

**Arizona Reporter's Handbook On Media Law**

7<sup>th</sup> edition

Perkins Coie LLP

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## **Arizona Reporter's Handbook on Media Law**

This seventh edition of the Arizona Reporter's Handbook on Media Law was prepared by Perkins Coie LLP. This edition marks 34 years that Perkins Coie has represented the First Amendment Coalition of Arizona, Inc. and provided this Handbook to the Coalition's member organizations: the Arizona Broadcasters Association, the Arizona Cable Telecommunications Association, the Arizona Newspapers Association, the Society of Professional Journalists and the Arizona Press Club. This Handbook addresses: (1) access to the news, including media access to court proceedings, public records, governmental meetings and facilities, and private property; (2) interference with the news gathering process, such as subpoenas, search warrants and gag orders; (3) limitations on the content of communications, including prior restraints and the laws of defamation and privacy; (4) promises of confidentiality to sources; and (5) copyright and trademark law.

This Handbook provides a general summary of media law and should not be relied upon or used as a substitute for seeking your own attorney's advice on the specific legal issues. If you wish further advice about anything contained in this Handbook, contact Daniel C. Barr at Perkins Coie at 602-351-8000 or through the firm's website, [www.perkinscoie.com](http://www.perkinscoie.com), which contains a description of the firm's Media Law practice and lists those professionals who practice in the area.

## **TABLE OF CONTENTS**

### **DETAILED TABLE OF CONTENTS**

#### **I. ACCESS TO THE NEWS**

#### **II. INTERFERENCE WITH THE NEWS GATHERING PROCESS**

#### **III. LIMITATIONS ON THE CONTENT OF COMMUNICATIONS**

#### **IV. PROMISES OF CONFIDENTIALITY TO SOURCES**

#### **V. COPYRIGHT**

#### **VI. TRADEMARK**

#### **APPENDIX A: Arizona Public Records Law Request Letter A-1**

#### **APPENDIX B: Federal Freedom of Information Act Request Letter B-1**

## [Detailed Table of Contents](#)

### **I. ACCESS TO THE NEWS**

#### **A. Court Proceedings**

1. Constitutional Rights of Access Under the First Amendment
2. Access to Arizona Court Proceedings
  - a. Access to Arizona Court Records
  - b. Access to Search Warrant Documents
3. Depositions
4. Photographing and Broadcasting Court Proceedings
  - a. Arizona State Courts
  - b. Federal Courts
5. What to Do When a Courtroom Is Closed

#### **B. Public Records**

1. Arizona Records
  - a. Denial of Access
  - b. Records Deemed Confidential
2. Federal Records
3. What to Do When You Are Denied Access to Records
  - a. Arizona Governmental Agency Records
  - b. Records of Federal Agencies
  - c. Arrest Information

#### **C. Open Meetings**

1. Arizona
  - a. Definitions
  - b. Minutes
  - c. Notice and Agendas
  - d. Executive Sessions
  - e. Exemptions and Limitations
  - f. Effect of Violation and Remedies
  - g. Judicial Construction of the Open Meetings Law
  - h. Arizona Attorney General Opinions on Open Meetings Questions
2. Federal Agencies

3. What to Do When You Are Excluded From a Meeting

#### **D. Access to Public Facilities**

1. Constitutional Right
2. State of Arizona's Policy Regarding Prisons

#### **E. Private Property**

#### **F. Selective Access**

## **II. INTERFERENCE WITH THE NEWS GATHERING PROCESS**

### **A. Subpoenas Issued Against the Press**

1. Introduction
2. Shield Laws
3. First Amendment Qualified Privilege
  - a. Information Sought by Investigative Bodies
  - b. Information Sought by Criminal Defendants
  - c. Information Sought by the Judge to Discover the Source of Interference With the Criminal Process
  - d. Information Sought by Civil Litigants When the Press Is Not a Party
  - e. Information Sought by Plaintiffs in Libel Actions Against the Press
4. Arizona's Media Subpoena Law
5. What to Do if You Are Subpoenaed or Asked to Testify
  - a. General Rules
  - b. Subpoenas Requesting Eyewitness Testimony
  - c. Subpoenas of Your Sources, Notes, Tapes and Other Materials Not Published or Broadcast
  - d. Subpoenas of Library Files

### **B. Search Warrants**

### **C. Gag Orders Against Trial Participants**

1. Actions to Take When a Gag Order Is Issued Against Trial Participants

### **D. Contempt of Court**

## **III. LIMITATIONS ON THE CONTENT OF COMMUNICATIONS**

### **A. Prior Restraints in the Coverage of Trials**

1. What to Do When a "No Print" Order Is Entered

### **B. Prior Restraints and Compelling State Interests**

## **C. Libel**

1. Introduction
  - a. Defamatory Statement
  - b. Statement of Fact
  - c. Concerning the Plaintiff
2. Privileges and Defenses
  - a. Truth
  - b. A Fair and Accurate Summary of Official Proceedings
  - c. Conditional Privileges
  - d. "Neutral Reportage"
  - e. Constitutional Privilege
  - f. Public Officials
  - g. Public Figures
  - h. Private Persons
  - i. Immunity for Online Content
3. Damages and the Arizona Correction Statute
4. Criminal Libel
5. How to Handle a Libel Claim

## **D. Privacy**

1. Public Disclosure of Private Facts
2. False Light in the Public Eye
3. Intrusion Upon Seclusion
4. Appropriation of Name or Likeness
5. Statutory Provisions

## **IV. PROMISES OF CONFIDENTIALITY TO SOURCES**

## **V. COPYRIGHT**

### **A. Introduction to the Law of Copyrights**

1. Subject Matter
2. Ownership
  - a. Copyright Ownership and the Employment Relationship
  - b. Joint Works
  - c. Collective Works

3. Rights
4. Infringement
5. Registration

**B. Limitations on Copyright Protection**

1. The Fair Use Doctrine
2. Parody

**C. The Digital Millennium Copyright Act**

**VI. TRADEMARK**

**A. What Is a Trademark?**

**B. Registration**

**C. Consequences for the News Media**

1. Parody
2. Generic Use
3. Innocent Infringement

**•APPENDIX A: Arizona Public Records Law Request Letter A-1**

**•APPENDIX B: Federal Freedom of Information Act Request Letter B-1**

**FIRST AMENDMENT TO THE  
CONSTITUTION OF THE  
UNITED STATES**

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

**ARTICLE TWO, SECTION SIX  
OF THE CONSTITUTION OF  
THE STATE OF ARIZONA**

*Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.*

## I. ACCESS TO THE NEWS

The First Amendment does not guarantee a right of access to all sources of information within government control or an unrestricted right to gather information. Nevertheless, the courts have recognized the news media's special role in gathering information for dissemination to the public, and the United States Supreme Court has acknowledged that "news gathering is not without its First Amendment protections" because "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 707, 681 (1972). Although the scope of this right of "news gathering" cannot be stated with precision, there is substantial case authority demarcating the right of the press to gather information in a variety of factual settings, which are discussed separately in Sections I(A) through I(F) below.

### **A. Court Proceedings**

#### **1. Constitutional Rights of Access Under the First Amendment**

Once court proceedings are opened to the public, the press has a virtually absolute right to report all events that transpire in the courtroom. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The limited situations in which a court may restrict publication of open court proceedings are discussed in Section III(A) of this Handbook.

During the 1980s, the United States Supreme Court decided five landmark cases upholding, in various contexts, the First Amendment right of the press to attend criminal proceedings. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980), the United States Supreme Court recognized a First Amendment right of the press and public to attend criminal trials. As then-Chief Justice Burger observed, a trial courtroom is "a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." Under *Richmond Newspapers*, a judge may not close a criminal trial without first making specific findings of an overriding interest in closing the courtroom and that alternatives less drastic than closure would be ineffective.

Following its ruling in *Richmond Newspapers*, the Court further strengthened the media's right of access to criminal trials by invalidating a statute that required closure of criminal sex offense proceedings during the testimony of minor victims. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982), the Court explicitly articulated the *Richmond Newspapers* presumption of access and established a rigorous standard for excluding the press from any criminal trial. Any denial of access must be "necessitated by a compelling governmental interest, and [be] narrowly tailored to serve that interest." *Globe Newspaper*, 457 U.S. at 606-07. While the Court acknowledged that these determinations could be made only on a case-by-case basis, it emphasized the importance and value of the open criminal trial and noted that "the circumstances under which the press and public can be barred from a criminal trial are limited."

In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"), the United States Supreme Court significantly enhanced the First Amendment right of access. *Press-Enterprise I* recognized the right of the press to attend the voir dire examination of potential jurors in a criminal proceeding. The Court refined the *Globe*

*Newspaper* test, declaring that the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." In the wake of *Press-Enterprise I*, sweeping closure orders—unsupported by specific findings that the restraint on access is constitutionally "compelling"—are subject to successful challenges by the press.

In *Waller v. Georgia*, 467 U.S. 39 (1984), the Supreme Court held that the right of access also extends to a suppression hearing prior to presentation of evidence to the jury. Finally, in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*"), the Supreme Court extended the First Amendment right of access to criminal pretrial proceedings as conducted in California because (1) the proceedings have traditionally been open and (2) public access to the proceedings plays a significant role in their functioning. The Court held that these preliminary hearings "cannot be closed unless specific, on the record findings" demonstrate that the test articulated in *Press-Enterprise I* is met. Further, the Court held that if the interest asserted is the defendant's right to a fair trial, a preliminary hearing cannot be closed, unless there is a showing (1) of "substantial probability" that publicity will prejudice the right; (2) that closure would prevent that prejudice; and (3) that no reasonable alternatives to closure can adequately protect the right. The Court did not specifically extend the right of access to pretrial proceedings. *But see El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (invalidating Puerto Rico statute providing for closure of preliminary hearings regarding whether defendant should be held for trial); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (one concurring opinion considering, but declining to decide, whether right of access extends to pretrial suppression hearings, but majority of justices finding qualified right of access).

The United States Court of Appeals for the Ninth Circuit, which includes Arizona, has "gone further and held that in general the public and the press have a qualified First Amendment right of access to pretrial hearings and documents." *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1515 (9th Cir. 1988); *see also Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990) (finding qualified First Amendment right of access to plea agreements and related documents). In *Seattle Times*, the court ordered disclosure of the defendant's and government's pretrial detention briefs and the defendant's financial affidavit.

The Ninth Circuit has held that to abrogate the right of access, three tests must be satisfied. First, "there must be a 'substantial probability that irreparable damage to [a defendant's] fair-trial will result' if [the proceeding is not closed]." Second, "there must be no less drastic alternative available." Third, "there must be a 'substantial probability that closure will be effective in protecting against the perceived harm.'" *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1146 (9th Cir. 1983), *cited with approval in Seattle Times*, 845 F.2d at 1513. Moreover, once the danger of prejudice has passed, transcripts of properly closed proceedings must be released. *See Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 947-48 (9th Cir. 1998).

The Supreme Court's decisions in *Globe Newspaper*, *Richmond Newspapers*, *Waller*, and the *Press-Enterprise* cases suggest that the Court would extend the First Amendment right of access to pretrial proceedings, as the Ninth Circuit and other courts have done.

While the United States Supreme Court has yet to consider the issue, federal appellate courts have extended the First Amendment right of access to also include *civil* court proceedings. For example, the United States Court of Appeals for the Third Circuit has upheld a First Amendment right of access for the press and public to attend a preliminary injunction hearing concerning a proxy fight. *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). Under *Publicker Industries*, before a civil proceeding may be closed, a court "must both articulate the countervailing interest it seeks to protect" by closure and "make 'findings specific enough that a reviewing court can determine whether the closure order was properly entered.'" *Id.* at 1071. Those findings must demonstrate that closure is essential to preserve an overriding interest and is narrowly tailored to serve that interest. *Id.*

In view of *Publicker Industries* (and other similar cases), the right of reporters to attend civil proceedings has gained firm recognition under the First Amendment. Other examples of courts extending the First Amendment right of access to civil court proceedings are *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (pre-enforcement challenge to proposed actions of Federal Trade Commission), *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984) (libel action), and *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337 (1999) (right of access applies equally in civil and criminal proceedings).

The First Amendment right to attend court proceedings is not absolute, however, and there are situations in which a courtroom can be closed to the public and the press. There may be other competing interests that, on balance, justify closed proceedings. For example, press coverage of court proceedings may infringe a criminal defendant's Sixth Amendment right to an impartial jury. Likewise, closing the courtroom to press coverage might be justified if state or trade secrets are the subject of testimony, or if a child or a particularly timid witness is testifying. On the other hand, as the Supreme Court stated in *Richmond Newspapers*, merely because all parties in the trial agree to closure is not sufficient to justify excluding the public. Because trials are presumed to be open, the party seeking to close the proceeding bears the burden of proving that the reasons for closure outweigh the public's right to know.

With increasing frequency, parties in matrimonial, bankruptcy, trade secret, and other business litigation cases are attempting to seal the entire court file in their matter by stipulating to its closure. However, "[t]he parties' desire and agreement that the court records [are] to be sealed falls short of outweighing the public's right of access to the files... Courts cannot honor such requests without seriously undermining the tradition of an open judicial system." *In re Johnson*, 20 Media L. Rep. (BNA) 1604, 1608 (Ill. App. Ct. 1992); *see also Lutz v. Lutz*, 20 Media L. Rep. (BNA) 2029 (Mich. Ct. Cl. 1992).

## **2. Access to Arizona Court Proceedings**

The Arizona Constitution also provides a right of access to court proceedings. Article II, Section 11 of the Arizona Constitution states: "Justice in all cases shall be administered openly, and without unnecessary delay." The Arizona constitutional right of access applies to pretrial proceedings. *See Phoenix Newspapers Inc. v. Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971) (defendant charged with multiple homicide not entitled to have reporters and public excluded from preliminary hearing); *see also Mountain States Tel. &*

*Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 355, 773 P.2d 455, 460 (1989) (observing that "*Jennings* today may define a broader free speech right under Arizona's constitution than the first amendment provides").

Apart from the Arizona constitutional right of access, Arizona Rule of Criminal Procedure 9.3(b) provides that all court proceedings in *criminal* cases shall be open to the public and representatives of the news media "unless the court finds, upon application of the defendant, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury." *See also Phoenix Newspapers*, 107 Ariz. at 560, 490 P.2d at 566 ("Clear and present danger means that the substantive evil must be extremely serious and the degree of imminence extremely high."). A criminal defendant's fear of testifying in open court does not amount to such a clear and present danger. *KPNX-TV Channel 12 v. Stephens*, No. 1 CA-SA 14-0213, WL 7240343 (Ariz. Ct. App. Dec. 16, 2014). Even if the proceeding is closed, however, Criminal Procedure Rule 9.3 provides that the transcript of the closed proceeding must be made available to the public and the news media upon the completion of the trial or the final disposition of the case.

