

Presumption of Public Access to Judicial Records:
What is the Constitutional Underpinning?
by
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Abstract

Federal and state courts at all levels recognize a presumption of public access to judicial records. All courts at all levels in both systems appear to recognize that presumption at common law. Many courts, but by no means all, view the underpinning of the presumption as the United States Constitution. The United States Supreme Court, for one, has not addressed whether there is a foundation for the presumption in the Constitution.

Courts which recognize a constitutional basis for the presumption of public access to judicial records usually point to the decision in *Nixon v. Warner Communic's, Inc.*, 435 U.S. 589 (1976) as the source. However, the Court said that it granted certiorari in that case to review the holding "that the common-law right of access to judicial records" required a federal district court to release tapes admitted into evidence in the criminal trial of President Nixon's former advisers. Although issues of First Amendment access by the press to a criminal trial, and Sixth Amendment guarantees of public access to attend criminal trials were raised in that case, there was no issue before the Court of a constitutional right of public access to judicial records.

The presumption has since reached other courts for consideration but it has not been considered by the Supreme Court. To the extent that such a presumption is required by the Constitution, it will impose a higher burden on the party seeking to prevent disclosure than does the common-law presumption.

The purpose of this article is two-fold: first, to explore the reasoning given by courts which have found a constitutional basis for the presumption and, second, to examine reasons to recognize a constitutional foundation for the public to access judicial records.

Biography

I am an "a, v" rated attorney, an elected member of the American Law Institute, and the author or co-author of four books. I supplement two of my books several times a year: *LITIGATION AND PREVENTION OF INSURER BAD FAITH*, now in its Third Edition in Two Volumes with 2022 Supplements in process, published by Thomson Reuters West Publishing, the First Edition of which was published in 1985 by Shepard's/McGraw-Hill; and *CATASTROPHE CLAIMS* (in process November 2021), of which I am co-author.

I have written many other works published by Thomson Reuters West Publishing, Lexis-Nexis, the American Bar Association, and other publishers. I wrote these books and articles for various legal journals, and maintained two blogs, all while actively practicing law and testifying as an expert witness. My full-time position now is that of a writer including continuing to write the blogs I started fourteen years ago.

Key words

Public access to judicial records, First Amendment, Sixth Amendment