



**Florida Press Association**  
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Chief Judge Donald R. Moran  
Fourth Judicial Circuit of the State of Florida  
330 E. Bay Street  
Jacksonville, Florida 32202

November 12, 2010

Dear Chief Judge Moran,

We write to express our concern that the right to open access to judicial proceedings is not being fully protected in the Duval County foreclosure division. It has recently come to our attention that Senior Judge Soud has severely curtailed public access to foreclosure proceedings, including access by members of the media. We urge you to take action to secure the public's right to observe the workings of the judicial system.

As you know, Florida law recognizes a strong presumption in favor of open access to judicial proceedings. We have received a number of reports, however, suggesting that members of the public and press who attempt to observe foreclosure proceedings in Duval County encounter unjustifiable hurdles. We have no objection, of course, to ordinary security screening measures. We are concerned, however, that the barriers to access here go far beyond such measures, leaving members of the public and press subject to the discretion of individual foreclosure judges to admit or exclude them.

This practice of exclusion recently crystallized into an explicit statement of policy by Senior Judge Soud. On October 26, an attorney from Jacksonville Area Legal Aid accompanied a reporter from Rolling Stone Magazine to observe proceedings held in Judge Soud's chambers. Neither the attorney nor the reporter did anything to disrupt the proceedings. At one point the reporter left the proceedings in order to interview a pro se litigant whose case had just been heard and who had left the room. Later that day, Judge Soud sent an email to the attorney castigating her for bringing the reporter into the proceedings. He stated that, while "attorneys are welcome in Chambers at their leisure," members of the media are "permitted" entry only upon "proper request to the security officer." He further informed the attorney that she "did not have authority to take anyone back to chambers without proper screening," and stated that her "apparent authorization that the reporter could pursue a property owner immediately out of Chambers into the hallway for an interview" may be "sited [sic] for possible contempt charges in the future."

Judge Soud's stated policy is irreconcilable with the extensive body of case law that has made Florida a model for open government. He has stated that members of the media may observe foreclosure proceedings only after making a "proper request" and that lawyers who facilitate access by the press may face contempt charges based on a reporter's non-disruptive interview and observation of judicial proceedings. But the Florida Supreme Court has held that "both civil and criminal court proceedings in Florida are public events and adhere to the well established common law right of access to court proceedings and records." *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So. 2d 113, 116 (Fla. 1988); *see also* Fla. R. Jud. Admin. 2.420

(codifying public right of access to records of the judiciary). *Barron* articulated this right of access in forceful terms. It emphasized that “a strong presumption of openness exists for all court proceedings” and outlined the carefully circumscribed exceptions to this broad rule:

[C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.

*Id.*, at 118. Even in these exceptional circumstances, “before entering a closure order, the trial court shall determine that no reasonable alternative is available to accomplish the desired result, and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose.” *Id.*

The protection of public access to judicial proceedings serves fundamental constitutional values. In particular, the “value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurances that established procedures are being followed and that deviations will become known.” *Sarasota Herald-Tribune v. State*, 924 So. 2d 8, 12 (Fla. 2d DCA 2005) (quoting *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984)). “A trial courtroom is a public place where people have a general right to be present, and what transpires in the courtroom is public property.” *Plaintiff B v. Francis*, No. 5:08-cv-79, 2010 WL 503067, \*2 (N.D. Fla. Feb. 5, 2010). Foreclosure proceedings are currently a matter of intense public interest. Indeed, the media has, in recent months, scrutinized them for possible procedural deficiencies. *See, e.g.*, Gretchen Morgenson and Geraldine Fabrikant, *Florida’s High-Speed Answer to a Foreclosure Mess*, N.Y. TIMES, Sept. 14, 2010; Polyana da Costa, *Before Foreclosing, Judges Must Hear Out Homeowners*, MIAMI DAILY BUS. REV., Oct. 14, 2010.