Rule of Criminal Procedure 9.3(c) distinguishes between members of the press and the general public, allowing the press greater access to court proceedings than the general public. *See Citizen Publ'g Co. v. Buchanan*, 22 Ariz. App. 521, 528 P.2d 1280 (1974). First, greater justification is needed to exclude the press than other spectators. For example, mere embarrassment of a witness is sufficient to exclude the general public under the Arizona rule, but insufficient to exclude the press because the press may not be barred from a criminal trial unless there is a "clear and present danger" to the defendant's right to a fair trial. Second, a court may exclude the general public on its own initiative, but can exclude the press only after a motion from the defendant. If the press is excluded, the court must state the factual findings that justify the closure.

As noted above, Criminal Procedure Rule 9.3 applies only to *criminal* trials. There is no comparable rule in Arizona applicable to civil cases. As for cases in juvenile court, Juvenile Court Rule of Procedure 19 gives a court the discretion to exclude the public and admit only those people with a direct interest in the case. Under Juvenile Court Rule 19, the judge must balance society's interest in open proceedings with the needs of the juvenile. *See Wideman v. Garbarino*, 160 Ariz. 16, 20, 770 P.2d 320, 324 (1989).

#### **a. Access to Arizona Court Records**

Access to records in Arizona state courts is governed by Arizona Supreme Court Rule 123, which, modeled after the Arizona Public Records Law [see Section I.B.1 of this Handbook], presumes that "the records in all courts and administrative offices of the Judicial Department of the State of Arizona are... open to any member of the public for inspection or to obtain copies at all times during regular office hours at the office having custody of the records." Rule 123(c)(1).

Rule 123 sets out the limits to access in both case files and court administrative records. Rule 123 also addresses how to obtain access to paper and electronic records. If a court custodian of the record denies access to a case file or an administrative record, you may request that the presiding judge of that court review the denial of your request. "A request for review must be filed in writing with the custodian who denied the request within 10

business days of [the] denial." The custodian must then "forward the request for review, a statement of the reason for denial, and all relevant documentation to the presiding judge or designee within 5 business days of receipt of the request for review." The presiding judge or designee shall issue a decision "not more than 10 business days" after receiving the written request for review. Rule 123(f)(5)(A). A party may appeal the decision of the presiding judge or designee by filing a Special Action in the Arizona Court of Appeals. Rule 123(f)(5)(B).

#### **b. Access to Search Warrant Documents**

Arizona law provides that search warrants and related documents "shall be open to the public as a judicial record" after the execution and return of the warrant or expiration of the five-day period after the issuance. A.R.S. § 13-3918. The mere assertion that release of search warrant documents could be harmful to an ongoing investigation is insufficient to justify sealing the materials. *See Wash. Post Co. v. Hughes*, 923 F.2d 324, 328 (4th Cir. 1991) (affirming the district court's release of a search warrant affidavit: "The relative importance of the asserted interests at stake is certainly not dispositive, for the inquiry must additionally focus on whether the asserted rights are actually compromised.").

### **3. Depositions**

Rule 26(c) of both the Federal and the Arizona Rules of Civil Procedure empowers courts to issue protective orders concerning discovery matters. A party or the person from whom discovery is sought must show "good cause" that the order is necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c). *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (newspaper defendant in a libel case may not publish material it obtains from the plaintiff subject to a protective order). The protective order may include a limitation on the persons who can attend a deposition. *See Lewis R. Pyle Mem'l Hosp. v. Super. Ct.*, 149 Ariz. 193, 197, 717 P.2d 872, 876 (1986) ("[A]s a general rule pretrial depositions are not public proceedings.").

### **4. Photographing and Broadcasting Court Proceedings**

The courts generally have held that local court rules prohibiting the taking of photographs in courtrooms do not violate the First Amendment. The rationale of these decisions is that under certain circumstances (most often in criminal cases), photographs tend to "disrupt" judicial proceedings.

Before the United States Supreme Court's decision in *Chandler v. Florida*, 449 U.S. 560 (1981), many believed that a defendant in a criminal matter had an unequivocal right to prohibit cameras from recording his trial and other ancillary proceedings. In *Chandler*, the Court stated that televising a criminal trial does not violate a defendant's right to a fair trial when the coverage is neither disruptive nor obtrusive. However, as one federal court has stated: "Holding that television coverage is not always constitutionally prohibited... is a far cry from suggesting that television coverage is ever constitutionally mandated." *United States v. Edwards*, 785 F.2d 1293, 1296 (5th Cir. 1986). Thus, after *Chandler*, a judge has a considerable amount of discretion regarding the use of photography in his or her courtroom. The court may allow cameras (as do all 50 state courts in varying degrees

and circumstances) or prohibit them altogether (as does the District of Columbia and all federal courts except the Second and Ninth Circuit Courts of Appeal).

#### **a. Arizona State Courts**

Arizona Supreme Court Rule 122 permits, subject to certain limitations, "the use of recording devices in the courtroom..."

A request to use a camera "must be submitted" sufficiently in advance of the proceeding to allow the judge to consider it in a timely manner." Rule 122(c)(2). If the camera request is for a trial, it must be submitted at least seven calendar days before the trial date. Rule 122(c)(2)(A). If the proceeding is not a trial, the camera request must be submitted no less than 48 hours beforehand. Rule 122(c)(2)(B). If the court schedules any proceeding on less than 72 hours notice, the camera request should be filed as soon as reasonably possible so as not to delay or interfere with the proceeding. Rule 122(c)(2)(C). Parties or witnesses may object to camera coverage. Rule 122(c)(4) and (5). Camera coverage of juvenile court proceedings is usually prohibited. Rule 122(k)(5). Under Rule 122, the judge must give "due consideration" to certain enumerated factors, including the fair trial rights of parties, the privacy rights of witnesses and parties, and the safety of any party witness or juror. Rule 122(d). A trial judge's decision concerning a camera coverage request may only be appealed to the Arizona Court of Appeals by a special action. Rule 122(d).

In the event permission to use a camera is granted, Rule 122 provides specific requirements for the number, decorum and location of cameramen as well as the types and usage of electronic equipment permitted (including sound and light restrictions). Rule 122(k) forbids coverage of jurors in any manner "except that juror may expressly consent to an interview after the jury has been discharged."

Reporters and other members of the public may use their smartphones, tablets or other portable electronic device to exchange email and texts, access the Internet and engage in social media while in court. Arizona Supreme Court Rule 122.1(e)(1). Using a portable electronic device inside the courtroom for photography and audio and video recording is prohibited unless allowed by the Court under Rule 122. Rule 122.1(c)(1). In areas within the courthouse other than a courtroom, no one may use a portable electronic device to "photograph or record an individual without that individual's express consent." Rule 122.1(c)(2).

Any allowed use of a portable electronic device may be terminated by the judge if it is disruptive or distracting to a court proceeding, or is otherwise contrary to the administration of justice. Rule 122.1(e). Under no circumstances may a portable electronic device be used to make or receive phone calls while court is in session. Rule 122.1(e)(2). Finally, all portable electronic devices must be silenced while in the courtroom. *Id.*

#### **b. Federal Courts**

At present, Arizona federal courts prohibit "[a]ll forms, means, and manner of capturing, recording, broadcasting, transmitting, and/or storing of anything by use of electronic, photographic, audio and/or visual means or devices... in all courtrooms and environs thereto during the course of, or in connection with, any judicial proceedings whether the

Court is actually in session or not." Ariz. LR Civ. 43.1; *see also United States v. Yonkers Bd. of Educ.*, 747 F.2d 111 (2d Cir. 1984) (discussion of the legal rationale for prohibiting tape recorders in federal courtrooms).

In 1990, the Federal Judicial Conference approved a pilot test of cameras for eight courthouses throughout the country—six district courts and two appellate courts. The experimental guidelines were similar to the Arizona rules, with the major exception that the program applied only to civil cases. (Federal Rule of Criminal Procedure 53 has banned cameras in federal criminal cases since its adoption in 1946.) The experimental program ended in 1993 and a summary report was issued in 1994. Following the report, the Judicial Conference recommended in 1996 that each federal judicial circuit ban cameras in its courtrooms. The Second and Ninth Circuits decided to permit cameras, but only in the appellate courts.

In 1998, the United States House of Representatives approved a bill that would have allowed federal judges to allow cameras and microphones in civil and criminal hearings, but the bill died in a Senate committee. A new bill that would authorize federal judges to decide whether to allow cameras on a case-by-case basis was introduced in 2000, but again the bill did not receive Senate approval. The Federal Judicial Conference has continuously opposed efforts to allow cameras in federal courtrooms.

In April 2001, the District Court for the Southern District of Indiana rejected a media request to broadcast the execution of Oklahoma City Bomber Timothy McVeigh live over the Internet. *See Entm't Network, Inc. v. Lappin*, 134 F. Supp. 2d 1002 (S.D. Ind. 2001). The court found that, although the press has a right to attend executions, the federal regulation prohibiting videotaping or photographing executions did not violate the First Amendment because it was a reasonable means of ensuring orderly and solemn executions, and, in any event, did not impair the press's ability to attend the execution.

## **5. What to Do When a Courtroom Is Closed**

If you are excluded from a court proceeding, you should do the following:

- a. Notify your editor or news director, and through him or her, your legal counsel;
- b. If you learn in advance that a hearing will be closed, or that a request will be made to close a hearing, notify the court in writing that you object to any closed proceedings and request the opportunity to be heard through counsel;
- c. Object to the closing of the proceedings on the record, if possible, and ask to be heard through counsel before the closed proceedings commence;
- d. If the court will not hear arguments from counsel, ask the court to stay further proceedings until application can be made to a higher court;
- e. Ask for a copy of the order closing the proceeding. If the order is not in writing, ask the court to enter a written order or to direct the court reporter to provide you with a transcript of the oral order and your objection to it if the objection is on the record;
- f. If the closed proceedings are already in session, send the judge a written objection and a written request for access to the proceedings. You should ask the bailiff or court employee to carry the written objection to the judge. Also request that the proceedings be stopped until either a hearing is held or an application for review of the court's order can

be made to a higher court. Finally, file your written objection with the clerk of the court under the docket number of the case involved;

g. Do not refuse to leave the courtroom when ordered to do so and do not attempt to force your way into a closed courtroom. You may be held in criminal contempt for failing to obey the order and for disrupting the proceedings;

h. Do not make any agreement with the judge whereby you agree not to publish a report of the hearing in return for his agreement to let you attend; and

i. If you learn from a source what transpired at the closed hearing, you are free to publish it.

If, despite your efforts, the court persists in keeping you out of the courtroom, you should consult your counsel, who may file an expedited appeal to open the proceedings. In Arizona, such an appeal is called a special action. In federal court, it is called a petition for writ of mandamus.

## **B. Public Records**

### **1. Arizona Records**

The Arizona Public Records Law provides that "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. Although the term "public records and other matters" is not defined by statute, the Arizona Supreme Court has defined "public record" as a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." *Mathews v. Pyle*, 75 Ariz. 76, 78, 251 P.2d 893, 895 (1952); *see also* A.R.S. § 39-121.01(B) ("All officers and public bodies shall maintain all records... reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state."). A document that is neither generated nor used by a public body in a capacity related to its duties is not a public record. *Salt River Pima-Maricopa Indian Cmty. v. Phoenix Newspapers, Inc.*, 168 Ariz. 531, 815 P.2d 900 (1991) (a federal government document that was neither created nor used by the state treasurer in the furtherance of state business is not a "public record" under Arizona law).

The statute's reference to "[p]ublic records *and other matters*" indicates that tangible and intangible records other than printed material are also subject to inspection and copying under the act. A.R.S. § 39-121 (emphasis added). This includes videotapes, *KPNX-TV v. Superior Court*, 183 Ariz. 589, 592, 905 P.2d 598, 601 (App. 1995); computer backup tapes of employee e-mail communication, *Star Publishing v. Pima County Attorney's Office*, 181 Ariz. 432, 434, 891 P.2d 899, 901 (App. 1994); and a public employee's non-personal e-mail communications related to government activities and sent during that employee's public employment, *Griffis v. Pinal County*, 213 Ariz. 300, 141 P.3d 780 (App. 2006). Indeed, the court in *KPNX-TV* suggested that the term applies to "all existing documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, regardless of physical form or characteristics." 183 Ariz. at 592, 905 P.2d at 601. And when the public record is maintained in an electronic format,

the electronic version of the record, including any embedded metadata, is subject to disclosure. *Lake v. City of Phoenix*, 222 Ariz. 547, 551, 218 P.3d 1004, 1008 (2009).

Although the Arizona Public Records Law does not contain any exceptions (such as those found in FOIA), Arizona appellate courts have indicated that FOIA may be useful as a guide in interpreting the Public Records Law. See *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 191 Ariz. 297, 300-01, 955 P.2d 534, 538-39 (1998); *Church of Scientology v. Phoenix Police Dep't*, 122 Ariz. 338, 342, 594 P.2d 1034, 1036 (App. 1979). However, records in the possession of Arizona agencies should be released unless an "important and harmful effect" on an official or agency would result from disclosure. *Church of Scientology*, 122 Ariz. at 341, 594 P.2d at 1035. Accordingly, unlike the federal law, the fact that a requested record is an interagency communication or is intended to be confidential is insufficient to prevent disclosure. The state must demonstrate that a "harmful effect" would result from the release. The Arizona Attorney General has made clear that "[d]oubts should be resolved in favor of disclosure." 1975-76 Ariz. Att'y Gen. Op. R75-781, at 145. In *Star Publishing*, 181 Ariz. at 432, 891 P.2d at 899, the Arizona Court of Appeals affirmed an order requiring Pima County to produce the computer backup tapes of the Pima County Assessor's Office for 1993, including e-mail communications of employees. In doing so, the court rejected the county's argument that "some of the material there recorded... might be protected," because the county failed to "demonstrate a factual basis why a particular record ought not to be disclosed to further an important public or private interest." *Id.* at 434, 891 P.2d at 901. The court also rejected the argument that the request, including an estimated 13,000 computer entries covering an entire year's worth of personnel records, telephone messages, and interoffice communications, was too broad. *Id.* Finally, the court also reversed the trial court's denial of attorneys' fees, holding that custodians of records act arbitrarily and capriciously if they "resist all disclosure on the ground that some documents may be legitimately kept secret." *Id.* at 435, 891 P.2d at 902.

In *Griffis v. Pinal County*, 215 Ariz. 1, 156 P.3d 418 (2007), the Arizona Supreme Court held that personal e-mails sent from a government-owned computer are subject to disclosure only if they have a "substantial nexus" with a government agency's activities. *Id.* at 4, 156 P.3d at 421 (quoting *Salt River*, 168 Ariz. at 541, 815 P.2d at 910). The Court noted that although the public records law creates a strong presumption in favor of disclosure, "disclosure of purely private documents does nothing to advance the purposes underlying the public records law." *Id.* Therefore, the Court must undertake a two-step process to determine whether the law requires disclosure. When the facts of a particular case "raise a substantial question as to the threshold determination of whether the document is subject to the statute," the court must first determine whether that document is a public record. *Id.* at 5, 156 P.3d at 422. (quoting *Salt River*, 168 Ariz. at 536, 815 P.2d at 905). If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies and, when necessary, the court can perform a balancing test to determine whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure. *Id.* Applying this standard, the *Griffis* court ordered an *in camera* review of disputed emails to determine whether they were subject to the statute. *Id.* at 6, 156 P.3d at 423.

