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Emergency stance has led some courts to try to ban media from attending hearings

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Some sheriffs and judges in California have barred the media and public from courtrooms, citing authority under emergency provisions in the state Penal Code.

However, media law experts say the code section expressly makes exceptions for members of the media precisely during a time of emergency, so they can fulfill their First Amendment role of gathering and disseminating information.

“It’s the one circumstance where the press has special access over the public,” media law expert Duffy Carolan of Jassy Vick Carolan LLP said in a phone interview after she was contacted by a reporter who was concerned he might not have access to a court in Contra Costa County, after it issued a statement indicating the court would be closed to the public.

Most presiding judges throughout the state have closed their courts, allowing only criminal departments to remain open for pressing matters.

Most have allowed the public and media to attend these criminal matters, with limitations to maintain social distancing in the courtroom. Some have not.

For instance, the Alameda County Superior Court said on its website, “Given public health directives regarding crowd size and social distancing, and given that our courthouses are currently closed to the public, any arraignments heard pursuant to the above will not be open to the public.”

Santa Clara County public information officer Benjamin T. Rada said Monday only members of the media who obtain

permission from a judge presiding over a specific hearing would be allowed access to that proceeding, but all other members of the public would not be granted access. Rada also said there are no other means, digital or otherwise, for the public to observe.

After being contacted by the reporter, Carolan said she advised him that under Penal Code 409.5 — which gives agencies the au-

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thority to bar the public from a particular area — exceptions for members of the media do exist and that he should be given access.

“It’s an important provision that is a balance between public safety and the public interest in having the press cover emergency situations and provide that vital information about the situation, so it allows a member of the press special access, under a statutory right,” Carolan said.

The reporter was subsequently allowed access after he contacted Contra Costa county Presiding Judge Barry Baskin.

“We currently have no plans for generalized courtroom media access through a pool or otherwise,” Baskin wrote in an email to the reporter. “The court must do its best to minimize attendance in its single courtroom to comply with local and state recommendations as to spacing and number of people in the enclosed area.

Media will, of course, be granted access to attend as space permits.”

In another instance, a Daily Journal reporter was barred from entering the Orange County Central Justice Center last Thursday after Superior Court Judge Kimberly K. Menniger issued a last-minute order opening a number of courtrooms to hear criminal proceedings. The order left attorneys scrambling to get themselves

be violated when the public is barred from a criminal courtroom.

“The public and press have an absolute right to be present in both civil and criminal proceedings,” Kaufman said in an email Friday. “If criminal trials proceed, accommodations must be made for the public and press to attend, such as continuing trials for those defendants not in custody until after the dangers of Covid-19 have passed or live-streaming trials that must proceed pursuant to the Sixth Amendment’s guarantee of a speedy criminal trial.”

Kaufman said while it remains to be seen whether the exception under Penal Code Section 409.5(d) for the media to enter emergency zones will apply to criminal trials in the context of the Covid-19 pandemic. “If a courtroom is deemed safe enough for a judge, a defendant, attorneys ... a bailiff, a court reporter ... to convene, it seems only reasonable that credentialed media should be allowed to attend.”

Constitutional law expert Eugene Volokh, a professor at UCLA School of Law, shares Kaufman’s Sixth Amendment concerns, reiterating the need for live-streaming.

“There’s a constitutional right of public access to court hearings, which can be overcome only when closure is the least restrictive means of serving a compelling government interest,” Volokh wrote in an email. “Here, physical exclusion of the public should be permissible in order to prevent illness and death — but only if audio and video recordings are made promptly available, since that is much less restrictive than categorical secrecy.”

and their clients to appearances, but initially left reporters and the public without access.

The Orange County court subsequently provided live-streaming of the proceedings on its website.

Chief Justice Tani G. Cantil-Sakauye has issued many recent emergency orders for the courts, but none address blocking access for the media. The chief’s office had no additional response to questions about the issue on Monday.

In an email Thursday, Blaine Corren, a public information officer for the Judicial Council, wrote, “At this time, the council has not shared any formal guidance with the courts on media access.

Other than right-of-access issues for the media, Rebecca N. Kaufman who leads the media law group at Bergeson LLP in Beverly Hills, said a defendant’s Sixth Amendment right to a public hearing and speedy trial may

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