Secret Justice:

Star Treatment

Courts are clamping down on public access to cases involving the rich and famous, from the criminal trials of **Michael Jackson** and **Kobe Bryant** to the divorce case of billionaire investor **Ron Burkle**. The reasoning judges often use — that increased public interest justifies tightening access — denies the public information in the very cases that show them the most about how the judicial system works.

Spring 2005

The Reporters Committee
For Freedom of the Press

Secret Justice:
A continuing series

The American judicial system has, historically, been open to the public, and the U.S. Supreme Court has continually affirmed the presumption of openness. However, as technology expands and as the perceived threat of violence grows, individual courts attempt to keep control over proceedings by limiting the flow of information. Courts are reluctant to allow media access to certain cases or to certain proceedings, like jury selection. Courts routinely impose gag orders to limit public discussion about pending cases, presuming that there is no better way to ensure a fair trial. Many judges fear that having cameras in courtrooms will somehow interfere with the decorum and solemnity of judicial proceedings. Such steps, purportedly taken to ensure fairness, may actually harm the integrity of a trial because court secrecy and limits on information are contrary to the fundamental constitutional guarantee of a public trial.

The public should be the beneficiary of the judicial system. Criminal proceedings are instituted in the name of "the people" for the benefit of the public. Civil proceedings are available for members of the public to obtain justice, either individually or on behalf of a "class" of persons similarly situated. The public, therefore, should be informed — *well* informed — about trials of public interest. The media, as the public's representative, needs to be aware of threats to openness in court proceedings, and must be prepared to fight to ensure continued access to trials.

In this series, the Reporters Committee takes a look at key aspects of court secrecy and how they affect the newsgathering process. We will examine trends toward court secrecy, and what can be done to challenge it.

The previous installments of this "Secret Justice" series concerned anonymous juries (Fall 2000), gag orders on trial participants (Spring 2001), access to alternative dispute resolution procedures (Fall 2001), access to terrorism proceedings (Winter 2002), secret dockets (Summer 2003), judicial speech (Spring 2004), and grand juries (Fall 2004).

This report was researched and written by Kimberley Keyes, the 2004-2005 McCormick-Tribune Legal Fellow at the Reporters Committee.

Star treatment: celebrities, justice and journalism

Imagine getting your criminal indictment sealed from the public until the day of your arraignment. Blocking the release of a transcript of your interview with police investigators because you say its disclosure invades your privacy. Paying a private judge nearly $75,000 to handle your divorce case and convincing him to seal all the financial records. Persuading a court clerk to conceal your divorce file in a super-secret system hiding more than100 other cases.

That's exactly what happened in high-profile cases recently. Courts are clamping down on public access to cases involving the rich and famous. And such "star treatment" doesn't just happen in Hollywood. From California to Colorado to Connecticut, courts are shielding documents in high-profile criminal *and* civilcases at the expense of the public's right to know.

"The celebrity trials of recent years seem to be resulting in a willingness on the part of judges to abandon the very strong presumption in favor of access," said media attorney Thomas B. Kelley, who challenged secret proceedings and documents in the former rape case against NBA all-star Kobe Bryant. "In effect, once the publicity level reaches a certain intensity, [they] presume that access is harmful to the process, at least during the pretrial stages."

The child sexual abuse case against pop superstar Michael Jackson offers an egregious example of star treatment. Long before the trial began in late January, Superior Court Judge Rodney S. Melville issued a gag order on all participants barring them from discussing details of the charges, identities of potential witnesses, or any evidence in the case. He also sealed most of the documents in the case, including the grand jury transcript, search warrant affidavits — even the indictment itself.

"We began covering this trial basically not knowing what it was about," veteran Associated Press reporter Linda Deutsch said. "The indictment had been sealed, which was quite extraordinary."

The California Court of Appeal in April ordered Melville to unseal the indictment, but with the names of Jackson's alleged co-conspirators redacted. Jackson, who is charged with plying a 13-year-old boy with alcohol and sexually molesting him, is currently on trial in Santa Maria, Calif. (*People v. Jackson)*

The trial court maintains a secret docket for the Jackson case. It also required all materials containing potentially "sensitive" information that could be covered by the gag order — virtually anything of substance — to be filed under seal. Any documents related to the search warrant also had to be filed with an accompanying motion to seal.

In July 2004, media attorney Theodore J. Boutrous Jr. of Gibson, Dunn & Crutcher filed a challenge to what he called the "presumption of secrecy" in the Jackson case to the California Court of Appeal in Ventura (2nd Dist.), essentially arguing there is no celebrity exception to the First Amendment. But the court rejected the media's argument as to all documents except the indictment, ruling on April 27 that Melville "carefully balanced the defendant's right to a fair trial and the public's right to know."