Four cases decided by the Arizona Supreme Court between 1984 and 1993 clarified the

proper interpretation of the Arizona Public Records Law. In *Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (1984), the court considered whether a prison offense report detailing allegations of sexual assault that had been released to a reporter was subject to disclosure under the Public Records Law. The court explained that agencies are to dispense with the initial determination of distinguishing between "public records" and "other matters," and instead presume that such documents are subject to disclosure. An agency may only withhold documents if it is able to demonstrate that a "countervailing interest[ ] of confidentiality, privacy or the best interests of the state" outweighs the public's right to know. *Id.* at 490, 687 P.2d at 1245. Importantly, in holding that the offense report was subject to disclosure, the court reinforced Arizona's strong statutory policy favoring access to and disclosure of government documents.

In *Mitchell v. Superior Court*, 142 Ariz. 332, 690 P.2d 51 (1984), the Arizona Supreme Court considered a prisoner's purported privacy right (among other things) as grounds to withhold his presentencing report. Rejecting the prisoner's arguments, the court characterized the public's need for information about the disposition of offenders as "compelling" and the fulfillment of that need "the public policy of this state." *Id.* at 335, 690 P.2d at 54. The court made clear that "[t]he burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks nondisclosure rather than on the party that seeks access." *Id.*

In *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 806 P.2d 348 (1991), the Arizona Supreme Court reiterated the principles established in *Mathews*, *Carlson*, and *Mitchell*, stating that public records can only be withheld if their release would have an important and harmful effect on the agency or the officers. There, the court decided that under the Public Records Law, the Board of Regents was not required to release the names of all 256 "prospects" for the position of President of Arizona State University because to do so might "chill the attraction of the best possible candidates for the position." 167 Ariz. at 258, 806 P.2d at 352. However, the Board was required to release the names of the final 17 "candidates" because "[t]he public's legitimate interest in knowing which candidates are being considered for the job... outweighs [any] 'countervailing interests.'" *Id.*

In *Cox Ariz. Publications, Inc. v. Collins*, 175 Ariz. 11, 852 P.2d 1194 (1993), the Arizona Supreme Court considered whether police reports in an active, ongoing criminal prosecution are exempt from the Public Records Law. Holding that such records are subject to the Public Records Law, the court emphasized that the public official seeking to withhold public records must "specifically demonstrate how production of the documents would violate rights of privacy or confidentiality, or would be 'detrimental to the best interests of the state.'" *Id.* at 14, 852 P.2d at 1197. In *Cox*, the court held that the county attorney's conduct was arbitrary and capricious because he did not attempt to meet this burden. Consequently, the court awarded the newspaper plaintiffs their attorneys' fees pursuant to A.R.S. § 39-121.02(B).

All public bodies and officers are required by law to keep all records "reasonably necessary or appropriate to maintain an accurate knowledge of their official activities." A.R.S. § 39-121.01(B). By any definition, these records are public records and should be open for inspection unless classified as confidential under one of the specific statutes

referred to below.

Any person may request a copy of, or to examine, any "public record" or other matter during office hours, and the agency may charge a reasonable fee for providing copies of such records. A.R.S. § 39-121.01(D)(1). Also, any person may request the mailing of a copy of a public record "not otherwise available on the public body's website." *Id.* Payment in advance of copying and postage charges, however, may be required. *Id.*

In addition, "[i]f requested... an agency shall furnish an index of records or categories of records that have been withheld and the reasons [for withholding]." A.R.S. § 39-121.01(D)(2). The term "agency" for this purpose is defined by A.R.S. § 41-1001, but excludes the departments of public safety, transportation motor vehicle division, juvenile corrections and corrections. *Id.* The index "shall not include" privileged or confidential information as designated by statute or a court order, *and* a court or administrative tribunal "shall not" construe A.R.S. § 39-121.01(D)(2) "to prevent or require an order compelling a public body other than an agency to furnish an index." *Id.*

In any event, if the "custodian of a public record" does not have access to copying facilities, the person entitled to inspect the public record "shall be granted *access* to the public record" in order to make copies; however, those copies "shall be made while the public record is in the possession, custody and control of the custodian" and subject to the custodian's supervision. A.R.S. § 39-121.01(D)(3) (emphasis added).

A public body may not charge a fee for someone to inspect, but not copy, a public record. Ariz. Atty Gen. Op., No. I13-012 ("A public body in Arizona therefore cannot charge copying fees to recoup the cost of copies made internally to allow a member of the public to inspect records."). Nor may a public body charge a fee for a member of the public to use a personal device to copy a public record. *Id.*

A person requesting copies of public records for a commercial purpose is required to submit a certified statement setting forth the commercial purpose for which the copies will be used. A.R.S. § 39-121.03(A). Journalists involved in news gathering activities are *not* persons seeking public records for a commercial purpose. *Star Publ'g v. Parks*, 178 Ariz. 604, 875 P.2d 837 (App. 1993); *see also Media Am. Corp. v. Phoenix Police Dep't*, 21 Media L. Rep. (BNA) 2087, 2089 (Maricopa Super. Ct. Aug. 10, 1993) ("a request by the media in its newsgathering function is not a commercial purpose"); Ariz. Atty Gen. Op. I86-090, at 13-14. Similarly, the federal Freedom of Information Act provides that a FOIA request made by a "representative of the news media" is not made for a commercial purpose. 5 U.S.C. § 552(a)(4)(A)(ii).

#### **a. Denial of Access**

Any person wrongfully denied access to public records may bring a special action in superior court to obtain such records. The court may award attorneys' fees and other legal costs if the person seeking public records has "substantially prevailed." A.R.S. § 39-121.02(B). On the other hand, if an agency determines that release of some information contained in a public record would result in "substantial and irreparable private or public harm," that portion of the record may be withheld. In such a case, the agency must then release whatever portions of the document can be released to the public, with an eye toward making as much available to the public as possible. *Carlson*, 141 Ariz. at 491,

687 P.2d at 1246; *see also* 1975-76 Ariz. Att'y Gen. Op. R75-781, at 145 ("Doubts should be resolved in favor of disclosure."). Failure to release as much of the document as possible can constitute bad faith, entitling the person seeking access to the document to an award of attorneys' fees. The Arizona Supreme Court has upheld an award of attorneys' fees against the Maricopa County Attorney because the county attorney did not produce redacted documents concerning the 1987 Phoenix Suns drug investigation or any other documents for an *in camera* inspection. *Cox*, 175 Ariz. at 15, 852 P.2d at 1198; *see also Dunwell v. Univ. of Ariz.*, 134 Ariz. 504, 505, 657 P.2d 917, 918 (App. 1982) (affirming award of attorneys' fees against state university officials who denied access to transcripts of interviews investigating an alleged athletic department slush fund "not because of some compelling state interest" but because they "feared too many embarrassing questions would be asked").

#### **b. Records Deemed Confidential**

"Public records and other matters" may be withheld if they are classified by statute as confidential. Generally, the records of certain professional groups, legal proceedings, law enforcement agencies, and health facilities are, by law, confidential. While the following is not a list of every record protected from disclosure recognized by Arizona statutes, it sets forth the major examples.

Certain records of professional groups are classified as confidential. Such groups include: (1) accountants (A.R.S. § 32-749(A)); (2) attorneys (Ariz. R. Crim. Proc. 15.4(b)(1)-(2), (d)); (3) dentists (A.R.S. § 32-1209); and (4) psychologists (A.R.S. § 32-2085).

Records compiled in the course of the following proceedings are likewise confidential: (1) adoption proceedings (A.R.S. §§ 8-120(A) and 8-121(A)); (2) attorneys' disciplinary proceedings (Sup. Ct. R. 70); (3) grand jury proceedings (A.R.S. § 13-2812 and Ariz. R. Crim. Proc. 12.8(c)); and (4) minutes from executive sessions of public bodies (A.R.S. § 38-431.03(B)).

Additionally, Arizona statutes recognize the following law enforcement records as confidential: (1) wrongful arrest (A.R.S. § 13-4051(B)); (2) consumer fraud (A.R.S. § 44-1525); (3) corrections department (A.R.S. § 31-221(C)); (4) criminal indictments (before serving a summons upon, or arresting, the accused) (A.R.S. § 13-2813); (5) private investigator case files (A.R.S. § 32-2455); (6) racketeering investigations (A.R.S. § 13-2315); and (7) criminal intelligence information (A.R.S. § 41-1750(Q)-(T)).

A number of laws pertaining to health care or "health care providers and facilities" also classify records as confidential: (1) A.R.S. § 36-107 (giving the Director of the Department of Health Services the authority to designate confidentiality); (2) A.R.S. § 36-404 (pertaining to health care institutions); (3) A.R.S. § 36-136(H)(11) (giving the Department of Health the authority to prescribe reasonably necessary measures to keep confidential information); (4) A.R.S. § 36-509 (mental patients); (5) A.R.S. § 36-445.01(A) (hospital panels); and (6) A.R.S. § 32-1451.01 (Board of Medical Examiners).

Finally, Arizona law has recognized that "[t]he right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in the family educational and privacy rights act and the federal regulations issued pursuant to [that] act." A.R.S. § 15-141(A). In addition,

Arizona law specifically empowers the superior court to grant injunctive or special action relief "if any educational agency or institution or an officer or employee of an agency or institution fails to comply with the act regardless of whether the agency or institution [received] any federal funds subject to termination pursuant to the act or whether administrative remedies through any federal agency have been exhausted." A.R.S. § 15-141(B).

## **2. Federal Records**

The federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), governs access to federal records. FOIA mandates that each federal agency make available its records to any person, as long as the request for such records reasonably describes the records and is made in accordance with the agency's published rules stating the procedure for making requests. In addition, FOIA requires that each federal agency make available to the public the following kinds of general information, including the information required to be published in the Federal Register: (1) final opinions and statements of policy and (2) administrative staff manuals and instructions of the agency that affect a member of the public.

The United States Supreme Court has stated that "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Accordingly, FOIA provides generally that all records in the possession of agencies of the executive branch of the federal government be made available for public inspection unless the information is exempt from disclosure because it pertains to matters that are:

- (i) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;
- (ii) related solely to the internal personnel rules and practices of an agency;
- (iii) specifically exempted from disclosure by statute, but only if the statute refers to specific types of information or establishes particular criteria for withholding such information;
- (iv) trade secrets and commercial or financial information obtained from a person, which information is privileged or confidential;
- (v) inter-agency or intra-agency memoranda or letters that are not available by law to a party other than the agencies involved;
- (vi) personnel and medical files and similar files which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (vii) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (a) could reasonably be expected to interfere with enforcement proceedings, (b) would deprive a person of a right to a fair trial or an impartial adjudication, (c) could reasonably constitute an unwarranted invasion of personal privacy, (d) could reasonably be expected to disclose the identity of a confidential source (and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential

information furnished only by the confidential source), (e) would disclose investigative techniques and procedures, (f) could reasonably be expected to endanger the life or physical safety of any individual, (g) would interfere with a criminal investigation or proceeding of which the subject is not aware, (h) would divulge informant records requested by a third party according to the name or personal identifier by which the records are maintained, or (i) would divulge classified records of the FBI pertaining to foreign intelligence, counterintelligence or international terrorism;

(viii) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, an agency responsible for regulating or supervising financial institutions; and

(ix) geological and geophysical information and data (including maps) concerning wells.

Under FOIA, if a portion of the requested information should be disclosed and a portion should not be disclosed, the agency has the obligation to attempt to identify, segregate, and produce those portions of the record that can be disclosed.

Although one might think that the Justice Department would advise an agency to disclose documents unless the agency could demonstrate that some harm would result from disclosure, this is not the case. Instead, the Justice Department will defend an agency's refusal to disclose unless the denial lacks "a substantial legal basis." In the past two decades, the Justice Department has been more willing to go to court and defend agency refusals to allow access.

"Education records" of agencies or institutions receiving federal funds are given special treatment under federal law. The Family Educational Privacy Act (also known as "The Buckley Amendment"), 20 U.S.C. § 1232g, delegates authority to the Secretary of Education to limit access to "education records" (those records are generally defined as files, documents, and other materials) that (1) contain information directly related to a particular student and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. The Buckley Amendment does not prohibit the disclosure of "directory information," which relates to a particular student and includes the student's "name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 20 U.S.C. § 1232g(a)(5)(A). When the Secretary determines that an educational agency or institution has a "policy or practice of permitting the release of education records" of students without the written consent of their parents, the educational agency or institution may lose its funds "under any applicable program" from the federal government. 20 U.S.C. § 1232g(b)(1).

### **3. What to Do When You Are Denied Access to Records**

#### **a. Arizona Governmental Agency Records**

If you are prevented from inspecting and copying documents of any Arizona governmental agency, you should:

(1) Make a written request for access to the documents. See Appendix "A" for a sample request letter;

- (2) Identify in the request as narrowly and with as much detail as possible the documents that you seek to inspect;
- (3) Not state your reason for requesting the documents, but should make clear that you do not intend to use the records for a commercial purpose;
- (4) If the written request is denied, ask that the denial be put in writing, together with a statement of the reasons for the denial; and
- (5) If the denial of access is based on a statute or regulation, ask for a copy of the specific section of the statute or regulation upon which the agency is relying.

If, despite your efforts to inspect public documents, you are denied access, consult your counsel.

#### **b. Records of Federal Agencies**

If you are prevented from inspecting or copying records of any federal agency:

- (1) You should make a written request to the court or agency for access to the documents. See Appendix "B" for a sample of request letter.
- (2) The request should describe the desired files with as much detail as possible. Avoid requests for "all files relating to \_\_\_\_\_" because this tends to result in the agency looking for ways not to answer the request.
- (3) Within 20 days from the date the agency receives the request, the agency must either answer the request, 5 U.S.C. § 552(a)(6)(A)(i), or notify the requester that the request cannot be answered within that time, 5 U.S.C. § 552(a)(6)(B)(ii). If the agency cannot process the initial request within 20 days, it must provide the requester with an opportunity to limit the scope of the request so that it may be processed within that time, or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*
- (4) The agency's answer to the request must state the reasons for denying access. If the request is denied in whole or in part, you may appeal to the head of the agency. The appeal should be in the form of a letter and must be filed within 30 days after the denial. It is advisable, although not required, to state a legal basis for the appeal. It makes sense, therefore, to have the appeal letter prepared or reviewed by an attorney.
- (5) The appeal must be answered by the head of the agency within 20 working days from the date the agency receives the appeal. 5 U.S.C. § 552(a)(6)(A)(ii). If the agency upholds the denial of access to the documents, a complaint may be filed in federal district court to challenge the denial of access.

For further advice concerning FOIA, contact the Media Hotline operated by Perkins Coie ((602) 351-8000 in Phoenix) or the Legal Defense Hotline sponsored by The Reporters Committee for Freedom of the Press in Washington, D.C., at 1-800-336-4243.

