

**OPEN COURTS GUIDELINES DURING PANDEMIC LIMITATIONS**  
**Prepared by the Fire Brigade, Bench-Bar-Press Committee**  
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The right to public trial/open courts is protected by the Washington Constitution, Art. 1, § 22, which guarantees a criminal defendant a right to a “public trial by an impartial jury”, and Art. 1, § 10, which provides that “[j]ustice in all cases shall be administered openly.” *State v. Frawley*, 181 Wn.2d 452, 458-59, 334 P.3d 1022 (2014) (plurality opinion). “Although the public trial right may not be absolute, protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The legal analysis and findings set forth in *Bone-Club* to safeguard a criminal defendant’s public trial right are the same as those required to protect the public’s Art. 1, § 10 right to open proceedings in the civil context. *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006); *see also Seattle Times v. Ishikawa*, 97 Wn.2d 30, 38-39, 640 P.2d 716 (1982).

The public’s right to open access to court proceedings extends well beyond the evidence-taking portion of trials, to pretrial and post-trial matters. *State v. Njonge*, 181 Wn.2d 546, 553-54, 334 P.3d 1068 (2014). If there is a question whether the public right to open court access attaches, courts apply an experience and logic test to determine whether the proceeding historically has been open to the public, and whether logic indicates that public access plays a significant role in the functioning of the proceeding at issue (for example, a proper side-bar conference vs. a motion to sever). *See id.*; *State v. Sublett*, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012); *State v. Smith*, 181 Wn.2d 508, 519, 334 P.3d 1049 (2014). Under this logic and current pandemic-required health procedures, the open courts doctrine would apply to a motion hearing being held in a high school gymnasium serving as a courtroom, but not to jury deliberations being conducted in a courtroom that offers sufficient space for that purpose.

Statute exempts some proceedings from the presumption of open access. *See, e.g.*, RCW 13.34.110 (excluding the public from dependency hearings); RCW 13.32A.200 (excluding the public from a Child in Need of Services or At-Risk Youth hearing if in the best interest of the child). Even statutory exemptions, however, must comport with a constitutional open courts analysis. *See Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) (Washington statute that prohibited release to the press of the names and personal information of child victims of sexual assault violated the individualized balancing of compelling interests required by Art.1, § 10); *State v. Waldon*, 148 Wn.App. 952, 967, 202 P.3d 325 (2009) (same; sealing of records). If the open courts doctrine applies to a proceeding, it is structural error to close it to the public without conducting an *Ishikawa/Bone-Club* analysis and making findings on the record. *Njonge*, 181 Wn.2d at 554.

The analysis required by *Ishikawa* and *Bone-Club* is the same, *Ishikawa* having been articulated first in the civil context under Art. 1, § 10; *Bone-Club* in the criminal context under Art. 1, § 22. Before a public hearing is closed or public documents are sealed, the following steps must be followed:

1. The proponent of the closure must articulate a compelling reason for the closure

- based on the facts of the case. Where this interest is for a reason other than the right to a fair trial, the proponent must show a “serious and imminent threat” to that interest.
2. A person present must have the opportunity to be heard in opposition to the motion.
  3. The court must weigh the competing interests favoring closure and public access.
  4. A limitation on public access must be the least restrictive method available to protect the threatened interest.
  5. Restrictions on public access must be no broader in application or duration than needed to serve their purpose.

*Bone-Club*, 128 Wn.2d at 258-59.

Not all restrictions on public access to a court proceeding constitute a “closure” or require an *Ishikawa/Bone-Club* analysis. A judge has inherent discretion to manage a courtroom and court proceedings to maintain fairness, safety, and decorum. *Njonge*, 181 Wn.2d at 558 (trial court judge possesses broad discretion in courtroom operations); *State v. Lormor*, 172 Wn.2d 85, 93-94, 257 P.3d 624 (2011) (trial court judge has broad discretion to preserve order, including removal of disruptive spectators). Space limitations on public access alone do not effect a closure. *Njonge*, 181 Wn.2d at 557.

Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the “public” will be present in the form of those persons who did gain admissions.... A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

*Estes v. Texas*, 381 U.S. 532, 588-89, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring) (cited with approval in *Njonge*, 181 Wn.2d at 557-58). No space for spectators, however, does constitute a closure, and is permissible only if authorized in advance through the *Ishikawa/Bone-Club* analysis. *State v. Wise*, 176 Wn.2d 1, 12, 288 P.3d 1113 (2012).

In response to a public health crisis that requires physical distancing and strict cleaning and sanitation measures when people are in a location together, many court proceedings have become “virtual” through the use of telephone and video hearings. Due to fundamental constitutional and statutory guarantees, not all proceedings can be conducted remotely. Historic courthouses and standard operations also may not be amenable to holding these proceedings in person while observing public health mandates. How to balance the onset of virtual proceedings; the need to restore in-person proceedings such as jury trials where space is limited; and maintaining open courts and public access to the greatest extent possible, is a challenge every trial court faces within the unique demands and resources of the individual jurisdiction. Accordingly, the key issue for a court is to recognize when a full or partial closure of a public proceeding requires an *Ishikawa/Bone-Club* analysis before the closure is effected, and when public access is sufficient, despite possible facility, health directives, or other constraints.

The following methodologies are available to strike this balance on a court-by-court, case-by-case basis. Courts should be open to modifying its standard response to this challenge on an as-needed basis. Courts did this before the pandemic, when a specific case required a unique response, and courts should continue to do so. No one methodology may be appropriate in all situations.

- **Open Courtroom:** If the courthouse is open to the public and the public may enter a courtroom to observe/listen to a proceeding, whether the proceeding is being conducted in-person or remotely, an open courtroom satisfies the public access doctrine so long as there is actual space available for public members. If a telephonic or video proceeding, it must be audible to all in the courtroom. If a video presentation, a monitor facing the gallery should be provided so public members also can observe the proceedings. If access to video is not available, the court should inquire on the record if there are objections to this limitation and, if so, conduct an *Ishikawa/Bone-Club* analysis to determine if the failure to offer a monitor to view proceedings is justified under the unique circumstances presented.

How much space is adequate for public access will vary according to the proceeding. “[T]he requirement of a public trial is fairly met if the trial court allows, without partiality of favoritism, a reasonable number of people to be in attendance.” *State v. Collins*, 50 Wn.2d 740, 747, 314 P.2d 660 (1957). Most proceedings do not attract more than a handful of public spectators. Having physically-distanced designated seating available for 5 - 10 public members in a majority of cases should be adequate, but what is “reasonable” in a specific context may be more or less.

If the court has reason to believe a large number of public members may want to observe, arrangements should be made in advance to accommodate more spectators, if possible. This can be accomplished by moving the proceeding to a larger public space, which necessitates advance planning and expense; by combining the open courtroom with an option listed below, or by using alone a virtual access modality.

- **1-Way Live Streaming Controlled by the Court:** A proceeding can be conducted from an open courtroom or with all participants present virtually, and live-streamed to another location for viewing by public members. Depending on a court’s resources, the proceeding can be live-streamed to a location within or outside of the courthouse, including a link posted by the court for public members to access and observe, but not participate in, the proceeding. If a proceeding is conducted in open court and streamed to another location in the courthouse or under court control, the court is able to monitor both public health requirements and restrictions on filming or recording the proceedings without prior court approval. When the proceeding has concluded, the video stream ends. Whether the proceeding is recorded or retained is within the court’s control.

This option requires that space be available in the courthouse or another physical location, and that the court have the technology available to stream and/or offer internet access to a live-stream. This, for example, is the methodology currently being used by

Washington's Supreme Court via TVW. Some courts have this option available through their video conferencing technology.

- **Video Streaming Through a Private Vendor:** YouTube, Zoom, WebEx, GoToMeeting, and others, are private vendors of video platforms currently used by Washington courts to allow members of the public observe court proceedings remotely. Each platform has unique characteristics, requirements, and costs a court must investigate and consider before using the platform for public access to proceedings. Specific characteristics include the ability to identify, mute, or exclude spectators; the ability to separate counsel and clients to conduct confidential conversations during the course of a proceeding; and the ability to control use and distribution of the proceeding upon its conclusion. For example, YouTube asserts a universal license to material broadcast over its platform, so unless it can be persuaded to remove specific content through its user rights recourse, the proceeding broadcast may be available for all time and for all uses over which the court has no control. Additionally, the court cannot control how members of the public may further record or disseminate the proceeding. Courts are concerned that proceedings generally available to the public may be used to harass, embarrass, or intimidate court participants, or modified or distorted to create false, misleading, or damaging portrayals of court proceedings.

