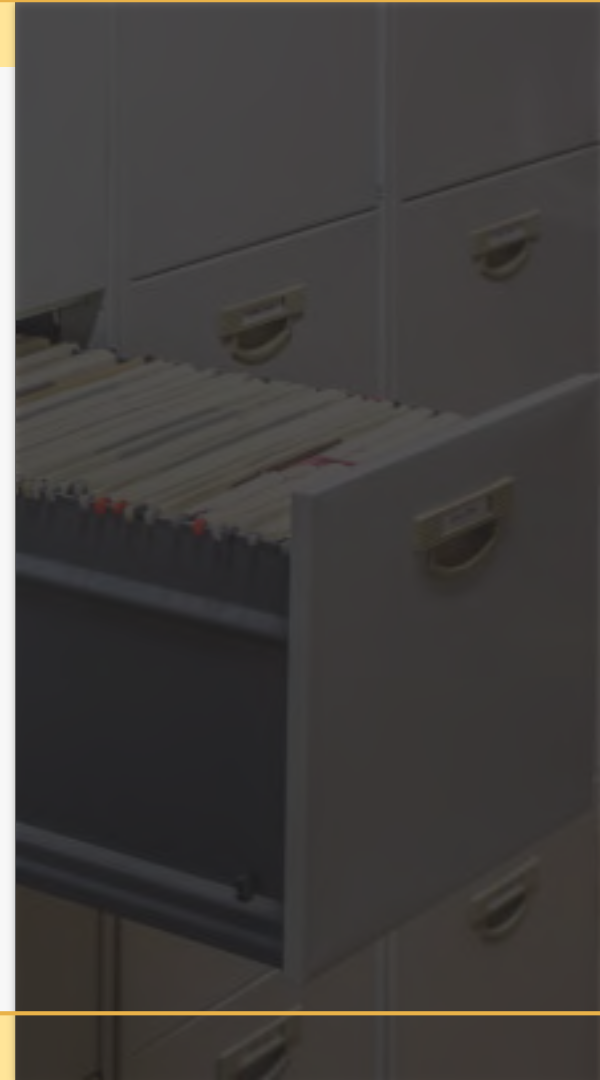
Arguments for Unsealing Documents

- The reviewing court may grant a request to unseal a previously sealed document if:
 - Moving party failed to show that privacy interests outweigh public right of access
 - Sealing court failed to follow the steps in Rule 21 (i.e. failed to hold a hearing or issue an order explaining the balancing of interests)
 - The documents have “*high evidentiary value*” (i.e. the documents are particularly relevant to legal issues in the case)



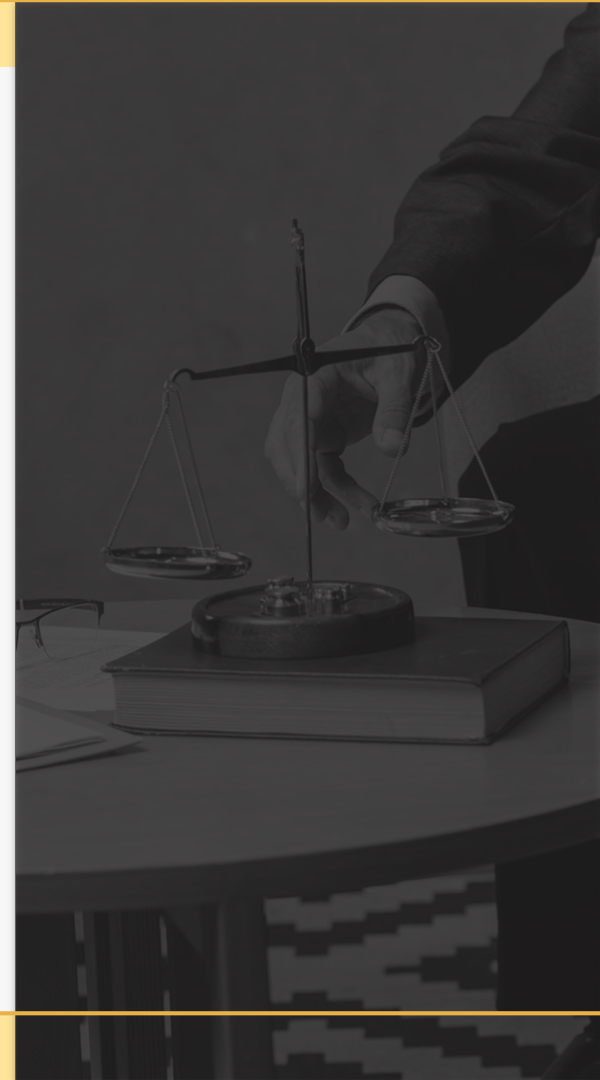
Records Available for Public Inspection

- The public has a right to inspect and copy documents filed with the court.
- However, the public does *not* have a right to discovery materials, as those are not submitted to the court.
 - But, when a discovery material is submitted in connection with a substantive motion to the court, it **becomes accessible by the public**, even if the discovery material is not central to the outcome of the case.
 - *Callahan v. United Network for Organ Sharing*, 17 F. 4th 1356 (11th Cir. 2021)