#### **c. Arrest Information**

At present there are no federal or state restrictions on the publication of arrest records or criminal history information. In the past some state law enforcement agencies have attempted to rely on the former federal Law Enforcement Assistance Administration

("LEAA") guidelines to limit the disclosure of criminal record history information, but the expiration of the LEAA more than a decade ago (and the state plans promulgated thereunder) has rendered all such attempts devoid of any legal basis.

## **C. Open Meetings**

### **1. Arizona**

Under the Arizona Open Meetings Law (the "OML"), A.R.S. §§ 38-431 through 431.09, all "meetings" of a "public body" to propose or take "legal action" (including any deliberations with respect thereto) shall be public meetings, and all persons shall be permitted to attend such meetings. "Deliberations and proceedings" include all general discussions about matters that foreseeably might require a decision by a public body, not just the formal act of voting. *See* Att'y Gen. Op. No. 75-8.

#### **a. Definitions**

Under the OML, "meeting," "public body" and "legal action" are defined as follows:

"'Meeting' means the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action." A.R.S. § 38-431(4).

"'Public body' means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of this state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body." A.R.S. § 38-431(6).

"'Legal action' means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state." A.R.S. § 38-431(3).

#### **b. Minutes**

All public bodies, except for subcommittees and advisory committees, must take written minutes of their meetings or otherwise record them. A.R.S. § 38-431.01(B). All or part of a meeting of a public body may be recorded by any person in attendance by means of a tape recorder, camera, or other means of sonic reproduction, provided there is no interference with the conduct of the meeting. A.R.S. § 38-431.01(F). The minutes or a recording of these meetings shall be open to public inspection (and available for photocopying) three working days after the meeting. A.R.S. § 38-431.01(D). Minutes of executive sessions shall be kept confidential except from:

- (i) "[m]embers of the public body which met in executive session[;]"
- (ii) "[o]fficers, appointees, or employees who were the subject of discussion or consideration[;]"
- (iii) "[t]he auditor general on a request made in connection with an audit authorized as provided by law[;]" and

(iv) "[a] county attorney or the attorney general when investigating alleged violations of this article." A.R.S. § 38-431.03(B).

In some instances, minutes of executive sessions will be made available if "[t]he interest [of] full disclosure warrants the revelation of information pertinent to the decision." *Shelby Sch. v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, 168, 962 P.2d 230, 242 (App. 1998).

### **c. Notice and Agendas**

Public bodies must give notice of all meetings. They also must file a statement setting forth where all notices of their meetings will be posted. The statements for state, county, or city public bodies must be on file in the office of the Secretary of State, the clerk of the county board of supervisors, or the city clerk or mayor, respectively. In addition to the posted notice described in the filed statement, public bodies must give such additional public notice as is reasonable and practicable as to all meetings. A.R.S. § 38-431.02(A). If the public body has a website, it must post all public notices of its meetings on the website and shall give additional public notice as is reasonable and practicable as to all meetings. A.R.S. § 38-431.01(A)(4). If an executive session is to be held, the notice shall be given to members of the public body and to the public, stating the specific provision of law authorizing the executive session. A.R.S. § 38-431.02(B). Meetings cannot legally be held without at least 24 hours' notice to members of the public body and the public except where there is an "actual emergency" or the meeting is a resumption of a properly noticed meeting that was recessed (and where public notice was given of time and place of the resumption prior to recessing). A.R.S. § 38-431.02(C) - (E).

Proper notice "shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such an agenda." A.R.S. § 38-431.02(G). Agendas must list "the specific matters to be discussed, considered or decided at the meeting." A.R.S. § 38-431.02(H). Notices of executive sessions need include "only a general description of the matters to be considered" and must not contain information that would "defeat the purpose" of the executive session. A.R.S. § 38-431.02(I). Importantly, "[t]he public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto." A.R.S. § 38-431.02(H).

### **d. Executive Sessions**

An executive session may be held only upon a public majority vote of a quorum of the public body. A.R.S. § 38-431.03(A). Significantly, "[l]egal action involving a final vote or decision shall not be taken at an executive session." A.R.S. § 38-431.03(D). The only legal purposes for holding an executive session are:

- (1) discussion or consideration of personnel decisions (e.g., employment, promotion, demotion, salaries, discipline, or resignation of a public officer or employee of any public body) regarding a public officer, appointee or employee, except that with the exception of salary discussions, the officer, appointee, or employee involved may demand a public meeting;
- (2) discussion or consideration of records exempt by law from public inspection;
- (3) discussion or consultation for legal advice with the public body's attorneys, including consideration of the public body's position and instruction of its attorneys regarding

contracts negotiations or about pending or contemplated litigation;

(4) discussions or consultations with the public body's representatives for consideration of the public body's position and instruction of its representatives regarding negotiations with employee organizations on the subject of salaries, salary schedules, or other compensation;

(5) discussions for international and interstate negotiations, or negotiations with Indian tribes; and

(6) "discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale, or lease of real property." A.R.S. § 38-431.03(A).

An Arizona Attorney General Opinion underscores that executive sessions are allowed only for the specific purposes outlined in the statute. Att'y Gen. Op. No. I81-058. The Attorney General advised that the statutory exception for executive sessions does not apply to budget discussions even though the discussion may involve personnel matters. The opinion states that exception (i) above "is limited to discussions relating to an individual employee" and is not available when the meeting covers "all or a class of all employees." *Id.* The mere presence of an attorney cannot be used to circumvent OML requirements and when a party challenges an executive session, the burden of proof shifts to the public body to prove that "its actions fall within an executive session exception to the open meetings law." *Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 121, 912 P.2d 1345, 1350 (App. 1995).

#### **e. Exemptions and Limitations**

Despite the broad definitions of "public body" and "meeting," the following types of sessions are exempt from the OML:

(1) the "judicial proceedings of any court or any political caucus of the legislature" (A.R.S. § 38-431.08(A)(1));

(2) "any conference committee of the legislature, except that all such meetings shall be open to the public" (A.R.S. § 38-431.08(A)(2));

(3) the "commissions on appellate and trial court appointments" and on "judicial qualifications" (A.R.S. § 38-431.08(A)(3));

(4) "[g]ood cause exception... determinations and hearings conducted by the [B]oard of [F]ingerprinting" (A.R.S. § 38-431.08(A)(4));

(5) the Board of Pardons and Paroles, while subject to the OML, by administrative order has placed certain restrictions on hearings of the Board held within a prison facility (A.R.S. § 38-431.08(B)); and

(6) actions involving the "discipline, suspension or expulsion of a pupil," unless requested by the parents or legal guardian of the pupil or by an emancipated pupil (except under certain limited circumstances) (A.R.S. § 15-843(A) & (G)).

#### **f. Effect of Violation and Remedies**

"All legal action transacted... during a meeting held in violation of [the OML] is null and

void..." A.R.S. § 38-431.05(A). However, the law permits the ratification of legal action taken in violation of the article "within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence." A.R.S. § 38-431.05(B)(1). In an attempt to discourage abuse of the ratification process, the law further requires that the notice of any meeting at which ratification will occur must contain "a description of the action to be ratified, a clear statement that the public body proposes to ratify a prior action and information on how the public may obtain a detailed written description of the action to be ratified." A.R.S. § 38-431.05(B)(2).

"Any person affected by an alleged violation of [the OML], the attorney general or the county attorney for the county in which an alleged violation... occurred" may file a lawsuit in the appropriate superior court for the purpose of requiring the public body to comply with the OML. A.R.S. § 38-431.07(A). The court may order that the person filing and prevailing in such a lawsuit be awarded his or her reasonable attorneys' fees. *Id.*; see also *Buckelew v. Town of Parker*, 188 Ariz. 446, 937 P.2d 368 (App. 1996) (holding that trial court has discretion to award fees to successful litigants). If the court determines that a public officer violated any provision of the OML "with intent to deprive the public of information," the court may remove the public officer from office and will assess him or her with all costs and attorneys' fees awarded to the plaintiff. A.R.S. § 38-431.07(A).

#### **g. Judicial Construction of the Open Meetings Law**

Despite the explicit declaration of public policy to construe the OML "in favor of open and public meetings" (A.R.S. § 38-431.09), the Arizona Supreme Court has interpreted the OML very narrowly. Initially, the Arizona Supreme Court defined "public body" to exclude all state advisory committees from operation of the OML. See *Wash. Sch. Dist. No. 6 v. Super. Ct.*, 112 Ariz. 335, 541 P.2d 1137 (1975). In reaction to that decision, the Arizona Legislature amended the statute by specifically including advisory committees within the OML's "public body" definition. Likewise, the Legislature expanded the coverage of the OML to include the meetings of administrative agencies in response to the Supreme Court's narrow interpretation of the "judicial proceeding" exception in *Ariz. Press Club, Inc. v. Ariz. Bd. of Tax Appeals*, 113 Ariz. 545, 547, 558 P.2d 697, 699 (1976). Although the Arizona Supreme Court acknowledged in its next OML case that *Arizona Press Club* was "in error," the court nevertheless upheld a lower court's dismissal of a student's complaint by construing the law to give the Superior Court wide discretion in deciding whether to order a meeting open to the public. *Rosenberg v. Ariz. Bd. of Regents*, 118 Ariz. 489, 578 P.2d 168 (1978).

Consistent with its narrow interpretation of the OML, the Arizona Supreme Court has refused to allow a "technical violation" of the law to void actions taken by a public body when the "technical violation" occurred after the meeting was properly noticed. See *Karol v. Bd. of Ed.*, 122 Ariz. 95, 593 P.2d 649 (1979) (holding that failure of the board to allow nonteachers to tape record the meeting did not void the board's action affecting teachers who were not denied any rights by the technical violation of the board); see also *City of Flagstaff v. Bleeker*, 123 Ariz. 436, 600 P.2d 49 (App. 1979) (finding substantial compliance with OML notwithstanding that minutes were not available to the public and vote was not taken in public). Arizona courts are likely, however, to invalidate action taken at a meeting where there was a misleading element inherent in the notice given. See *Johnson v. Tempe Elem. Sch. Dist.*, 199 Ariz. 567, 20 P.3d 1148 (App. 2001) (notice of

appeal was null and void when school board violated OML by deciding to appeal decision reversing dismissal of a teacher); *Thurston v. City of Phoenix*, 157 Ariz. 343, 757 P.2d 619 (App. 1988) (setting aside land annexation by the city where agenda did not properly describe all the property being considered for annexation); *Carefree Improvement Ass'n v. City of Scottsdale*, 133 Ariz. 106, 649 P.2d 985 (App. 1982) (finding that notice was insufficiently given when postings were made in designated locations that were inaccessible to the public prior to the time of the meeting and meeting was held prior to the time that those in attendance at initial meeting had been informed that the meeting would resume).

#### **h. Arizona Attorney General Opinions on Open Meetings Questions**

In a series of advisory opinions, the Arizona Attorney General has interpreted the OML more broadly than has the Arizona Supreme Court. Although opinions lack the precedential force of case law, they provide guidance for the public bodies of the State and are often considered by courts in their decisions. Particularly since 1975, the opinions of the Attorney General have construed the OML liberally in reaching, for example, the following conclusions: (1) quasi-judicial proceedings of administrative agencies are covered by the OML (Ariz. Att'y Gen. Op. No. I75-7); (2) a school district policy allowing all meet-and-confer discussions to take place in executive session is contrary to the OML (Ariz. Att'y Gen. Op. No. I79-126); (3) board members may not meet informally or socially to discuss issues which may come before the board, and a gathering of less than a quorum of board members cannot be used to circumvent the purposes of the OML (Ariz. Atty. Gen. Op. No. I79-4); (4) meetings of a board formed to assist a state agency in budget and rule making are subject to the law (Ariz. Att'y Gen. Op. No. I90-013; *but see* Ariz. Att'y Gen. Op. No. I92-007 (advisory committee appointed to advise governor, alone, not subject to OML)); (5) nothing can be added to an agenda once a meeting has begun, not even by majority vote of the public body (except in the case of an actual emergency) (Ariz. Att'y Gen. Op. No. I79-192); (6) when members of a public body are parties to an exchange of e-mail communications that involve discussions, deliberations, or taking legal action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technological devices under the OML (Ariz. Att'y Gen. Op. No. I05-004) ; and (7) the Open Meeting Law does not prohibit a member of a public body from speaking to the media regarding a matter that may come before the public body. Ariz. Att'y Gen. Op. No. I07-013.

Even where certain entities (such as the Arizona Intercollegiate Association and Green Valley Community Coordinating Council, Inc.) are technically not subject to the OML, the Attorney General has opined that such entities are "strongly encouraged to always conduct public meetings which are properly noticed [and] the public should always be invited to attend, observe and even participate in the [entity's] deliberations." *See* Ariz. Atty. Gen. Op. Nos. I89-010 & I88-055.

#### **2. Federal Agencies**

The Government in the Sunshine Act (the "Sunshine Act"), 5 U.S.C. § 552b (1976), requires that any "meeting" of an "agency" that results in the "disposition of official agency business" "shall be open to public observation." 5 U.S.C. § 552b(a)(1)-(2), (b).

The Sunshine Act defines an "agency" as any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the government, or any independent regulatory agency "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. §§ 552(f)(1) & 552b(a)(1). Therefore, although the major departments of the federal government, such as the State Department and Department of Defense, are not covered by the Sunshine Act, independent federal agencies with multiple members (e.g., the FTC, FCC, and SEC) do fall within the ambit of the Act. A meeting need not be open to the public, however, if the agency properly determines that the meeting is likely to:

- (i) "disclose matters that are [] specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy;"
- (ii) "relate solely to the internal personnel rules and practices of an agency;"
- (iii) "disclose matters specifically exempted from disclosure pursuant to statute;"
- (iv) disclose trade secrets or privileged or confidential commercial or financial information obtained from a person;
- (v) "involve accusing any person of a crime, or formally censuring any person;"
- (vi) "disclose information of a personal nature [that] would constitute a clearly unwarranted invasion of personal privacy;"
- (vii) "disclose investigatory records compiled for law enforcement purposes..., but only to the extent that production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority... or [national security agency], confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;"
- (viii) disclose certain information relating to the regulation of financial institutions;
- (ix) disclose information that may "(i) lead to [] speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of [a] financial institution," or "significantly frustrate the implementation of proposed agency action," or
- (x) "concern the agency's issuance of a subpoena" or participation in civil litigation, arbitration, or the "initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication." 5 U.S.C. § 552b(c).

The Sunshine Act requires agencies to "make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information." U.S.C. § 552b(e)(1). Under certain circumstances, less advance notice may be given. Suits may be brought in federal district court to enforce the Sunshine Act. The court may grant declaratory judgment, injunctive relief, attorneys' fees, or other relief as may be appropriate. 5 U.S.C.

§ 552b(h)(1) & (i).