Some of the documents at issue, including the grand jury transcript and the indictment, had been made public since the appeal was filed, prompting the appellate court to ask Boutrous during oral argument in February why the appeal was not moot. Boutrous responded "that an opinion that considers the appeal at the time the motions to unseal were made would establish useful precedent," presiding Justice Arthur Gilbert wrote in the Court of Appeal's decision.

"We therefore journey in an imaginary judicial time machine to last year," Gilbert wrote. "We temporarily disarm our powers of hindsight so that our perception of events at the time the motions [to unseal] were made will not be distorted."

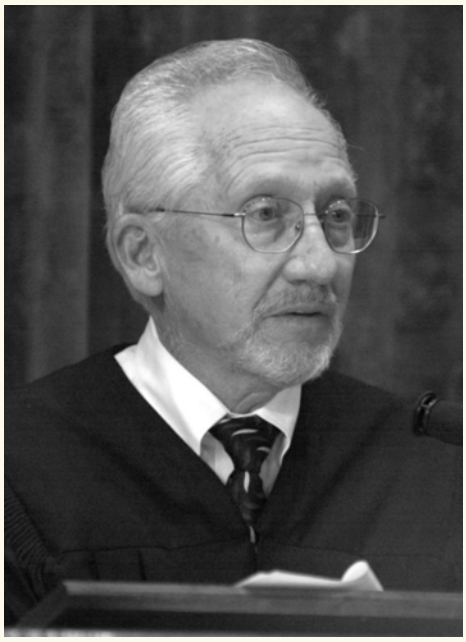
The court, which noted its difficulty in shielding itself from news of Jackson's case, said it was "unlikely" that potential jurors would not be influenced by exposure to details of the alleged crimes. The need to safeguard the privacy of the minors involved as well as Jackson's right to a fair trial and the government's then-ongoing investigation justified the orders to seal, the court said.

Boutrous said many documents related to the case remain sealed, and the media fears that the trial court's actions could serve as a model for future cases if allowed to stand.

"There was no reason to have to get in the time machine — the public's rights

continue to be violated to this day," said Boutrous, who represents a coalition of 10 news outlets. He and his clients were considering their next step in early May.

Others also decry the extraordinary — perhaps unprecedented — degree of secrecy Melville imposed in the Jackson case. Loyola Law School professor Laurie Levenson noted that at one point, it was "taken to the ludicrous level where the judge was trying to redact language out of Supreme Court decisions," referring to a defense document released by Melville from which references to pornography or obscenity had been excised.



AP PHOTOS

Judge Rodney S. Melville, left, "carefully balanced" Michael Jackson's fair trial rights against the public interest in open courts — and decided virtually everything about the case must be secret.

"Excuse me, if the Supreme Court thought it was OK to publish those decisions, who is Judge Melville in Santa Maria to second-guess that decision?" Levenson said. "I had to shake my head."

Boutrous said that the secrecy "really has gotten extreme and out of control in that sense."

Gaining access to celebrity cases is not always so difficult. The judge who presided over actor Robert Blake's spring 2005 murder trial was "a lot more inviting" to the media, Levenson said. And anyone with Internet access can read 2,400 pages of FBI files on Frank Sinatra, including the record of his arrest at age 22 in Hackensack, N.J., on a charge of "seduction."

But judges made it far more difficult to see documents in the sex crime cases against Jackson and basketball star Bryant.

Police searched Jackson's Neverland ranch in Santa Barbara, Calif., in November 2003. Melville sealed the executed warrant, the inventory of seized items, and the supporting affidavit until Jackson's arraignment — even though under California law, such records usually become public 10 days after the search. NBC moved in January 2004 to unseal the search warrant documents.

Melville held a hearing on the media's motion on Jan. 16, 2004, the same day Jackson was arraigned. He later found that the "privacy of the minors involved" and the need to avoid tainting the jury pool justified sealing the entire 82-page search warrant affidavit, except some "general introductory material." In February 2004, the court released heavily redacted versions of the warrant and inventory, as well as the "general introductory material" from the affidavit.

Melville also issued a broad gag order barring the parties, lawyers and potential witnesses from discussing details of the charges, identity of witnesses, and statements about evidence. Indeed, anyone subject to the order must get the trial court's permission before making any public statement about the case — leading to a famous bit on "The Tonight Show." When it appeared that host Jay Leno might be subpoenaed to testify, he enlisted his guests to tell jokes about Jackson for him. (Melville later clarified that the order did not stop Leno from telling Jackson jokes.)