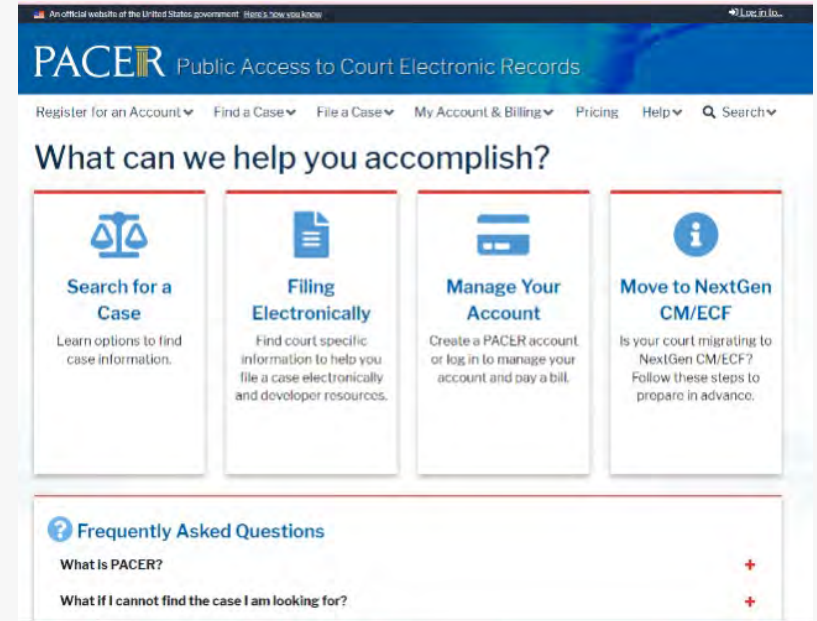
When Can Public Access Be Limited?

- If a federal court limits public access to *documents* or *proceedings*, it must use a balancing test and consider a variety of factors:
 - Whether access would harm legitimate privacy interests;
 - The degree of and likelihood of injury if made public;
 - The reliability of the information;
 - Whether there will be an opportunity to respond to the information;
 - Whether the information concerns public officials or public concerns; and
 - The availability of a less onerous alternative to sealing the documents.



Accessing Federal Documents

- Most documents in federal courts are filed electronically, using a system called **Case Management/Electronic Case Files** (CM/ECF).
- Members of the public and media can view filings found in this system through the **Public Access to Court Electronic Records** service (PACER).



The screenshot shows the PACER website homepage. At the top, there is a navigation bar with the PACER logo and the text "Public Access to Court Electronic Records". Below the navigation bar, there is a search bar and several menu items: "Register for an Account", "Find a Case", "File a Case", "My Account & Billing", "Pricing", "Help", and "Search". The main content area features a heading "What can we help you accomplish?" followed by four service tiles: "Search for a Case", "Filing Electronically", "Manage Your Account", and "Move to NextGen CM/ECF". Each tile contains an icon and a brief description of the service. At the bottom, there is a "Frequently Asked Questions" section with two questions listed: "What is PACER?" and "What if I cannot find the case I am looking for?".



03

Gag Orders in Georgia State and Federal Court

What is a Gag Order?

- Order from a judge **not to talk or publish** about a case
 - Form of **“prior restraint”** on speech and press
 - Presumed Unconstitutional
- Has to be **necessary** and **“narrowly tailored”** to protect another compelling interest such as the right to a fair trial

Gag Orders Applied to the Media

Gag orders that **apply to the media** are **disfavored** by Georgia state and federal courts in both civil and criminal court proceedings.

Media Gag in Criminal Case:

- *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976):
A prior restraint on the media is only permissible if “narrowly tailored to avoid a clear and present danger or serious and imminent threat to a competing protected interest” and there are no less restrictive alternatives.

Nebraska Press Factors

1. The probable scope and nature of the pre-trial publicity
2. The likely impact such publicity will have on potential jurors
3. Whether alternative measures exist that could mitigate any prejudicial effect on jurors
4. And whether the gag order is written in a narrow way that can be enforced

Together, these factors amount to a “strict scrutiny” test

Alternatives to “Gag Order”

- Moving the trial to another location
- Postponing the trial
- Carefully questioning potential jurors
- Instructing the jurors on their duty
- Sequester the jury once they are selected

Gag Orders Applied to the Media

Media Gag in Civil Case:

- *Ga. Gazette Publishing Co. v. Ramsey*, 248 Ga. 528 (1981):
The protective order sought against the newspaper was “an unwarranted restraint upon the newspaper’s liberty of speech and of the press.”
- The newspaper’s right under the Georgia State Constitution to write, speak, and publish on all subjects “must remain paramount”

Third -Party Media Challenges to a Gag Order

- In Georgia state and federal courts, the media **can** challenge a gag order that does not restrict its speech when “a **willing speaker** exists.”
- The media can challenge the gag order because the order interferes with their **newsgathering ability** (which is inherent in the First Amendment right to receive information and ideas).
- *WXIA-TV v. State*, 303 Ga. 428 (2018):
 - The Court struck down a gag order, challenged by members of the media, that restricted extrajudicial statements about numerous aspects of the case by the parties, counsel, court staff, members of law enforcement.



Gag Orders in Family Law Cases

- **Constitutional** - parents engaged in divorced proceedings cannot make defamatory remarks about the other in front of their children.
- *Maloof v. Maloof*, 231 Ga. 811 (1974)
- **Unconstitutional** - prohibiting the parents from talking about the case on any “social media, website, or other public medium” until the child turned 18
- *Baskin v. Hale*, 337 Ga. App. 420 (2016)





04

Challenging Restrictions on
Court Access

THANK YOU!



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