### **3. What to Do When You Are Excluded From a Meeting**

If you are excluded from any meeting you should:

- a. Object to any closed meeting and ask that your objection be recorded in the minutes of the meeting;
- b. Ask that the statement of the reasons for the closed meeting be recorded in the minutes;
- c. If a closed meeting or the subject to be discussed is prohibited by the OML, advise the participants of the meeting that any formal action taken at a meeting held in violation of the OML is void;
- d. If the closed meeting is already in progress, deliver a written objection to the public body and request that the objection be incorporated in the minutes of the meeting;
- e. Not volunteer to leave the meeting, but rather let the public body order you to leave;
- f. Not refuse to leave a meeting when ordered to do so, but ask first that a public vote be taken on whether to close the meeting and that the vote of each member be recorded in the minutes;
- g. Never permit "off the record" remarks during a meeting and never agree not to report certain portions of the meeting;
- h. If the public meeting is adjourned for an "executive session," ask that the head of the public body state the reasons for the executive session. Also, request that these reasons be recorded in the minutes of the meeting. Remember, even executive sessions are subject to 24-hour notice except for actual emergencies; and
- i. Make a written request for a transcript of the proceedings or copies of the minutes. You may report any information you obtain as to what happened at a closed meeting. If you are wrongfully excluded from a meeting governed by the OML, you may seek to void any legal action taken at the closed meeting and obtain injunctive relief against the public body to prevent any further violations of state or federal open meetings laws.

## **D. Access to Public Facilities**

### **1. Constitutional Right**

The First Amendment does not provide the media with a constitutional right of access to public facilities greater than that afforded to the general public. In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), the United States Supreme Court held that prison authorities could prohibit substantial access to a state prison facility to the general public and the news media. The Court reasoned that the public importance of knowing about jail conditions and the media's role in providing such information afford no basis for reading into the First Amendment a right of the media to enter into prisons, gather information, and take pictures for broadcast purposes in a manner not accorded to the general public. The most troubling aspect of *Houchins* is that, even with the excessive censorship present under the facts of that case, the Court granted no special right of access to the press. Another case holding that the Constitution does not afford the press any greater rights of

access to public facilities than the general public is *Pell v. Procunier*, 417 U.S. 817 (1974). In *Pell*, the Court made clear that the press has no special right of access to prisons by upholding a California statute denying press interviews with specific individual inmates. Similarly, the Court has ruled that "the press [has] no right to information about a trial superior to that of the general public." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978). However, it violates the First Amendment to provide journalists with less access to a jail than that given to members of the public. See *Copley Press, Inc. v. Aurora*, 11 Media L. Rep. (BNA) 1679 (Ill. Cir. Ct. 1985).

## **2. State of Arizona's Policy Regarding Prisons**

Although no Arizona constitutional or statutory right granting the press access to prisons exists, on September 1, 1996, the Arizona Department of Corrections issued the following policy regarding media access to prison facilities and inmates:

- a. Except for scheduled events open to the public, news media representatives may have access to Arizona correctional facilities only during regular working hours Monday through Friday;
- b. News media representatives shall not be allowed access to facilities for the purpose of interviewing inmates, although they may correspond with inmates through the United States mail or, upon proper approval, communicate with them by telephone for no longer than 15 minutes;
- c. Inmates must sign an Inmate Media Authorization form prior to contact with any new media representative;
- d. Press members desiring access to the facilities and staff, or wishing to arrange telephone interviews with inmates, shall notify the Public Information Officer at (602) 542-3133 at least 24 hours in advance, or access will be denied;
- e. News media representatives may be denied access to any facility if the Director of the Department of Corrections or other prison official determines that their presence may jeopardize the safety or security of the facility, the staff, or the media representatives;
- f. News media representatives may take facial photographs of inmates at the discretion of the inmate; any inmate that is identified by name must sign a waiver. News media representatives also may take pictures of file photographs of inmates. Requests for access to these file photographs shall be made to and approved by the Public Information Officer;
- g. Inmates will not be allowed to participate in any live broadcast format for either radio or television;
- h. News media representatives are not authorized to be placed on an inmate's visitation list in an attempt to circumvent the Department of Corrections' policy prohibiting face-to-face interviews;
- i. Death row inmates on the 14-day pre-execution watch ("death watch") and inmates currently under investigation are not available for interviews; and
- j. Although the Department of Corrections also has a policy regarding media access to executions, access to this policy is restricted. However, the Department of Corrections

has confirmed that news media representatives may request in writing to witness a particular inmate's execution. The Department of Corrections grants requests first to reporters located in the area the crime was committed, and in granting requests attempts to strike a balance between print and electronic media. All reporters can await news of an execution at a designated staging area. News media representatives who witness executions are required to speak to reporters at that staging area following the execution. No electronic or mechanical device (e.g., cameras, tape recorders) or "drawing or art supplies" are permitted in the execution witness room.

Because these policies are administrative, the Director of the Department of Corrections may change them at any time. One can access Department of Corrections policies on the following websites: <https://corrections.az.gov/media-relations> However, not all policies are updated on the websites as soon as they change. Thus, it is prudent to call the Department of Corrections Public Information Office at (602) 542-3133 for the latest information.

In 1995, Phoenix Newspapers unsuccessfully challenged the Department of Corrections' restrictions on media interviews of inmates, arguing that the policy unconstitutionally discriminated against the press by denying them privileges afforded to the general public. *See Phoenix Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 934 P.2d 801 (App. 1997). The Arizona Court of Appeals affirmed the dismissal of Phoenix Newspapers' lawsuit, holding that the law does not guarantee the public unrestricted access to prisoners, and that the Department of Corrections is empowered to issue policies, like the one restricting media interviews of inmates, to maintain a safe and efficient prison system. The California Department of Corrections' restrictions on media access to executions have also been upheld by the courts. *See Cal. First Amend. Coalition v. Calderon*, 150 F.3d 976 (9th Cir. 1998). However, such restrictions must be "reasonably related" to legitimate penological exception. For example, the Ninth Circuit has held that restrictions that prevented the viewing of lethal injections until *after* prison administrations had inserted IV lines and left the execution chamber were an exaggerated, unreasonable response to prison official's legitimate concerns for the safety of prison staff, which violated the public's First Amendment right to view executions from the moment the inmate is escorted into the execution chamber. *Cal. First Amend. Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002).

## **E. Private Property**

Reporters and their employers have been sued successfully for trespass and/or invasion of privacy after entering private property. Although no definitive rules establish when a reporter or photographer is legally entitled to enter upon private property to gather or photograph news, a few particularly dangerous activities may be identified. These include situations where a reporter gathers news by physically intruding into a place where a person has secluded himself, such as when a reporter forces his way into someone's hotel room, insists on entering over someone's objection, or secures entry by fraud or deceit. See Section III(D)(3) of this Handbook. The use of a telephoto lens to photograph a person in his home, place of business, or anywhere he might have a justified expectation of privacy may also subject the photographer to liability for invasion of privacy.

In the 1990s, state and federal courts addressed several cases involving news media

"ride-alongs" with law enforcement. In 1999, the United States Supreme Court unanimously held that it is a violation of the Fourth Amendment for police to bring members of the media into a home during the execution of a warrant where the presence of the media was not in aid of the execution of the search warrant. *Wilson v. Layne*, 526 U.S. 603 (1999); *see also Hanlon v. Berger*, 526 U.S. 808 (1999). Five years earlier, a federal trial court judge forcefully criticized the practices of news media "ride-alongs" in *Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994), *abrogated on other grounds by Wilson*, 526 U.S. 603. In *Ayeni*, Secret Service agents invited a CBS cameraman to videotape the search of a private home. The CBS crew spent 25 minutes inside an apartment filming the search and the emotional reactions of the occupants. CBS never broadcast any portion of the video. The trial judge, however, found the news crew's participation in the search to be appalling:

[I]t is the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another... CBS had no greater right than that of a thief to be in the home to "capture" the scene of the search on film and to remove the photographic record.

*Id.* at 368.

An Arizona statute makes it a felony for a person who is not a party to a conversation to engage in wiretapping or eavesdropping by means of an electronic, mechanical, or other device. *See* A.R.S. § 13-3005. A similar Florida statute has been held by the Florida Supreme Court not to infringe upon the press's First Amendment right to gather news. The United States Supreme Court refused to review the Florida Supreme Court's decision. *See Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977), *appeal dismissed*, 435 U.S. 920 (1978).

## **F. Selective Access**

Occasionally, government officials deny access or information to one reporter that they provide to others. The courts that have addressed this problem of selective access have held that, when some reporters are given access to cover an event, the government cannot arbitrarily impose limits on other reporters' access to the news. The government must have a legitimate or compelling reason, unrelated to the content of the journalist's publications, to justify such selectivity. This standard applies even where the government grants a state-created organ of the press access to governmental proceedings or information and denies the private press the right to republish such information. *See Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985).

Most often, courts find that selective access is unjustified and violates the excluded reporter's First Amendment or civil rights. In one case, where the mayor of Honolulu disliked a particular reporter and ordered that he be excluded from general news conferences, the court held that the mayor's action violated the First Amendment. *See Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974). Another court issued a temporary restraining order prohibiting the Boston City Council from excluding from its council meetings radio and television stations owned by a corporation involved in a labor dispute. *See Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895 (D. Mass. 1976). In another case where the Secret Service denied a reporter a White House press pass for "reasons of

security," the court held that the failure to publish an explicit and meaningful standard governing the denial of the passes and to afford procedural protections to those persons who were denied passes violated the First Amendment. *See Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977). A federal court in New York granted a preliminary injunction prohibiting a racing association from limiting the ability of a racing magazine publisher to take photographs at the association's racing tracks where other journalists were not similarly barred and the restriction was content-based. *See Stevens v. N.Y. Racing Ass'n*, 665 F. Supp. 164 (E.D.N.Y. 1987). Similarly, a federal court in California granted a preliminary injunction prohibiting the City of Los Angeles from limiting a television station's access to an official ceremony, which traditionally had been exclusively produced and broadcast by a competitor, even where the competitor provided a video feed of the ceremony to other stations. *See Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

Less frequently, courts have upheld the selective denial of access to information where government officials offered a reasonable basis for their decision. *See, e.g., D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538 (D.R.I. 1986) (public civic center's enforcement of non-negotiable condition of rock musicians performing at the center that no photographs be taken during their performances, even though print journalists faced no restrictions, did not violate the First Amendment rights of a photojournalist, given the center's dependency on rock concerts for solvency), *aff'd mem.*, 815 F.2d 692 (1st Cir. 1987); *Los Angeles Free Press, Inc. v. Los Angeles*, 9 Cal. App. 3d 448, 88 Cal. Rptr. 605, 608 (1970) (affirming the trial court's dismissal of a weekly newspaper's complaint to require the city, its police chief, and the county sheriff to issue it press identification cards where that newspaper had no regular "police-beat or fire news as such").

## II. INTERFERENCE WITH THE NEWS GATHERING PROCESS

Thus far, this Handbook has focused on situations where newsmen are denied access to sources of information. This section discusses situations where affirmative government action interferes with the news gathering process. There is less precision in the definition of the permissible forms of interference with the news gathering process than in the definition of other areas of the law affecting the news media because there are few, if any, statutes specifically addressing the problem of interference. Accordingly, it is extremely difficult to formulate general rules for the following legal areas since their development hinges on highly fact-specific situations arising under case law.

### **A. Subpoenas Issued Against the Press**

#### **1. Introduction**

Members of the press have often been subpoenaed by trial participants and investigative bodies that seek to obtain information gathered by the press. The press regularly challenges these subpoenas. The United States Supreme Court has addressed this issue only once and recognized that, while news gathering qualifies for certain First Amendment protections, the First Amendment was not violated by requiring a newsman to appear and testify before a state or federal grand jury and answer questions (1) pertaining to an investigation into the commission of a crime and (2) otherwise disclosing information that the newsman obtained in confidence relevant to such an investigation. *See Branzburg v. Hayes*, 408 U.S. 665 (1972).

Reporters who have successfully challenged attempts to compel disclosure of confidential information by the issuance of a subpoena have relied on two basic grounds: state shield laws and the First Amendment. The following sections analyze judicial decisions where reporters have claimed such statutory and constitutional privileges.

#### **2. Shield Laws**

**a. Arizona.** From the onset, it is important to realize that "shield laws" are merely state statutes and, under our system of federalism, may be required to yield to superseding federal statutory or constitutional law. Arizona's shield law, A.R.S. § 12-2237, provides as follows:

A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed.

The Arizona shield law takes a functional approach, protecting only those persons "engaged in newspaper, radio, television or reportorial work." The Arizona Court of Appeals applied this approach in *Matera v. Superior Court*, 170 Ariz. 446, 825 P.2d 973 (App. 1992). *Matera* arose in the aftermath of the "AzScam" sting operation of Arizona state legislators and lobbyists. An AzScam defendant subpoenaed the notes and

documents gathered by an author writing a book on Joseph Stedino, the primary undercover figure in the sting. The author sought to quash the subpoena, but the court refused to extend the privilege to him because he was not engaged in the regular reporting of recent events and, therefore, was not a "member[]... of the 'news media' as that term is commonly understood." More than 20 years have passed since *Matera* was decided and when the online media did not exist. It is questionable today that an Arizona appellate court would limit "reportorial work" to only those employed by a newspaper, radio station or television station.

**b. Other States.** Approximately 39 states and the District of Columbia have enacted shield laws either (1) providing the press with a qualified privilege from complying with a subpoena ordering the disclosure of confidential information; or (2) limiting the circumstances in which the press can be held in contempt of court for refusing to comply with a subpoena. All shield laws in other states protect the news media from being forced to disclose the identity of confidential sources. Beyond that, however, shield laws in other states vary widely. Over half of the state laws protect unpublished information obtained from confidential sources. Several state statutes render the privilege inoperative in certain circumstances, such as when the information described in a subpoena is relevant to a defamation suit. Statutes in California and New York do not grant privilege from disclosure of information obtained from confidential sources but grant the press immunity from the contempt sanction.

### **3. First Amendment Qualified Privilege**

Any discussion of the scope of a reporter's constitutional privilege must necessarily begin with *Branzburg*, 408 U.S. at 690-91. In *Branzburg*, a reporter named Paul Branzburg wrote a detailed newspaper story about his observations of two people synthesizing hashish from marijuana. The story stated that Branzburg had promised not to reveal the identity of the two hashish makers.

Shortly after the story was published, Branzburg was subpoenaed by a county grand jury but refused to disclose to that grand jury the identity of the individuals he had seen making the drugs. Branzburg asserted that he should not be forced either to appear or testify before the grand jury unless the government could show that the following conditions were met: (a) Branzburg possessed information relevant to the crime the grand jury was investigating; (b) the information sought was unavailable from other sources; and (c) the need for the information was sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by compelled disclosure. *Id.* at 680.