In April 2004, a grand jury returned a 10-count felony indictment against Jackson, charging him with conspiracy to commit child abduction, false imprisonment and extortion; commission of a lewd act upon a child; and administering an intoxicating agent (alcohol) to assist in the commission of a felony. Melville released a heavily redacted version of the indictment at the time, specifying only the counts, not the details of the charges — not even the identities of Jackson's alleged co-conspirators. He refused to unseal the other portions of the indictment, citing the same concern for the integrity of the jury pool.

Although grand jury transcripts in California are generally released to the public 10 days after an indictment is issued, Jackson's remained sealed for months. In contrast, record producer Phil Spector, who is charged with fatally shooting an actress at his Los Angeles home, unsuccessfully appealed to the California Supreme Court to keep his grand jury transcript sealed after a trial judge ordered it to be released.

"Basically the argument of the celebrity defendant is, I can't get a fair trial [because of negative pretrial publicity.] I'm so famous, the jury will really pay attention to it," said attorney Susan Seager of Davis Wright Tremaine, who represented the *Los Angeles Times* in getting the Spector transcript unsealed. "But it sort of turns the whole idea of public access on its head because really, there *is* increased public interest because they are a celebrity — and you can't use that to keep the public out.

"You can't say, 'You should be punished, public, for your interest in this trial, and we're going to keep you out, we're going to seal the documents.' That's not the way it works. But that's sort of how it's been working," Seager said.

Not on candid camera

Melville has banned electronic devices from the Jackson courtroom, including cameras. *(See sidebar.)* Some observers say that judges presiding over celebrity trials fear being another Lance Ito, the judge perceived by some as having lost control of the O.J. Simpson trial.

But Levenson said the presence of televison cameras in the O.J. courtroom had no impact on the outcome of the case.

"I think that the behavior by some of the people in the courtroom would have been different — there was a lot of mugging for the camera — but I don't think the verdict would have been different," she said.

Deutsch said television cameras in the Jackson courtroom would show the world

AP PHOTOS

Documents in Kobe Bryant's rape case, including his statement to police, were kept under seal by Judge W. Terry Ruckriegle.

that Melville is a "very strong taskmaster" who is conducting things differently than Ito did in the Simpson trial.

"People who complained during the O.J. trial that what they saw on TV was a very lax proceeding will see, in this case, one that is very regimented and regulated," Deutsch said.

"They'd also see some of the most interesting witnesses that have ever testified in a courtroom," she continued. "If the accuser's mother" — who reportedly affected a German accent during her testimony — "had been testifying in a televised trial, people would have accused her of playing to the cameras, but there are no cameras. It proves the point that witnesses will be witnesses."

Levenson, who has attended the Jackson proceedings, said televising the trial would give the public a greater sense of the prosecution witnesses' credibility.

"What the public is hearing is these witnesses make these claims of very sordid behavior by Michael Jackson, but the public has no way of assessing the credibility of the people making those claims," she said. "It's not just what a witness says, it's how they say it. And the problem for the media is, you can tell people what they say, [but] you can't make the judgment for them as to whether it was said in a truthful manner."

Public scrutiny lost

Although the rape charge was dropped before the case went to trial, the Colorado judge presiding over the criminal case against all-star basketball player Kobe Bryant in 2004 also tried to limit how much information reached the public.

"This is a judge who had taken some pride in his ability to manage high-profile cases in the past, and he assigned this case to himself for that reason," media lawyer Kelley said of District Judge W. Terry Ruckriegle. "It was clear he just didn't anticipate the intensity of the media coverage that would occur, and I think he started to feel very uncomfortable with his inability to control what was going on outside his courthouse."

Although Ruckriegle ruled favorably for the press on some issues, such as keeping a public docket, Kelley said his attitude may have shifted after the preliminary hearing in which certain facts, including the results of DNA tests on the accuser's underwear, were publicly disclosed.

"The judge was somewhat horrified by the extent to which all of this information got published world-round, and wanted to do something about it," said Kelley, a partner at Faegre & Benson in Denver, Colo. "What he did was essentially close any filing and most hearings where arguably sensitive material might be disclosed."

Ruckriegle sealed the transcript of Bryant's 2003 interview with Eagle County sheriff's investigators about a rape accusation made by a 19-year-old woman Bryant had met at a resort near Vail, Colo. The defense claimed that portions of the transcript — which contained references to the married Bryant's sexual proclivities and infidelities — were inadmissible and should be sealed to protect Bryant's right to privacy, Kelley said.

