Chicago Daily Law Bulletin®

Volume 163, No. 193 Serving Chicago's legal community for 162 years

Private lives, right to know a balancing act

MODERN FAMILY

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Today, the line between personal and private information seems blurred due to the overwhelming use of social media in society.

Whether Facebook, Twitter or Instagram, we now know more about the everyday lives, whether mundane events or extraordinary acts, of our colleagues, clients, neighbors and friends than we ever expected (or cared) to know. Yet, the public access to or sharing of "private" information is not a new trend but rather an established public policy.

For example, judicial proceedings in the United States are generally open to the public by force of tradition. See, *A.P. v. M.E.E.*, 354 Ill.App.3d 989 (1st Dist. 2004). From the 1934 custody trial of Gloria Vanderbilt, where more than 100 reporters covered the trial in great detail, to the O.J. Simpson murder trial infamously dubbed "the trial of the century" with the entire trial being broadcast on 24-hour cable networks to a nationwide audience captivated by the evidence and testimony.

The common-law right of access to court records or proceedings is essential to the proper functioning of a democracy; it ensures the public's ability to monitor the functioning of their courts and to form educated and knowledgeable opinions about their judicial system.

However, the right of access is not absolute as it may be evaded by the court limiting or restricting public access including the sealing of court files.

To restrict access to judicial records, the Illinois Supreme Court has stated that the trial court should use its discretion and take into account all of the facts and circumstances unique to a case. *Skolnick v. Altheimer & Gray,* 191 Ill.App.2d 214, 231 (2000).

Illinois courts have also framed this in terms of a balancing test where courts consider the interests supporting access, including the presumption favoring public access, against interests asserted for restriction. See, *In re Marriage of Johnson,* 232 Ill.App.3d 1068, 1072 (4th Dist. 1992).

Even so, the court must be sensitive to the rights of the public in determining whether the public should be prohibited from the proceedings or whether documents are appropriately under seal.

Recently, former U.S. representative Anthony Weiner and his estranged wife, Huma Abedin, requested the court to extend orders to protect their privacy in their pending divorce by the joint filing of a motion to bar photographers from the proceedings.

"Because there's a child involved," the parties argued, "we'd like to keep these proceedings secret to the extent the court will allow."

In denying their motion, Justice Michael L. Katz of the New York Supreme Court (Civil Branch), stated, "I appreciate the parties' request to keep this as quiet as possible. But, it doesn't appear that this is possible."

The New York court has taken under advisement the parties' motion to identify both parties as "anonymous" in court paperwork and will issue a later ruling on the privacy request.

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The mere fact that a person may suffer embarrassment or damage to reputation as a result of allegations is not enough to justify the court sealing a court file or prohibiting public access. However, the presumption of public access can be overcome under the balancing approach if the moving party meets the burden of establishing (1) a compelling interest why access should be restricted and (2) that the protective order is drafted in the manner least restrictive of the public's interest.

Whether to restrict the public's access to judicial records is "left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of a particular case. See, *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 599 (1978).

Illinois law does provide certain protections to public access. For example, Illinois Supreme Court Rule 201(c) (1) (allows pretrial protective orders as justice requires) and 735 ILCS 5/2-401(e) (provides for the use of a fictitious name for good cause shown).

In addition, Illinois law allows certain information to be kept confidential including privileged information (i.e. attorney-client information) and information required by statute to remain as confidential (i.e. name of a minor victim in a sexual assault, juvenile identity in certain criminal matters).

As practitioners, we must make sure that our clients are aware that, except in certain instances as approved by the court, court filings and proceedings are generally open to the public.

Finding the balance between the public's "need to know" versus "want to know" is something the judicial system has been trying to do long before the world was inundated with "Likes," "Tweets" and "Snapchats."