The Supreme Court rejected Branzburg's claim that the foregoing conditions must be met prior to ordering a reporter to comply with a subpoena issued by a grand jury, and in an opinion written by Justice White, concluded as follows:

[W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Importantly, however, although the Court upheld the compulsion of confidential source

information from the reporter, five of the nine justices stated in various opinions that there are exceptions to a reporter's duty to disclose confidential information to a grand jury. Three justices supported the conditions set forth by *Branzburg* and would have granted reporters a qualified First Amendment privilege. Justice Douglas advocated an absolute privilege. Justice Powell conceded that there were circumstances in which a reporter might be justified in refusing to testify before a grand jury, but agreed that *Branzburg* should be compelled to testify in this case.

Some courts have interpreted *Branzburg* as recognizing a qualified First Amendment privilege. In recent years, however, at least some federal courts have held that the First Amendment provides little, if any, protection to journalists from testifying to a grand jury about their confidential sources. *New York Times* reporter Judith Miller spent 85 days in jail for contempt of court after refusing to identify her source that identified Valerie Plame as an undercover CIA agent. See *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir.), cert. denied 125 S. Ct. 2977 (2005); see also *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013), cert. denied, No. 13-1009, 2014 WL 695068 (2014) (holding that there is generally no First Amendment reporter's privilege). But, there has not been uniform interpretation of the First Amendment Privilege after *Branzburg*. And, as one federal appeals court judge put it, the lessons of *Branzburg* [are] "about as clear as mud." *Sterling*, 724 F.3d at 523 (Gregory, J., dissenting).

Regardless, the scope of this privilege and the media's success in resisting compelled disclosure have depended in part on who is seeking the information and what type of information is sought. Individuals and groups seeking to compel disclosure fall into five categories: (a) investigative bodies, such as grand juries; (b) criminal defendants; (c) trial court judges; (d) civil litigants in cases where the press is not a party; and (e) plaintiffs in defamation suits against the press. The information sought may include eyewitness or other testimony, the identification of the source of a story, or the production of notes, tapes, photographs, or other documentary evidence. These categories are discussed below.

#### **a. Information Sought by Investigative Bodies**

*Branzburg* established that courts may compel members of the press to testify before a grand jury when the reporter personally witnessed the commission of a crime. The only exceptions recognized by the plurality opinion in *Branzburg* were if the reporter could show that (1) the grand jury's investigation was being carried out in bad faith; or (2) the subpoena constituted impermissible harassment of the press under the First Amendment. State cases interpreting *Branzburg* have also, in some circumstances, held that state shield laws do not protect the press from subpoenas issued by grand juries where the reporter personally witnessed the crime.

A more difficult question arises when the reporter does not actually witness the crime that the grand jury is investigating. Although the holding in *Branzburg* does not specifically address this issue, the Court's opinion does indicate that "the public interest in pursuing and prosecuting those crimes reported to the press" takes precedence over the First Amendment interests served by confidentiality. 408 U.S. at 695; see also *Sterling*, 724 F.3d at 492.

#### **b. Information Sought by Criminal Defendants**

Occasionally, a criminal defendant will attempt to subpoena information in the possession of the press by contending that the information sought is necessary for his or her defense. Most courts have granted the news gatherer a qualified privilege to refuse disclosure of the information. Generally, this privilege is defeated if the criminal defendant can show that (1) the information is relevant and material to his defense and (2) there is no other available source of the information. In light of the constitutional rights of criminal defendants, courts have grown increasingly hostile to assertions of a First Amendment privilege in response to a criminal defendant's requests for information.

For example, in the case of *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), a defendant in a criminal proceeding subpoenaed virtually all of the materials of Myron Farber, a *New York Times* reporter, concerning a series of articles Farber wrote that led to the defendant's criminal indictment. The trial court ruled that Farber was required to produce the subpoenaed materials to the court for an *in camera* inspection before it would consider Farber's motion to quash the subpoena. Farber was held in civil and criminal contempt. The New Jersey Supreme Court ruled that the lower court should have made a preliminary determination that the materials in question were relevant, material, and unavailable from other sources prior to compelling *in camera* disclosure, but that such a determination was unnecessary in this case because the trial record supported such a finding. Moreover, the court held that the New Jersey shield law did not apply because the defendant's Sixth Amendment right to a fair trial overrode the state shield law. Thus, Farber and the *New York Times* were not able to raise their claim of privilege without first disclosing to the court all of the information requested by the subpoena. The United States Supreme Court declined to review the decision.

### **c. Information Sought by the Judge to Discover the Source of Interference With the Criminal Process**

When efforts by a court to ensure a fair trial by issuing gag orders to trial participants or sealing grand jury transcripts have been undermined by leaks to a reporter, some courts have demanded disclosure of the identity of the person responsible for such disclosure despite the apparent qualified constitutional privilege against disclosure of confidential sources.

For example, in *Farr v. Superior Court*, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1972), a reporter covering the Manson trial reported facts that he could only have learned from someone subject to a court order prohibiting disclosure of such facts. Another case, *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), involved four newspaper employees who refused to disclose how they obtained a grand jury report the court had sealed. In both cases, the courts determined that the reporters' First Amendment interests were outweighed by the criminal defendants' right to a fair trial. *See also In re Willon*, 47 Cal. App. 4th 1080, 55 Cal. Rptr. 2d 245 (1996) (weighing interests in disclosing a newsperson's source after a gag order has already occurred). In one South Carolina case, *In re Decker*, 471 S.E.2d 462 (S.C. 1995), a reporter covering the trial of Susan Smith, a mother accused of murdering her two young children, reported facts that she could have only learned from someone subject to a court-imposed gag order. In affirming a contempt order against the reporter for failing to disclose her source, the South Carolina Supreme Court determined that her First Amendment interests were "patently outweighed" by the trial courts "fundamental need to enforce its own orders."

*Id.* at 466. In a Florida case, *Morgan v. Florida*, 337 So. 2d 951 (Fla. 1976), however, a contempt citation against a newspaper reporter for failure to disclose how she obtained a sealed grand jury document was overturned because there was no showing that anyone had been harmed by the publication of the document.

#### **d. Information Sought by Civil Litigants When the Press Is Not a Party**

Civil litigants have encountered more difficulty in obtaining information from the press than have their counterparts in criminal cases. In cases where the press is not a party to the litigation, the courts have been reluctant to force disclosure of confidential information.

Recent cases indicate that, before a court will order the disclosure of confidential information in civil cases, the person seeking information from nonparty journalists must demonstrate that, for example: (1) the information sought is relevant to the claim; (2) there are no alternate sources for the information; and (3) the information sought goes to the heart of the litigation. This standard has generally been applied regardless of the nature of the confidential information. *See also LaRouche v. Nat'l Broad. Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986) (applying similar three-part test). In one case applying this standard, the court held that even disclosed sources were entitled to protection from further disclosure of information and quashed the subpoena. *In re Consumers Union*, 495 F. Supp. 582 (S.D.N.Y. 1980).

Similarly, litigants who demand *nonconfidential* information from the press must demonstrate that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) not cumulative; and (3) clearly relevant (not just potentially relevant) to an important issue in the case. *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995).

#### **e. Information Sought by Plaintiffs in Libel Actions Against the Press**

Special problems arise for reporters who seek to protect information from discovery by plaintiffs in libel lawsuits when the allegedly defamatory article was based in whole or in part on information derived from confidential sources. Because the First Amendment does not protect the calculated or reckless falsehood, courts have compelled reporters to disclose confidential sources and have permitted plaintiffs to discover other information where, for example, "actual malice" must be proved in libel actions. Where, however, a plaintiff fails to present evidence that a press defendant in a defamation action acted with reckless or knowing disregard for the truth, a court may not force a reporter to disclose his confidential sources. *See, e.g., Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972). Subsections (1) and (2) below address the problems of protecting confidential sources and other information in the context of libel litigation.

**(1) Confidential Sources.** In libel cases where a court concludes that the plaintiff's interest in obtaining information outweighs the defendant's First Amendment rights, the media defendant may face a contempt of court citation (or other judicial orders) for refusing to disclose its sources. For example, in *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), a newspaper columnist quoted the remarks of an unnamed CBS executive in an article that plaintiff considered defamatory. During depositions, the columnist refused to answer plaintiff's questions regarding the identity of the executive. The columnist was

held in criminal contempt for her refusal to comply with a judicial order compelling disclosure of the executive's identity.

While no appellate court has directly addressed the Arizona shield law in the context of a defamation action to date, courts interpreting nearly identical shield laws from other states have uniformly concluded that such statutes create an absolute privilege preventing the disclosure of a reporter's confidential sources. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (Pennsylvania shield law affords libel defendant an absolute privilege to maintain confidentiality of sources and outtakes); *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 603 F. Supp. 377 (E.D. Pa.) (same), *aff'd*, 780 F.2d 340 (3d Cir. 1985); *Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (same); *Newton v. Nat'l Broad. Corp.*, 11 Media L. Rep. (BNA) 1950, 1956 (D. Nev. 1985) (Nevada shield law prohibits disclosure of media defendant's sources and evinces a legislative decision "to favor the public's interest in access to information over an individual's interest in vindicating his reputation in a defamation action"); *Maressa v. N.J. Monthly*, 89 N.J. 176, 445 A.2d 376 (1982); *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 658 (Md. Ct. App. 1979) (Maryland shield law protects reporters in libel suits from revealing their sources and from answering any questions "aimed, directly or indirectly, toward the sources' identity" (quoting *Lightman v. State*, 15 Md. App. 713, 725, 294 A.2d 149, 156, *aff'd*, 266 Md. 550, 295 A.2d 212 (1972))).

In some jurisdictions (typically, those without shield laws like Arizona's), however, courts have taken various actions when reporters refuse to disclose their confidential sources despite a court order mandating them to do so, including: (1) issuing a contempt citation against the reporter, *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791 (1977), *overruled in part by Matter of Contempt of Wright*, 700 P.2d 40, 44 (Idaho 1985); (2) applying a legal presumption that the reporter has no source for the information, *Downing v. Monitor Publishing Co.*, 415 A.2d 683 (N.H. 1980); and (3) prohibiting the reporter from relying on the undisclosed sources, *Greenberg v. CBS, Inc.*, 69 A.D.2d 693 (N.Y.2d Dept. 1979).

**(2) Other Information.** A libel plaintiff's need to obtain information from a reporter is particularly acute where the central question in the litigation is whether the defendant published with "actual malice" (i.e., with knowledge of the statement's falsity or in reckless disregard of the truth). Based on this rationale, the United States Supreme Court ruled in *Herbert v. Lando*, 441 U.S. 153 (1979), that the First Amendment does not protect the thought processes in the preparation of a story. The Court reasoned that since the state of mind of the writer and editor is a crucial element of a libel claim requiring proof of "actual malice," a plaintiff should be allowed to ask the defendants about their thoughts, conclusions, and opinions concerning the preparation of the story. *Lando* also permits a libel plaintiff access to reporters' notes and internal memoranda if this material is relevant to the issue of the reporter's or editor's intent in publishing the story.

#### **4. Arizona's Media Subpoena Law**

Under the Media Subpoena Law, A.R.S. § 12-2214, any subpoena for the attendance of a witness or for production of documentary evidence issued in a criminal or civil proceeding to a person "engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public," and which relates to such activities, must be

accompanied by an attached affidavit setting forth the following:

- "1. Each item of documentary and evidentiary information sought from the person subpoenaed.
2. That the affiant or his representative has attempted to obtain each item of information from all other available sources, specifying which items the affiant has been unable to obtain.
3. The identity of the other sources from which the affiant or his representative has attempted to obtain the information.
4. That the information sought is relevant and material to the affiant's cause of action or defense.
5. That the information sought is not protected by any lawful privilege.
6. That the subpoena is not intended to interfere with the gathering, writing, editing, publishing, broadcasting and disseminating of news to the public as protected by the First Amendment, Constitution of the United States, or by article II, section 6, Constitution of Arizona."

If the affidavit is controverted, or a motion to quash the subpoena or for a protective order is filed by the person subpoenaed, the command of the subpoena shall be postponed until a hearing is held and the court enters an order. After the hearing, the command of the subpoena shall be carried out in accordance with the order of the court.

The Media Subpoena Law does not apply to subpoenas for the attendance of a witness or the production of documentary evidence issued by, or on behalf of, a grand jury or a magistrate during an investigative criminal proceeding. Also, the Arizona Court of Appeals held more than 20 years ago (and before the advent of the online media) that the Media Subpoena Law protects only "persons who gather and disseminate news on an ongoing basis as part of the organized, traditional, mass media." *Matera v. Super. Ct.*, 170 Ariz. 446, 448, 825 P.2d 971, 973 (App. 1992) (holding that professional author writing a book about the "AzScam" sting operation was not a member of the media and thus was not protected by the statute).

## **5. What to Do if You Are Subpoenaed or Asked to Testify**

### **a. General Rules**

Before an attorney attempts to subpoena your testimony or notes, he or she may ask you to appear voluntarily as a witness in the proceedings. You should refuse politely to do so. Moreover, if an attorney asks you for "background" or additional information about a published or broadcast story, exercise extreme caution in disclosing any information. Any disclosure to the attorney may later be deemed a waiver of your protection under the Arizona shield law.

If you are subpoenaed, you should do the following:

- (1) Immediately report the receipt of a subpoena to your editor;
- (2) Do not contact any of the attorneys involved in the case for which you have been subpoenaed;

- (3) Record precisely when, by whom, and how the subpoena was served;
- (4) Always demand a check from the subpoena server to cover certain expenses prescribed by statute; if no check is received, ask the subpoena server to note that fact on the subpoena itself; and
- (5) Do not testify at any proceeding without your attorney present to represent you. An editor or your company's lawyer should contact the attorney who subpoenaed you and find out the nature of the proceeding and the testimony sought. In many cases, it is possible to convince the attorney that the issuance of the subpoena is not advisable, especially if he or she is told that the broadcaster or newspaper will not cooperate and may seek to formally quash the subpoena.

Do not agree in advance of your appearance to produce any documents requested by the subpoena, including news clips or transcripts of broadcasts. As indicated above if the subpoena fails to comply with the Arizona Media Subpoena Law, you are under no legal obligation to produce any such documents at the time and place identified in the subpoena. Moreover, the attorney responsible for issuing the subpoena has no right to any documents until the reporter is actually on the witness stand.

#### **b. Subpoenas Requesting Eyewitness Testimony**

If only your eyewitness testimony is sought (no notes are requested and no confidentiality is involved), you usually will be required to comply with the subpoena and testify about what you observed. While you may petition the court to quash the subpoena on the ground that being injected into the legal dispute will forever taint you in the eyes of your sources and may preclude you from reporting on the story again, this is a very difficult argument to advance successfully. Of course, your testimony on what you saw does entitle an attorney to discover your sources or what they have told you.

Again, if you are required to testify, you should be accompanied to the court by an attorney.

#### **c. Subpoenas of Your Sources, Notes, Tapes and Other Materials Not Published or Broadcast**

- (1) Immediately notify your editor and, through him, your legal counsel;
- (2) Any objections or motions to quash the subpoena should be filed as quickly as possible, *see* A.R.S. § 12-2214; and
- (3) Do not discuss the matter with the attorney issuing the subpoena. Disclosure of any facts not set forth in the published or broadcast story may be a waiver of the protection of the shield law.