"To me [that was] a novel contention, but it's clear the judge accepted it to some degree," he said.

That the court accepted Bryant's privacy argument to shield a criminal investigation indicates celebrities may enjoy a different kind of justice, Kelley said.

"I can't imagine a statement being made to a police officer in a criminal case treated as a matter of privacy for any defendant but a celebrity," he said.

The *Vail Daily* newspaper later obtained a tape of the police interview and published excerpts. Kelley said he thought the transcript portrayed Bryant credibly and was not overly prejudicial. "But it certainly was not going to bring his endorsements back any faster," he noted.

Prosecutors dropped the felony sexual assault charge against Bryant last September after the accuser decided not to pursue the case. But Kelley said the case may have ended sooner if more light had been shed on the prosecution's stumbling blocks and efforts to overcome them.

"That benefit of public scrutiny was lost," he said.

Kelley cited four factors that he said fueled the court's desire to restrict public access. Bryant was accused of date rape, raising issues of consent and the alleged victim's sexual history. The case involved race, a sensitive issue which Kelley said was part of the reason the judge closed the jury selection to the public. It involved sex, which many people are uncomfortable discussing in a public courtroom.

And, of course, it involved a celebrity, "which tends to add a certain show-like atmosphere to the case," Kelley said.

Both he and Levenson, a frequent TV commentator on legal affairs, said courts treat celebrities differently.

"That doesn't mean they're treated better — sometimes they're treated more harshly — but we have a hard time just treating them like everyone else," said Levenson, noting that judges and other officials can be starstruck by a celebrity presence in their courtroom — and the media glare that goes with it. "I think people get worried when there's a lot of attention focused on them in any regard, and if you have a celebrity case there's attention focused on you, so you tend to bend over backwards in either direction — either to be overly fair, or to not appear to be overly fair.

"I think it's hard to just treat the celebrity like everyone else."

Ruckriegle, in Kelley's opinion, "was really overwhelmed by the intensity of the spotlight and his inability to maintain control over it."

What the judge failed to appreciate was that shutting down access "at this point really can't remedy what's already out there.

It really just assaults the First Amendment," Kelley said. "That's the perspective I thought was lost in this case."

Not-so-civil proceedings

Courts have restricted public access to civil cases as well as criminal. The good news is, the media is fighting back — and winning.

Thanks to media intervention in a high-profile divorce case, Los Angeles Superior Court Judge Roy L. Paul recently declared that a hastily passed law designed to shield all divorce records that contain certain financial information violates the First Amendment.

Billionaire investor Ron Burkle had asked Paul, under Section 2024.6 of California's Family Code, to seal certain documents in his divorce file that contained identifying information about financial assets, "which Mr. Burkle interpreted to mean street address," said media attorney Seager, who represented a coalition of press groups that opposed the sealing request.

The media coalition relied on a 1999 California Supreme Court case involving the palimony contest between Clint Eastwood and Sondra Locke, in which the court held that the First Amendment grants a right of public access to civil court proceedings and documents. (*NBC v. Superior Court*)

"These rights do not disappear merely because the proceedings involve wealthy, powerful public figures," the media argued in the Burkle case. "[T]o the contrary, the public's interest in ensuring that equal treatment is given in such cases arguably is even stronger."

Dollar signs of the times

Local court officials who once saw small press contingents arrive in their communities to cover high-profile trials now frequently greet the descending media hordes with two words: Pay up.

Today the press pool covering the Michael Jackson sex abuse trial in Santa Maria, Calif., pays $1,500 a day in media "impact" fees to defray the county's cost of hosting some 1,600 credentialed journalists. Media lawyer Theodore J. Boutrous Jr. estimated the press has already paid $100,000 to cover the case, which isn't expected to go to the jury until sometime in June.

"It's a whole new unfortunate world of covering trials," said special correspondent Linda Deutsch, who has covered courts for The Associated Press for more than 30 years. "It's not what I grew up with."

In the old days, said Deutsch, a small corps of mostly newspaper reporters traveled the country covering big trials. Today, the media — complete with satellite trucks, TV cameras, lights, wires, microphones, soundstages, podiums and, of course, lots and lots of people — set up a virtual tent city outside a courthouse where a high-profile case is unfolding.

Running that mini-city costs money for overflow rooms, extra security, trash removal, even portable restrooms. And public officials — as well as some members of the press — balk at passing those added costs along to taxpayers.

"After O.J. and after Court TV began, they [the news media] realized people were really interested in this, and that's when everybody started committing to covering trials," Deutsch said. "And that's when people who were in these little towns where the press descended upon started to realize there was money to be made.

