Kentucky's governments are more open than most, but family courts worry advocates

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Kentuckians can feel confident their government is operating with a relatively high degree of transparency and openness, except for "serious problems" in the family court system, which includes juvenile proceedings.

That's the view of Jon Fleischaker, a Louisville lawyer who wrote Kentucky's open-government laws and remains the state's foremost First Amendment attorney.

"We're doing a lot better than other places," Fleischaker said in an interview. "That may be damning with faint praise – other places have problems. But I think we have a governor who believes very strongly in First Amendment issues," and a state high court that often sides with advocates of open government.

"The Supreme Court issued a terrific decision in the fall of 2008 on the University of Louisville Foundation – that donor names must be open," Fleischaker said. "I don't think we would have gotten that any place else in the United States."

The ruling ended a long legal battle between the university and The Courier-Journal, which Fleischaker represents. On July 12, the Louisville newspaper published a front-page story and online database about the $156 million in contributions the foundation received from 2004 to 2009.

Another major player in open-government issues is the attorney general, whose opinions in open-records and open-meetings matters have the force of law unless appealed to circuit court. Jack Conway, who was elected attorney general in 2007, has issued decisions generally supportive of open government.

When the Kentucky Open Government Blog (http://kentuckyopengovernmentblog.bplogspot.com) began early this year, Conway welcomed it, saying he had the duty and privilege to promote the ideal stated by Supreme Court Justice Louis Brandeis, a Louisville native: "Sunlight is said to be the best of disinfectants; light the most efficient policeman."

Fleischaker said the open-government atmosphere underwent a marked improvement after the 2007 gubernatorial election, in which Steve Beshear unseated Ernie Fletcher. "It was far different in the Fletcher administration," he said. "I think that (now) there is a continuing effort in Kentucky by most officials to try to comply with openness and transparency required by law. That doesn't mean everyone does it – they don't, especially local law-enforcement agencies. But generally I think we've held our own over the past couple of years."

The General Assembly has had some problems with open-government issues, but "That's nothing new," Fleischaker said. He cited the attempt in the 2009 session to create a legislative investigative agency exempt from open-records laws, calling it "a terrible idea." The proposal quickly drew public criticism and was withdrawn by the legislative leaders who proposed it.

Fleischaker also represents the Kentucky Press Association, and agreed with KPA Executive Director David Thompson's judgment that the 2009 session was a good one for open government because the legislature passed no new restrictions on government openness. "That's a great year – no harm done," Fleischaker said. "We've always taken the position that no harm done is a victory."

For KPA and other open-government advocates, legislative sessions are usually a matter of playing defense. "We don't seek legislative solutions to certain problems," Fleischaker said, "because we could always come out worse than we went in."

Fleischaker applauded recently installed Chief Justice John Minton's publicly stated intention to improve openness and transparency in the court system, including unspecified changes in family courts.

"The juvenile court system and the parts of the family court system that are closed to the public have become rife with at least opportunities for mischief," Fleischaker argued. "Due process often doesn't apply. Nobody's looking at what's going on, the public can't find out, can't get court records. This encourages less than due process."

Those courts, and the Cabinet for Health and Family Services, combine to create the biggest black hole in Kentucky government, in Fleischaker's view. "That's our biggest problem," he said. "You have this huge state agency with no one being held responsible, that simply has no public supervision. Social workers are off doing their own thing. We have a court system that has no public responsibility, we have elected judges who are operating in secret, so there's no way to know what they're doing, how they're doing. The public has no idea. I think it's a huge problem."

For example, Fleischaker said, social workers have too much unchecked power to remove children from the home. "We hear stories (of social workers saying) 'If you don't do this, I'm going to take your kids away,' 'If you don't do that, I'm going to take your kids.' That's a pretty awesome power of the state, to take your kids. Where is the oversight? Why can't you protect the kids and still give the parents due process?"

Chief Justice Minton said in an interview, "I see the problem there." He noted that he is just one of seven members of the Supreme Court, who collectively set rules for the court system, but "I would be inclined to believe that things that happen in court happen in a public place, that proceedings of all kinds should be open until I am convinced otherwise."He said he is also considering more openness in disciplinary proceedings, which are confidential unless action is taken against a lawyer or judge. "I'm certainly going to be on the side of making openness the default position," he said.

Minton said some confidentiality in juvenile courts is acceptable, since those courts often dealt with sensitive issues such as sexual abuse.

Juvenile proceedings have historically been closed to protect the long-term interests of the children involved, but Fleischaker said that makes it easier to abuse the system. "I think there are real abuses going on," he said, without citing any specific cases. "You wouldn't have these abuses in many cases if you had open courts. You just wouldn't have them."

Reports of abuses led former Chief Justice Joseph Lambert to support legislation that would have given judges more discretion to open child-protection proceedings, but "He was surprised at how little traction it got among the legislators," Minton said. Lawmakers did open dockets of juveniles charged with violent crimes.

The new chief justice said his initiative for more openness in the system was originally driven by a desire for more transparency in its finances and administration, partly because of complaints from legislators. But he said the establishment of family courts in most areas, and the election of judges who ran for the new seats, "is causing a culture change" in the system.

"They have a special calling to that job," he said of family court judges. And now that juvenile courts are part of family courts, the longstanding secrecy that surrounds juveniles is spreading into non-juvenile proceedings in family court.

But some children's advocates say more openness wouldn't necessarily help juveniles.

"Mr. Fleischaker equates openness in juvenile court with greater due process and less abuse. I have seen no studies which indicate that either is true," said Kim Brooks Tandy, executive director and founder of the Covington-based Children's Law Center. She said she has helped evaluate systems for defense of the indigent "in more than a dozen other states" and has seen no correlation between openness and "fundamental fairness and basic due process protections for children and youth."

Tandy said courts and agencies can be held accountable through appellate courts, commissions that regulate conduct of lawyers and judges, foster-care review boards and the Court Appointed Special Advocate program to help juveniles who have been removed from their homes.

"A core principle of the juvenile court since its inception has been protecting youth from feeling the public stigma of court involvement, which studies show can provoke kids to surrender and give up" trying to reverse course, Tandy said. She contended that information about juvenile offenders is often sought "to punish the child of family or to sensationalize their circumstances."

Tandy acknowledged, "There are valid interests on both sides of this issue," and suggested that the state needs "a comprehensive statistical data collection on the youth in the system and how they are faring at every major juncture in the system."

Minton said his office hopes to submit a draft of new rules to the Judicial Council, a panel of judges, lawyers and legislators who advise the Supreme Court, by this fall.

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