#### **d. Subpoenas of Library Files**

- (1) Copies of newspaper articles published or radio and television programs actually broadcast must be produced **only if a proper subpoena (and the requisite affidavit thereto)** is served. *See Bartlett v. Super. Ct.*, 150 Ariz. 178, 722 P.2d 346 (App. 1986);
- (2) Ordinarily the subpoenaed party is not entitled to shift the cost of complying with the subpoena to the party who served it. You may, however, request the attorney serving the subpoena to pay all copying fees and the hourly wage of the employee searching for the

files. If that attorney refuses to pay such expenses, your chances of getting a court order awarding expenses are not good except in extraordinary circumstances;

(3) If there is insufficient time to comply with the subpoena, you may seek to have it quashed or the response date postponed; and

(4) If a proper subpoena has been served, you should contact all parties to the lawsuit and seek their agreement to accept an affidavit from the librarian or other custodian of the requested documents attesting to the fact that the clippings or transcripts of broadcasts (which should be attached to the affidavit) are genuine and authentic. The affidavit will avoid having an employee waste valuable time appearing in court.

## **B. Search Warrants**

Although subpoenas, discussed in Section II(A) of this Handbook, must be served, set forth a date by which one is to comply, and provide an opportunity to make objections, search warrants are not required to meet such procedural safeguards. In Arizona, a search warrant is a written order issued in the name of the state, signed by a magistrate, directed toward an officer of the peace, commanding the officer to search for personal property, persons, or particular items. *See* A.R.S. § 13-3911. Absent exigent circumstances, an officer of the peace must obtain a warrant prior to conducting a search. A properly acquired search warrant is supported by a finding of probable cause and a signed affidavit, and specifies the place to be searched and the property to be seized. *See* A.R.S. § 13-3913. Once a warrant has been issued, an officer of the peace may, without notice, commence a search of the person or property identified in the warrant.

In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the U.S. Supreme Court considered whether the federal Constitution prohibited a state from issuing a search warrant to seize photographs and other materials located in a newspaper office. The photographs and materials were relevant to identifying individuals who had participated in a violent demonstration. The Court concluded that neither the First nor the Fourth Amendment prohibited the use of search warrants to obtain such evidence, and that the pre-conditions to obtaining a warrant afford sufficient protection against harms threatened by warrants for searching newspaper offices. *Id.* at 565. The Court noted, however, that nothing in the Constitution prohibited Congress from protecting a reporter's work product from police searches pursuant to a warrant, and invited Congress to write such a law. *Id.* at 567.

In response to *Zurcher*, Congress enacted the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa ("PPA"). The PPA prohibits the state and federal governments, in connection with a criminal investigation or prosecution, from searching or seizing (1) any work product materials possessed by "a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication..." or (2) documentary materials from such individuals without first obtaining a subpoena. 42 U.S.C. § 2000aa(a)-(b).

Work product materials include materials (other than property used to commit a criminal offense) prepared and possessed for the purposes and "in anticipation of communicating such materials to the public," and which contain the author's "mental impressions, conclusions, opinions, or theories." 42 U.S.C. § 2000aa-7. Documentary materials include materials (other than things possessed for use in a criminal offense) like notes,

photographs, negatives, video and audio tapes, and other mechanically, magnetically, or electronically recorded cards, tapes, or disks. *Id.*

Despite its protections, the PPA allows the government to depart from its requirements where the immediate seizure of work product and/or documentary materials is necessary to prevent a person's death or serious bodily injury. 42 U.S.C. § 2000aa(a)(2), (b)(2). The PPA further provides for the seizure of such materials when the person in possession of the materials is the suspect of a crime to which the materials relate. 42 U.S.C. § 2000aa(a)(1), (b)(1); *see also Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001).

Notwithstanding the PPA's suspect exception, the Fourth Amendment's prohibition against unreasonable search and seizure still constrains government conduct. Accordingly, government actors remain obligated to obtain a search warrant prior to searching and/or seizing property from any individual—even one suspected of a crime.

Furthermore, the PPA's suspect exception does not apply if the crime charged is the receipt, possession, communication, or withholding of the materials themselves, and the materials do not involve national defense secrets, classified information, or certain restricted data. Under such circumstances, the materials remain protected. 42 U.S.C. § 2000aa.

Finally, the PPA permits the search and seizure of documentary materials without a subpoena if (1) there is reason to believe notice of a subpoena would result in the destruction, alteration or concealment of the documents, or (2) a prior subpoena has been ignored, and all appellate remedies have been exhausted or the interests of justice would be threatened by the additional delay. If a search warrant is sought as a result of a person's failure to comply with a subpoena, the possessor of the documents must, pursuant to the PPA, be afforded an opportunity to show that the documents are not subject to seizure. 42 U.S.C. § 2000aa(b)-(c).

Any person who violates the PPA is liable for at least \$1,000 in liquidated damages, as well as actual damages, costs, and attorneys' fees. 42 U.S.C. § 2000aa-6(f).

### **C. Gag Orders Against Trial Participants**

With direct restraints on the press regarding what to print or broadcast now being extremely rare, courts have turned to other means of controlling the dissemination of information to the public. One frequently employed device is a "gag order" forbidding or limiting participants in court proceedings from discussing the case with the news media. *See* Ethical Rule 3.6 of the Arizona Rules of Professional Conduct; Ariz. LR Civ. 83.8 and Ariz. LR Crim. 57.2; *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

A court has wide discretion in this area. A trial judge need not give the media notice or an opportunity to be heard prior to issuing a gag order to trial participants. However, although a gag order directed at parties, witnesses, and attorneys is difficult to overturn, most courts do grant the press the right to challenge the validity of an order even though it is not directed specifically at the press. *See, e.g., Radio & Television News Ass'n v. U.S. Dist. Ct.*, 781 F.2d 1443 (9th Cir. 1986) (Association's interest in gathering news was sufficient to establish standing to raise freedom of the press concerns under the First Amendment).

No definitive guidelines exist for testing a gag order's validity. Generally, courts hold that gag orders are a constitutionally permissible means of ensuring that prejudicial statements do not reach the jury or threaten the integrity of the judicial process. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 361 (1961). Because gag orders do not impose a direct restraint on the media, they often are upheld if there is a reasonable likelihood that news coverage will jeopardize a defendant's right to a fair trial. In *Central S.C. Chapter, Society of Professional Journalists v. Martin*, 556 F.2d 706 (4th Cir. 1977), for example, a federal court, believing it was reasonably likely that dissemination of certain information might jeopardize a defendant's right to a fair trial, issued a broad gag order precluding lawyers, parties, witnesses, jurors, and court officials from divulging any trial-related matter that was not of public record. The U.S. Supreme Court, in denying certiorari, let the gag order stand. Other appellate courts, however, require a stronger showing of potential prejudice and will uphold gag orders only if there is a serious and imminent threat of interference with a defendant's right to a fair trial. Those courts may require lower courts to specify the subjects with respect to extrajudicial statements that are proscribed. *See, e.g., RTNA v. United States Dist. Court*, 781 F.2d 1443 (9th Cir. 1986).

In *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431 (1984), the Arizona Supreme Court addressed the validity of a gag order issued in a criminal trial that prohibited trial participants from communicating with the media. Prompted by requests from both the prosecution and defense, the lower court ordered the appointment of a "media liaison" to handle all media inquiries concerning the case. Although one justice authored a forceful dissent, the majority upheld the order, finding that the government's interest in a fair trial outweighed the media's interest in pretrial interviews. The court noted that the media's First Amendment interest in gathering news "means precisely the right to attend the trial and report on what transpires" and no more. *Id.* at 256, 678 P.2d at 441.

It is possible that a lawyer may claim that he or she cannot discuss the case with you under Ethical Rule 3.6 of the Arizona Rules of Professional Conduct. If the case is in federal court, a lawyer in Arizona also may rely on Local Civil Rule 83.8 or Local Criminal Rule 57.2. Ethical Rule 3.6 provides that a lawyer cannot make extrajudicial statements that would be disseminated to the public if the "lawyer knows or reasonably should know" that it "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Although a lawyer may interpret the rule to preclude any discussions with a reporter, the rule has a "safe harbor" provision that allows a lawyer to discuss many aspects of a case, including the nature of the claim or defense, information contained in a public record, the general scope of any investigation, and the identity of the parties, unless prohibited by law. When a lawyer claims he or she cannot discuss a case with you under this rule, remind the lawyer that the rule prohibits only statements that would prejudice the case. In reversing the Nevada State Bar's sanction of a defense attorney for holding a press conference to provide a rough sketch of the defense he planned to present at trial, the U.S. Supreme Court held that the "safe harbor" provision of Ethical Rule 3.6, as applied by the Nevada Supreme Court, was unconstitutionally vague in that it provides insufficient guidance to attorneys on what out-of-court statements are permissible. *Gentile*, 501 U.S. at 1030.

## **1. Actions to Take When a Gag Order Is Issued Against Trial Participants**

When a court orders trial participants not to discuss the case with the media, you should take the following actions:

- a. Notify your editor, and through the editor, legal counsel, of the gag order;
- b. Attempt to obtain a copy of the order, if it is in writing. If the order was entered orally, but on the record, request a copy of the transcript;
- c. You may continue asking trial participants questions;
- d. The legal procedure to challenging a gag order is identical to that for attacking an order closing a courtroom, discussed in Section I(A)(5) of this Handbook.

## **D. Contempt of Court**

Reporters who refuse to: (i) obey a subpoena to testify; (ii) identify sources of information; or (iii) turn over material to the court may be charged with contempt of court. The court's contempt power is the inherent power of judges to ensure that judicial proceedings are conducted in an orderly manner and that the judge's orders are obeyed. The court may exercise both civil and criminal contempt powers. Courts use the civil contempt power to enforce compliance with judicial orders, such as an order requiring a reporter to turn over all information obtained in a case. Using the civil contempt power, a judge may coerce a reporter into obeying a court order by ordering the reporter jailed or fined until the reporter complies with the order. Courts use the criminal contempt power to punish certain behavior, such as disruption of the courtroom. The normal sanction for criminal contempt is imprisonment and/or a fine.

A single refusal to obey a subpoena may be treated as civil and/or criminal contempt. For example, in *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), the *New York Times* was ordered to pay a fine of \$100,000 (criminal contempt) and \$5,000 a day until it complied with the subpoena (civil contempt). The reporter for the *New York Times*, Myron Farber, was sentenced to prison until he turned over his notes (civil contempt) plus an additional six months' imprisonment as a punishment for his refusal to obey the subpoena in the past (criminal contempt). Refer to Section II(A) of this Handbook if you receive a subpoena.

### III. LIMITATIONS ON THE CONTENT OF COMMUNICATIONS

An attempt to restrict the content of communications can arise in one of two ways: (1) a prior restraint or (2) subsequent punishment. A prior restraint directs the media not to publish information that it already has obtained. Since 1931, prior restraints have been regarded as presumptively invalid and, accordingly, rarely have been upheld. *Near v. Minnesota*, 283 U.S. 697 (1931).

In recent years, trial courts throughout the nation have demonstrated an increased willingness to impose prior restraints. In most cases, these orders were reversed on appeal. Two notable exceptions are *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990) and *People v. Bryant*, 94 P.3d 624 (Colo. 2004). In *Noriega*, the court refused to vacate a temporary restraining order barring CNN's broadcast of certain tape recordings of conversations between Manuel Noriega and his defense counsel. The order prohibited broadcast of the tapes pending the trial court's *in camera* review to determine whether their broadcast would violate Noriega's Sixth Amendment right to a fair trial and the attorney-client privilege. Cable News Network refused to turn over the tapes to the district court and repeatedly broadcast portions thereof. The network submitted the tapes to the district court only after the United States Supreme Court denied its request for a stay of the trial court's order and the accompanying petition for certiorari. *Cable News Network, Inc. v. Noriega*, 498 U.S. 976 (1990). Ultimately, the district court lifted the stay and returned the tapes to the network, finding that broadcast of the recordings would not violate the defendant's right to a fair trial. *United States v. Noriega*, 752 F. Supp. 1045 (S.D. Fla. 1990). The network had agreed earlier not to broadcast any of Noriega's conversations with his attorney.

By upholding the order, even on a temporary basis, the Eleventh Circuit in *Noriega* ignored case law establishing the "presumptive unconstitutionality" of prior restraints. See *In re King World Prods., Inc.*, 898 F.2d 56, 60 (6th Cir. 1990) ("The temporary nature of the district court's order does not relax this presumption because 'a prior restraint, by... definition, has an immediate and irreversible sanction.'" (citation omitted)). Other courts have refused to uphold prior restraints pending *in camera* review of the material sought to be printed or broadcast. *Goldblum v. Nat'l Broad. Corp.*, 584 F.2d 904 (9th Cir. 1979).

In *Bryant*, the trial court conducted two closed hearings, pursuant to Colorado's rape shield law, to determine the relevance of the prior and subsequent sexual conduct of the accuser in the Kobe Bryant rape case. A court reporter accidentally emailed transcripts of the two closed hearings to the news media. The trial court entered a prior restraint forbidding the media from revealing the contents of the transcripts and directed the media to destroy all copies of the mistakenly sent transcripts. The Colorado Supreme Court upheld the prior restraint as narrowly tailored because it was "necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated by less intrusive measures." 94 P.3d at 633. The Colorado Supreme Court, however, struck the portion of the trial court's order requiring the destruction of the transcripts. 94 P.3d at 638.

Prior restraints often are imposed when a criminal defendant argues that the publication of certain information may deprive him or her of a fair trial, as in *Noriega*, or when the

government argues that publication of the information is against the national interest. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), and *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Supreme Court held that the prior restraints under review were unconstitutional. These cases are discussed in Sections III(A) and III(B) below. As distinguished from a prior restraint, a subsequent punishment imposes civil or criminal liability after the offending communication has been published. Subsequent punishments most often arise in the context of suits for libel and invasion of privacy.

## **A. Prior Restraints in the Coverage of Trials**

In *Nebraska Press Ass'n*, the Supreme Court held that prior restraints against the media in the coverage of trials were impermissible unless the trial judge had exhausted all other methods of protecting a defendant's rights. To impose a "no print" order on the press, the trial judge must find that: (1) pretrial publicity would impair the right to a fair trial; (2) no alternatives, such as change of venue, postponement, closed questioning of jurors, or sequestering of jurors, would guarantee a fair trial; and (3) the order would guarantee a fair trial. In addition, the trial judge is required to hold a public hearing on the need to impose a prior restraint before issuing such an order.

Given the Supreme Court's finding that this test was not met in *Nebraska Press Ass'n*, a case involving a mass murder and sexual assault in a small community that attracted nationwide press coverage of the defendant's "confession," it is doubtful that the Court would uphold any prior restraint on the coverage of a trial. It merits emphasis that, in addition to the requirements set forth in *Nebraska Press Ass'n*, Arizona Rule of Criminal Procedure 9.3(b) provides that all criminal proceedings shall be open to the public unless the court finds, upon application of the defendant, that open proceedings pose a "clear and present danger" to defendant's right to trial by an impartial jury. See Section I(A)(2) of this Handbook.