"Obviously it costs them money to have us there as well, and we were willing to pay for that," she added. "But it's gotten out of hand."

When the murder trial of Scott Peterson moved from Modesto to San Mateo, Calif., county officials in San Mateo immediately told TV networks that it would cost $51,000 to secure an anchor position on the plaza in front of the courthouse, said media coordinator Peter Shaplen, who served as the liaison between the press pool and courthouse officials for the Peterson case. He now has the same role in the Jackson case.

"That was the first example that I know where a jurisdiction said, 'Hi, welcome to our community. Pay up,'" said Shaplen, a former TV producer with 33 years in the news business.

The press ended up renting space in an adjacent building and paying the county nothing, he said.

Not so with the Jackson case. The media and Santa Barbara County officials originally negotiated a fee of $7,500 a day in May 2004. Boutrous and Shaplen renegotiated to $1,500 earlier this year. The cost is shared by the various broadcast and print outlets that cover the trial.

Both Boutrous and Shaplen acknowledge concerns about the perception of charging money for access to a public court proceeding.

"There's a real aversion, as there should be, to paying to cover a public trial," said Boutrous, a partner at Gibson, Dunn & Crutcher in Los Angeles who represents 10 news organizations battling access issues related to the Jackson trial.

"It's been a real challenge to strike that balance" between maintaining a system to defray legitimate costs to the county, and making sure no one is denied access because they can't afford to chip in, he said.

If you're not a regular media presence at the trial, according to Shaplen, who handles billing, it costs up to $45 just to drop in for the day. (Unless you're a local station or newspaper. Then it's free, by order of the county.) Shaplen stresses that the daily fee is *not* an admission ticket to the courtroom, which contains 47 seats for the media and 45 for the public.

"We conduct our courts in the open. Anyone should be able to go in; there should never be a ticket cost. That's not what we're talking about," he said.

What they're talking about is the impact of a press corps that has exploded in recent decades. Today you have a number of networks — CNN, CourtTV, even E! Entertainment — that thrive on court coverage, and have spawned generations of TV lawyers, as Shaplen pointed out. "Trials," he said, "have become big media."

"Who can afford to cover those trials?" Shaplen asked. "Who can afford *not* to?"

So far no one has refused to pay the impact fee, he said, although some have grumbled about it. If someone flat-out refused, they would not be barred from covering the trial, Shaplen insisted. "I would never put the pool into the position of being a roadblock to the First Amendment," he said.

But he *would* disclose their refusal to everybody else who ponied up, he said.

One of the challenges of the negotiations was persuading the county to make the fees reasonable while making the media understand what exactly they are paying for, according to Shaplen. It's an issue that's not likely to go away.

"This is the dilemma that we face in contemporary trials, and I think we're going to see more of it," he said. — *KK*

Burkle hired a private temporary judge under a system in California disparagingly called the "rent-a-judge" system because litigants can hire their own judges to resolve disputes, to try his divorce from wife Janet. He persuaded the temporary judge, Stephen M. Lachs, to seal documents in the case, although Lachs apparently lacked the authority to do so. Lachs vacated the sealing order in April after Seager argued that under court rules, only the "presiding" judge — in this case, Paul — can issue such orders.

Section 2024.6 of California's Family Code, which took effect in June 2004, requires a court to seal upon request any divorce-related document that lists a person's financial assets and liabilities and "provides the location or identifying information" about such assets and liabilities.

"What is so dangerous about this law is it would allow people to just stick a piece of financial information in a footnote, and ask the court to seal the entire document," Seager, who intervened in the case on behalf of the *Los Angeles Times*, The Associated Press and the California Newspaper Publishers Association, said. "In that way someone could seal every single pleading that was filed in a divorce case."

Judge Paul invalidated the law because it is not narrowly tailored to protect sensitive financial data and it "unduly burdens" the public's right of access to civil court proceedings.

"The court concludes the statute is overbroad because it mandates sealing entire pleadings to protect a limited class of specified material," Paul wrote in his Feb. 28 ruling.

He would have had to grant Burkle's request if the *Times* and AP had not asked to intervene, Paul wrote.

Attorney Patty Glaser, who represents Ronald Burkle, said her client is appealing both Judge Paul's ruling that Family Code section 2024.6 is unconstitutional and Judge Lachs' decision to vacate his sealing order.

"I think the Court of Appeal will hopefully see it our way," said Glaser, a partner at Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro in Los Angeles. She said the law gives judges the appropriate amount of discretion to determine if what is being sealed qualifies as the requisite information under the statute. If documents are improperly sealed, "any member of the public can get them unsealed," she said.