Judge Soud’s policy stands in direct opposition to these principles of open access. Rather than adhere to the “strong presumption of openness,” he does precisely the opposite: he employs a presumption of exclusion that apparently may be overcome only if he gives permission to specific members of the press. *Cf. NYCLU v. NYC Transit Auth.*, 675 F. Supp. 2d 411, 428-39 (S.D.N.Y. 2009) (holding that administrative hearing that can be closed upon request of a party violates the First Amendment right of access). Under Florida law, there are few justifications that can counterbalance the right to access. Even when those exceptional circumstances exist, the court must still determine that no more narrowly tailored alternative is available. *Barron*, 531 So. 2d at 118; *see also Globe Newspaper Co. v. Super. Ct. for the County of Norfolk*, 457 U.S. 596 (1982) (invalidating statute closing trials for certain sex offenses involving minors where state had a “compelling” interest in protecting minors’ privacy but where the court “offered no empirical support” that closure would effectively further that interest). It follows from the enumeration of a narrow set of exceptional circumstances under which proceedings may be

closed that *Barron* precludes a situation where access is contingent on court approval; reversing the presumption of openness is tantamount to exclusion. Judge Soud has failed to engage in the rigorous analysis necessary to establish the prerequisites for court closure.

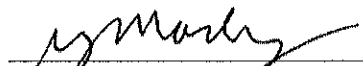
We recognize that the heavy volume of foreclosure cases has led to difficulties finding judges and courtrooms to hear the cases. As a result, some cases are being held in chambers for lack of an available traditional courtroom. Nevertheless, the proceedings must be open, even if they are held temporarily in a smaller and less formal physical setting than usual. While we understand the necessity for ordinary and uniform security screening procedures, the unavailability of a traditional courtroom cannot justify a deprivation of the rights established under Florida law and the U.S. Constitution.

As the Florida Supreme Court has noted, the press plays an indispensable role in maintaining “the judicial system’s credibility in a free society.” *Barron*, 531 So. 2d at 116. That credibility cannot be maintained when members of the public and media are dependent on the specific permission of the presiding judge to observe important judicial proceedings.

It is our sincere hope that we, and other representatives of the media, will be able to avoid instituting litigation over the issue of access to foreclosure proceedings. We do face certain time constraints, however, because Florida Rule of Appellate Procedure 9.100(d) provides for expedited review of orders excluding the public and media from judicial proceedings, and it requires such petitions to be filed within 30 days of an exclusion order.<sup>1</sup>

Accordingly, we urge you to take corrective action to ensure citizen and press access as required by Florida law. In particular, we ask that you promulgate an Administrative Order or take other expeditious and appropriate action setting forth clear procedures governing public access to foreclosure proceedings in the Fourth Judicial Circuit.<sup>2</sup> Those procedures should ensure that both the public and media can observe proceedings subject only to ordinary security measures.

We thank you for your attention to this important matter.

  
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Sam Morley, General Counsel  
The Florida Press Association

  
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<sup>1</sup> The incident described in this letter occurred on October 26<sup>th</sup>. Accordingly, the last day to file a petition for review pursuant to Rule 9.100(d) is November 29<sup>th</sup>.

<sup>2</sup> Although the incident described herein is particularly disturbing, barriers to public access to foreclosure proceedings have been reported statewide, and for that reason we have also sent a letter to Chief Justice Canady requesting that he take action to ensure open access to foreclosure proceedings across the state.



Larry Schwartztol, Staff Attorney  
The American Civil Liberties Union



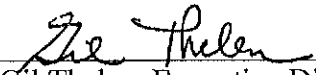
Randall Marshall, Legal Director  
The American Civil Liberties Union of Florida



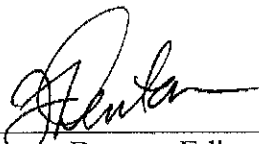
James Parker Rhea, Director & General Counsel  
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