As noted under General Provisions below, a court at all times has authority to restrict in full or in part public access to information if justified by a compelling interest after an *Ishikawa/Bone-Club* analysis. In any telephonic or video proceeding over which the court cannot control the admission or conduct of spectators, an explicit warning should be given that recording or transmission of the proceeding is prohibited; violation of this prohibition may result in legal sanctions. Additionally, a court must weigh the risk associated with the possibility of abuse of the court record in a specific situation versus the value of making the proceeding accessible to the public at large. In many situations, the value may overcome the risk. The risk may be more compelling if an alleged victim has been sexually assaulted or highly confidential medical or financial evidence is presented. Embarrassment or invasion of privacy alone, however, do not outweigh the public's right to access. *State v. Loukaitis*, 82 Wn.App. 460, 467-68, 918 P.2d 535 (1996). In all cases in which an *Ishikawa/Bone-Club* analysis is conducted, the specific facts in those circumstances will be determinative of the outcome and the nature of the least restrictive limitations, if any, imposed.

Each video platform has unique characteristics to allow participation at different levels. Two-way live streaming allows interactive participation, which is needed if court participants are present remotely. Courts now use this technology to conduct court hearings, bench trials, and jury *voir dire* remotely. Courts must determine how spectators are allowed to participate, if at all. To ensure the exclusion of case witnesses before offering their testimony, some courts ask observers to identify themselves. With Zoom, for example, the court may invite proceeding participants to join the hearing with one call-in number, and post another number for observers who are not seen by court participants. Observers can be muted from speaking, and access to Q&A and chat can be allowed or disabled. If a closure issue should arise during the course of a proceeding and

the court invite persons present to voice any opposition to the requested closure, the platform's chat function can be activated to allow an opportunity to be heard, or the court can provide an email address or telephone number for a spectator to use, taking a short recess to allow any opposition to be submitted and reviewed.

### **General Provisions Applicable to All Proceedings**

1. Court calendars and information regarding access to them (*e.g.*, limited courtroom seating, location of and/or internet link to live stream, telephone/video call-in number and/or internet link) should be posted on both the court's website and in the courthouse, if it is open to the public. *See* "Court Calendar and Access Information" Template. Appendix 1.
2. Where instructions are posted informing the public how to observe or join remotely a court proceeding, the notice should include an admonition that filming, photography, and broadcast of proceedings is prohibited without prior court approval. Contact information to seek prior approval, primarily for the benefit of the media, should be posted. The notice should include a statement that violation of this prohibition may result in legal sanctions. *See* "Recording Court Proceedings" Website Posting Template. Appendix 2.
3. In any video or remote proceeding in which the public can participate, an instruction should be given at the start of the proceeding instructing on technological and procedural rules that apply.
4. As pre-pandemic, all court proceedings must be recorded to create the court record, which is available to the public on request under standard court procedures.
5. As pre-pandemic, the court has authority to fully or partially close any courtroom proceeding or seal records based on the specific, compelling interests involved. Accordingly, if during an open court or video proceeding, for example, highly personal testimony is anticipated or a witness is particularly vulnerable, limitations on public access to this material may be imposed if warranted after conducting an *Ishikawa/Bone-Club* analysis and making findings as required by this authority. The court should inquire and litigants should bring special requests of this nature to the court's attention in advance of the proceeding, if possible. If the public interest is not represented due to agreement by the parties or limited public access, the court must supply it. It is the court's responsibility to acknowledge and represent the right to open access to the courts. At the same time, circumstances can exist that justify closure despite this important value.

### **Additional Resources**

GR 15 & 16

Court - Media Bench Card, Appendix 3

"Resuming Jury Trials in Washington State, Guidelines for Operations During the COVID-19 Pandemic", June 2020