Glaser said although Lachs agreed with the media that as a privately paid temporary judge, he lacked the power to seal court records, "he thinks the statute doesn't go far enough" — a view she personally shares.

"I really believe there is so much indicia in our society of privacy being eroded," Glaser said, pointing out that a divorce action compels parties to disclose personal information in a public forum. "I think the law needs to recognize that there needs to be some parameters here."

"I happen to believe there is far too much made of people's private [lives.] Why shouldn't that be kept private?"

Protecting privacy, especially that of high-profile people, is important because disclosure of such information can lead to problems such as identity theft and kidnaping threats, Glaser said. She said Burkle had to get a court order to restrain a "stalker" who was following him and his son.

The state legislature cited similar concerns when it hurriedly passed Family Code section 2024.6 in June 2004.

"It is necessary that this act take effect immediately as an urgency statute because the records that this act seeks to protect may disclose identifying information and location of assets and liabilities, thereby subjecting the affected parties and their children, as well as their assets and liabilities, to criminal activity, violations of privacy, and other potential harm," a note to the statute says.

The *Los Angeles Times* noted in court papers that the law was enacted "shortly after Mr. Burkle and his companies donated $147,800 to the governor's political committees and the State Democratic party."

Glaser said the *Times* has referred to Family Code section 2024.6 as the "Burkle statute" without any basis in fact. She denounced any alleged connection between the two as "defamatory."

Glaser said Burkle "had nothing to do with the passage of the statute," adding that if she was wrong and there was evidence to the contrary, the *Los Angeles Times* should reveal it. Otherwise, she said, "please don't throw in scurrilous" accusations. She also said the statute's reason for being "is not relevant to the issue" of its constitutionality. The issue, she said, is "should the public have [access to] very private information?"

The law applies to any party to a divorce, she pointed out. "Being rich doesn't help you one iota," she said.

She also denied that wealthy people enjoy special treatment by the courts.

"No, I don't think rich people get more privacy. I think they get far less privacy, thank you very much," she said.

But Seager said only the wealthy typically can afford privately paid temporary judges like the one Burkle hired. According to court documents, Burkle paid Lachs up to $400 an hour for services rendered between November 2003 to December 2004, totaling more than $73,000. Seager said Lachs also presided over Michael Jackson's divorce from ex-wife Debbie Rowe.

Under California law, privately paid temporary judges act as a court of public record, and court rules mandate that the same public access requirements apply to the privately paid judge's proceeding as any other court proceeding, according to Seager. Glaser said that a member of the press would be entitled to sit in on the hearings. However, when asked if notices of such hearings are posted publicly, she said, "Not to my knowledge." To find out about them, one would "ask the parties," she said.

Because the hearings are often held behind closed doors, away from a courthouse, "the public and the press kind of lose track of these things," Seager said.

She said public oversight is particularly important in divorce cases, which often involve issues such as child custody and property division that have significant and widespread impact.

"These are very important, fundamental issues that society has a stake in making sure that they're being done fairly, and also monitoring the law that changes which it has in this area," Seager said.

Californians aren't the only ones who'd like to keep their divorce records secret.

While looking into the divorce of former General Electric chairman Jack Welch, *Connecticut Law Tribune* reporter Thomas B. Scheffey learned in December 2002 that state courts maintained a secret docketing system for certain cases. (See also "Secret Dockets," a Summer 2003 installment of this "Secret Justice" series.)

The *Hartford Courant* reported in February 2003 that for years, Connecticut judges had "selectively sealed divorce, paternity and other cases involving fellow judges, celebrities and wealthy CEOs that, for most people, would play out in full view of the public. . . ." Among the files hidden in the super-secret system were a paternity action against E Street Band saxophonist Clarence Clemmons and the divorce records of University of Connecticut President Philip E. Austin.

The cases were filed according to three levels of secrecy. Level 3 cases were public except for certain sealed documents in the file. Level 2 designation allowed disclosure of the parties' names and case number, "but nothing more," according to a June 2000 memo to trial court administrators and clerks from Court Manager Judith D. Stanulis.

For Level 1, the highest degree of secrecy, no information whatsoever about a case was available to the public — it was simply invisible.

The media estimated that the courts concealed more than 10,000 cases using this cryptic system during a period that spanned nearly 40 years.

In the Austin case, lawyer Eliot J. Nerenberg wrote to Superior Court clerk Krista

Keeping the beat on the Santa Maria Death March

You arrive at the courthouse by 7:30 a.m. and stay until 2:30 p.m. with no break for lunch. You get three recesses, each lasting 10 or 15 minutes, during which you may use the bathroom, grab a snack or file a story. Don't even try to do all three, because if you're late getting back, you won't get back in.

No laptops, cameras, cell phones, pagers or Blackberrys are allowed inside the courtroom. If you accidentally bring one in and, God forbid, it goes off, you're banished for a week. No exceptions.

Interviews? Absolutely prohibited outside the designated areas. Even saying hello to an official or just *looking* at a lawyer can land you in hot water.

They call it the Melville Diet — a forced feeding by the judge presiding over the Michael Jackson trial. And the reporters covering the case must stick to it, or else.

AP PHOTO

Reporters wait outside the courthouse during the Michael Jackson trial.

"This is a hard trial," media pool coordinator Peter Shaplen said. "Jackson is brutally hard. The schedule has been not-so-laughingly called the Santa Maria Death March. It has been referred to as the 'Melville Diet' by the judge himself. It doesn't give the media time to file a story, go to the bathroom and get something to eat in 10-minute breaks. It's hard, really hard."

So hard, said AP special correspondent Linda Deutsch, that it's actually causing health problems for some.

And Judge Rodney S. Melville's media decorum order, limiting where the press can go and whom they can speak to, is "a nightmare," she said. Journalists' complaints that court personnel interpret the restrictions too broadly have prompted a request to Melville to clarify the order.

"We're not allowed to talk to anybody outside the courtroom — we can't talk to the lawyers, we can't talk to the fans," Deutsch said. "They tell us that we have white badges, so we can talk to each other, but you can't talk to anyone with any other color badge. It's unbelievable, it's truly unbelievable. I don't know why they're thinking this way."

The veteran journalist wishes that court personnel — whom she suspects are acting under someone else's orders — would heed the wisdom of her late friend Theo Wilson of the *New York Daily News*, who used to say, "No reporter ever killed a good trial."

"Reporters don't cause trouble for officials unless they are incited in some way, [if] the officials become so oppressive that you feel like you may have to answer back at some point," Deutsch said.

"But in this one, everybody's afraid to even speak."

Attorney Thomas B. Kelley, who represented the media covering the Kobe Bryant case in Colorado, said most judges are not accustomed to the intense publicity that surrounds celebrity trials.

"I think when there's media camped outside, they have a sense of having to contend with barbarians at the gate, if you will," said Kelley, who described the "meadows" of satellite trucks, tents, soundstages and podiums that sprung up outside the Eagle County, Colo., courthouse during the Bryant proceedings.

"It took the last generation of judges a while to get used to TV. It's going to take this generation a while to get used to the proliferation of media that we now have," Kelley said.

By all accounts, the press covering the Jackson trial has conducted itself in an orderly, respectful manner. But some court personnel treat the press in a "demeaning and unprofessional" way, said Loyola Law School professor Laurie Levenson.

"Now I can understand the media doesn't always behave itself, but I frankly have been shocked, and I think it's fairly undeserving in that situation," Levenson said.

Deutsch — who has covered hundreds of trials, starting with Charles Manson's in 1970 — says she's never seen a trial quite like Jackson in terms of the way the press is treated. The closest one, she said, was the 1972 trial of Angela Davis, a former UCLA professor charged in connection with a shootout at the Marin County, Calif., courthouse that left four people dead, including a judge. Deputies marched the reporters around with guns drawn, Deutsch recalled.

But "their concern was at least based on something you could understand," she said.

"The thing that bothers me the most, I think, is that the people who regulate this case don't seem to respect us as people who are doing a job," Deutsch said. "The mood that pervades everything is that somehow we're there for fun. And it's anything but fun. It's the most grueling work that I have encountered on a trial, ever. And that says a lot." — *KK*

Hess to inform her that the parties had asked Judge Linda Pearce Prestley to seal the file.

"We explained to Judge Presley [sic] the importance of having this file sealed from the public because the defendant husband is the President of the University of Connecticut," Nerenberg wrote in a letter dated May 1, 2001.

Prestley, at their request, had sealed the case under a Level 2 designation, "so that if [someone] put their name into the judicial department computer, it would not even show up as a file," Nerenberg wrote. But the lawyer soon realized that they meant to request a Level 1 designation. He asked Hess to correct the error and give the parties a code number they would need to recognize court motions when they appeared on the docket.

A handwritten note in the lower right-hand corner of the letter reads, "Per Grendel, J. — Seal file @ level 1," with the initials KH and the date, May 2, 2001. Herbert Gruendel was another Superior Court judge at the time. He now sits on the state Appellate Court.

"It's crystal clear from this letter that there was no hearing. This was just a very . . . cozy relationship between the lawyers and the judge," said attorney Daniel J. Klau of Pepe & Hazard in Hartford, who represents the *Law Tribune*. "Why none of the judges thought this was highly inappropriate is beyond me."

The *Courant* and the *Law Tribune* sued the chief court administrator and the chief justice in federal court to gain access to summary information in Level 1 and Level 2 cases. But a federal district judge dismissed the case in November 2003, saying the defendants lacked power to alter sealing orders previously entered by other judges.

The media appealed to the U.S. Court of Appeals in New York (2nd Cir.), which ruled last summer that the public has a qualified First Amendment right of access to docket sheets. The court remanded the case to the federal district court determine whether, in each particular case, there was a judicial order to seal the docket sheet. (*Hartford Courant v. Pellegrino*)

Since the system was uncovered, all but a few hundred Level 2 cases have been unsealed, "so the fight now is pretty much about the Level 1 cases," said Klau.

The judicial branch identified 185 Level 1 civil and family cases as of December 2002. Although the Connecticut Supreme Court passed new court rules that abolished Level 1 secrecy in July 2003, the change did not apply retroactively. About 42 cases remain classified as Level 1, according to Klau.

He said U.S. District Judge Robert Chatigny, who is now presiding over the case, has received copies of the sealing orders in all Level 1 cases and some Level 2 cases.

The judicial branch filed for summary judgment, claiming that the docket sheets are covered by the sealing orders that have been provided to Chatigny. The media says it needs to see the sealing orders to respond to the summary judgment motion.

"How do you challenge the legitimacy of a sealing order, and whether or not it applies to a docket sheet, if you can't even see that?" Klau asked. He said he will move to compel disclosure if the judicial branch refuses to comply with the discovery requests.

No one knows which judges ordered "super-sealing" in the vast majority of the concealed cases — "and the judicial branch doesn't want us to know," Klau said.

He said the *Courant* and *Law Tribune* asked, in front of Judge Chatigny, for the names of those who signed the sealing orders, but lawyers for the judiciary were adamant that the identities of those judges be kept secret. Ultimately the sealing orders were submitted to Judge Chatigny with the names of the judges who issued them redacted, Klau said.

How to fight it

Lawyers say the press has to be aggressive in challenging court secrecy right from the start. Cases such as *Richmond Newspapers, Inc. v. Virginia* and *Press-Enterprise Co. v. Superior Court ("Press Enterprise II")*, in which the United States Supreme Court declared the public's First Amendment right of access to court proceedings and documents, provide the ammunition.

"I actually blame the media somewhat [for the secrecy in the Jackson case] because I think initially they backed down to Judge Melville, thinking if they were compliant he wouldn't be so tough. Wrong," Levenson said. "The media should be the media of the *Press-Enterprise* time, and the media should be constantly filing and appealing and asserting First Amendment interests — because if they don't, no one else can."

Boutrous, whose appellate brief says his clients fought for public access "from the very beginning" of the Jackson case, said it is important to take a strong position based purely on the law. "The law is very much on our side on these points," he said.

At the same time, he advised, "do your best to get what you can as soon as you can get it."

In addition to arguing vigorously in favor of access, the media have tried to keep the lines of communication open with the court and persuade Melville to disclose as much information as possible, Boutrous said. As a result, the judge has been "willing to listen to our arguments. He has changed his approach, and as the case rolled on, he released more and more information," he said.

Klau said if a reporter learns of a secret docket, he or she should ask the court clerk to see the file. If a verbal request is denied, make it in writing. If the clerk still says no, the press has to decide whether to pursue legal action.

The problem, he said, may be finding out about the secret case in the first place.

"At least in these high profile cases, whether it's Michael Jackson or Kobe Bryant or Martha Stewart, the existence of the case is a matter of public record, and the press can challenge specific sealing orders," Klau said. "But when the entire case disappears, unless you're lucky and somebody's telling you there's something funny going on, nobody knows."

And as the public grows ever more interested in high-profile cases, the press likely will have to continue to wage the battle for access.

"It looks to me like trials are going to be an even bigger story than they've ever been," Deutsch said. "People are fascinated with them, and we have to somehow get a handle on this and get our message across that the public has a right to know what's going on at trials. It's as simple as that.

"I'm sure that most of the judges in these high-profile trials would be very happy if they could have them private — have their own private trial! But there are huge amounts of money being expended, public money, on these cases, and the justice system itself is on trial in these cases," Deutsch said.

"Trying to shut it down is not the answer."

Cases cited:

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"Secret Justice: Secret Dockets" is available at www.rcfp.org/secretjustice/secretdockets