In Arizona, a question involving a prior restraint arose when a superior court judge in a notorious criminal trial issued an order requiring sketch artists to submit their drawings of the jury to the judge for his review and approval prior to publication or broadcast. See *KPNX*, 139 Ariz. at 246, 678 P.2d at 431; see also *Brice v. Super. Ct.*, 139 Ariz. 260, 678 P.2d 445 (1984). Noting the heavy presumption against the constitutional validity of prior restraints, the Arizona Supreme Court invalidated the order on First Amendment grounds. The court adopted the *Nebraska Press Ass'n* test, which in *KPNX* and *Brice* measured: (1) the gravity of the harm posed by media coverage; (2) whether alternatives less drastic than prior restraint could have adequately protected any fair-trial right; and (3) how effectively the sketch order avoided the threat to a fair trial. In reviewing the lower court's sketch order, the court concluded that the order failed to meet the requisite three-part test. It should be noted, however, that the court expressed willingness to uphold narrowly tailored sketch orders whenever the artists' activities become "disruptive and distracting" to the judicial process.

### **1. What to Do When a "No Print" Order Is Entered**

If a "no print" order is entered, you should do the following:

- a. Immediately notify your editor, and through him or her, legal counsel;

- b. Request a copy of the order. If the order is not in writing, request that it be put in writing. If the order is entered orally on the record, request that a copy of the transcript be prepared immediately and, if possible, signed by the judge and formally filed with the clerk of the court;
- c. Make your request for a copy of the order on the record. If no court reporter is available or if the judge refuses to go "on the record," deliver a letter to the judge and the clerk of the court setting forth your requests;
- d. Make your requests forcefully and emphatically, but also with respect and dignity;
- e. Object to the order and ask for the opportunity to be heard immediately through counsel;
- f. Advise the court that it is your understanding that no such order is valid until, at the very least, a full hearing is held;
- g. Do not enter into an agreement with the judge not to publish matters relating to the trial, even if your access to the hearing is conditioned on such an agreement. If the court seeks such an agreement, respectfully advise the court that you have no authority to make it; and
- h. Exhaust all legal remedies available in the circumstances before giving any thought to violating the order.

Legal counsel should immediately move to vacate the order as a prior restraint, and if the motion is denied, demand an immediate hearing. If the motion is denied, counsel should seek an immediate appeal before an appellate court.

## **B. Prior Restraints and Compelling State Interests**

In *New York Times Co v. United States*, 403 U.S. 713 (1971), the United States government sought to enjoin the New York Times from publishing excerpts from the Pentagon Papers. The Supreme Court held that the Times could publish the information and indicated that prior restraints would be tolerated in this situation only if the publication would "threaten" national security. As noted in the classic case of *Near v. Minnesota*, 283 U.S. 697 (1931), prior restraints can be justified only if publication would harm the national interest in the most severe circumstances, such as where the nation is at war and a newspaper seeks to publish the number and location of troops. Although the government's attempt to enjoin the publication of excerpts of the Pentagon Papers was held unconstitutional in *New York Times*, four Supreme Court justices indicated that the newspapers could be held criminally liable for disclosure of certain classified information and two of the justices would have permitted the prior restraint to stand.

The highly publicized case concerning an article that revealed details for building a hydrogen bomb, *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), is one of the few cases where a court found the impairment of national security interests sufficiently grave to warrant an injunction forbidding the magazine to publish its article. This controversial decision was appealed, but the appeal was dismissed as moot when another magazine printed the article and the government withdrew its complaint. In two more recent cases, CNN was barred from broadcasting recorded conversations between

Manuel Noriega and his defense counsel until the trial judge could listen to the tapes to determine whether they contained any privileged attorney-client conversations and whether their public release threatened Noriega's constitutional fair trial right. *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990). Likewise, the news media covering the Kobe Bryant rape trial in 2004 was prevented from disclosing the contents of the transcripts of two hearings that were closed pursuant to Colorado's rape shield law. *People v. Bryant*, 94 P.3d 624 (Colo. 2004).

Recognizing the difficulty of sustaining a prior restraint, state legislatures have on occasion sought to prohibit publication of specified material by imposing criminal or civil sanctions. The United States Supreme Court, however, consistently has held that state officials may not constitutionally punish the publication of truthful information if the media has obtained the information lawfully. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (publication of rape victim's name lawfully obtained through inspection of police report where name was erroneously included); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (publication of name of youth charged as juvenile offender where name was lawfully obtained by interviewing witnesses); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (publication of rape victim's name where name was lawfully obtained through court documents open to public inspection). Recently, a federal appellate court held that a newspaper could not be held civilly liable for the truthful publication of a person's juvenile criminal history, even though a Pennsylvania statute prohibits the disclosure of juvenile law enforcement records. *Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783 (3d Cir. 2005). The court held that the newspaper could not be sued for invasion of privacy because the information "was truthful, lawfully obtained, and concerned a matter of public significance." 404 F.3d at 789.

These cases involved situations in which the information was lawfully obtained. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the United States Supreme Court addressed the situation of a reporter who received the information lawfully but from a source who obtained it unlawfully. There, a reporter published a tape of a cellular telephone conversation between a local union president and the union's chief negotiator. The reporter knew, or should have known, of the suspect origin of the tape. The conversation involved threats to those opposing the union's efforts, a subject deemed by the Court to be a matter of public concern. The Court held that, despite the federal Wiretap Act and a similar Pennsylvania statute to the contrary, the reporter was not liable for publishing the illegally intercepted conversation where the reporter lawfully obtained the tape, played no part in the illegal interception, and never learned the identity of the person who made the interception.

A different result may occur when the media participates in an illegal interception. In *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001), the Fifth Circuit held that the First Amendment did not protect a reporter from civil liability under federal and Texas wiretap statutes for disclosure of a taped cordless telephone conversation. The court found that the reporter participated in the illegal interception by agreeing to accept tapes of future conversations and by giving instructions to the person making the tapes.

### **C. Libel**

## 1. Introduction

In Arizona the definition of libel (a written defamation) is any publication that "tends to bring any person into disrepute, contempt, or ridicule or... to impeach his honesty, integrity, virtue or reputation." A person attempting to prove libel must show that someone made:

- a. a written, defamatory statement
- b. of fact
- c. concerning the plaintiff
- d. which was communicated to a third party
- e. thereby injuring the plaintiff's reputation.

The plaintiff must also show that the person writing the statement, at a minimum, acted negligently in failing to ascertain the facts published.

A person also can libel someone by repeating or republishing another person's libelous statements. *Peagler v. Phoenix Newspapers, Inc.*, 131 Ariz. 308, 640 P.2d 1110 (App. 1981). "Story balance" is not a substitute for the republisher's exercise of due care. *Id.* As discussed separately in Section III(C)(1)(i) below, republishers of defamatory content on an interactive computer service may, depending on the circumstances, be immune from liability pursuant to Section 230 of the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230.

A defendant can defeat a libel action by proving that the statement was true or that it fell within a category of communications privileged under the common law or the First Amendment.

The elements of proof required of a plaintiff in a libel case and the defenses available to a defendant are discussed below.

### a. Defamatory Statement

"To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation." *Turner v. Devlin*, 174 Ariz. 201, 203-204, 848 P.2d 286, 288-89 (1993).

The allegedly libelous publication must be considered in its entirety and weighed in connection with its structure, nuances, implications, and connotations. The fact that the publication is subject to an interpretation that would render it innocuous does not mean that it is not libelous. The test is the effect that the publication is likely to produce in the mind of the average person who reads it.

Illustrations and headlines can be libelous even when the text of the publication is not libelous in and of itself. The editor must focus on the probable meaning of the publication when read as a whole. For example, a random photograph of children from the paper's files used to illustrate an article on children's need for psychological help can be libelous to the children in the photograph because it implies that the children need psychological help.

The omission of important facts also can be libelous. For example, the true report of a

married man in the captain's cabin with a single woman might well be libelous if that report failed to disclose that the two were also accompanied by the man's spouse and discussing the prospective purchase of a sailboat. Thus, even where the report is accurate, the omission of material facts that would significantly alter the conclusion to be drawn from the facts reported may render the report libelous. *See, e.g., Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977 (9th Cir. 2002) (network failed to disclose that interviewee's usage of medication was more than 10 years in the past and that the medication was not mind-altering).

#### **b. Statement of Fact**

A statement that can reasonably be interpreted as stating or implying false assertions of fact may form the basis of a defamation claim. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (the First Amendment does not provide for a separate "opinion" privilege). To determine whether a statement can be read to imply an assertion of fact, a court may look at three factors: (1) whether the speaker uses figurative or hyperbolic language; (2) whether the general tenor of the speech (i.e., humor or satire) negates the impression that the statement could be viewed as a factual assertion; and (3) whether the statement is susceptible of being proved true or false. *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (Andy Rooney's statement during his weekly commentary on "60 Minutes" that a product "didn't work" is a statement of fact). *Cf. Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005) (photograph's caption including the word "pimp" is not a criminal accusation when the context was satirical slang).

In *Yetman v. English*, 168 Ariz. 71, 811 P.2d 323 (1991), the Arizona Supreme Court held that a Republican state representative's reference to a Democrat county supervisor as being a "communist" could be construed as a statement of fact. *See also Phoenix Newspapers, Inc. v. Church*, 103 Ariz. 582, 447 P.2d 840 (1968) (newspaper editorial comparing a "people's council" advocated by the attorney general to a "Communist technique (for seizing) power" can be construed as a statement of fact). In *Turner v. Devlin*, 174 Ariz. 201, 848 P.2d 286 (1993), the Arizona Supreme Court held that a school nurse's statements that a police officer was "rude and disrespectful" and that "his manner bordered on police brutality" were not actionable because they were "subjective impressions, unprovable as false."

#### **c. Concerning the Plaintiff**

To be actionable, libelous words must refer to some ascertained or ascertainable person. A publication may be clearly libelous and yet not refer to an individual plaintiff. In such cases, the plaintiff must prove that the libelous statement will be understood to pertain to him. *Hansen v. Stoll*, 130 Ariz. 454, 636 P.2d 1236 (App. 1981).

Where the publication is directed toward a class or group whose membership is so numerous that no one individual member can reasonably be deemed an intended object of the libelous publication, there is no action for libel. Thus, statements such as "all lawyers are crooks" are not actionable by any individual lawyer. However, a statement that all lawyers in a particular law firm are crooks might be actionable by a lawyer in that firm because a smaller, more identifiable group has been defamed. In a 1998 libel case against talk show host Oprah Winfrey, the trial court held that a cattle ranchers' organization could not maintain a defamation claim against Winfrey regarding her statements about

"mad cow disease." *Tex. Beef Group v. Winfrey*, 11 F. Supp. 2d 858 (N.D. Tex. 1998). The court reasoned that Winfrey had not mentioned any of the plaintiffs by name and there are "about a million" cattlemen in the United States.

## **2. Privileges and Defenses**

### **a. Truth**

Truth is an absolute defense to a libel action. The defense of truth is available if the statement is inaccurate in some minor detail but is "substantially" true in all significant respects. Thus, in Arizona "substantial truth" stands as a complete defense. *Read v. Phoenix Newspaper, Inc.*, 169 Ariz. 353, 819 P.2d 939 (1991). A statement is "substantially true" if "viewed through the eyes of the average reader it differs from the truth only in insignificant details." *Currier v. W. Newspapers, Inc.*, 175 Ariz. 290, 293, 855 P.2d 1351, 1354 (1993). Where the statement involves a matter of public concern, a libel plaintiff bears the burden of showing falsity. *Milkovich*, 497 U.S. at 19; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986); *see also City of San Diego v. Roe*, 543 U.S. 77 (2004) (defining a matter of "public concern" as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value to the public at the time of publication"). Otherwise, defendants bear the burden of proving truth. See Section III(C)(2)(h) for a discussion of "private persons."

### **b. A Fair and Accurate Summary of Official Proceedings**

Reporters have a privilege to summarize and report fairly on judicial, legislative, and governmental administrative proceedings. Thus, publication of charges made on the floor of the legislature, or allegations made in court documents or proceedings, may be reported without fear of libel, so long as the report is a fair and accurate summation. *See, e.g., Bailey v. Superior Court*, 130 Ariz. 366, 636 P.2d 144 (App. 1981); *Petroni v. Bd. of Regents*, 115 Ariz. 562, 566 P.2d 1038 (App. 1977).

### **c. Conditional Privileges**

Arizona reporters have a privilege to publish the following material if it is not published with subjective knowledge of falsity or conscious disregard for the truth: (1) statements that are fair and accurate reports of public proceedings, *Green Acres Trust v. London*, 141 Ariz. 609, 688 P.2d 617 (1984); (2) statements contained in public records, *Carlson v. Pima County*, 141 Ariz. 487, 687 P.2d 1242 (1984); (3) statements made by speakers who communicate information pursuant to a legal, moral, or social duty, *Aspell v. Am. Contract Bridge League*, 122 Ariz. 399, 595 P.2d 191 (App. 1979); (4) statements made in editorials published in the "public interest," *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966); (5) statements made by union officials acting pursuant to official duties, *Ross v. Duke*, 116 Ariz. 298, 569 P.2d 240 (App. 1976); (6) statements made to others who share a common interest in the subject matter thereof, *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092 (App. 1986); (7) statements made by high-level executive government officials within the scope of their duties, *Chamberlain v. Mathis*, 151 Ariz. 551, 720 P.2d 905 (1986); (8) statements by an employee to an employer reporting perceived sexual harassment in the workplace, *Miller v. Servicemaster By Rees*, 174 Ariz. 518, 851 P.2d 143 (App. 1992); (9) communications made to public officials concerning

matters that affect the discharge of their duties, *Lewis v. Oliver*, 178 Ariz. 330, 873 P.2d 668 (App. 1993); (10) statements made by government employees in the course of discretionary administrative actions, *Carroll v. Robinson*, 178 Ariz. 453, 874 P.2d 1010 (App. 1994); and (11) statements made at a municipal Board of Adjustment meeting, *Burns v. Davis*, 196 Ariz. 155, 993 P.2d 1119 (App. 1999).

#### d. "Neutral Reportage"

Under the theory of "neutral reportage," when a responsible prominent person or organization makes serious charges against a public figure or public official, the accurate and disinterested reporting of those charges (commonly called "neutral reportage") should be protected regardless of the publisher's private views on the validity of the charges. *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989); *Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113 (2d Cir. 1977); *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984). The rationale for this theory is that the accusations made by a responsible or prominent person are newsworthy simply because they are made, regardless of their truth. Although two Arizona trial court judges accepted the neutral reportage privilege as a defense more than two decades ago, see *Godbehere v. Phoenix Newspapers, Inc.*, 15 Media L. Rep. (BNA) 2050 (Maricopa Super. Ct. 1988); *Marley v. Investigative Reporters & Eds., Inc.*, No. C365969 (Maricopa Super. Ct. 1979), no Arizona appellate court has decided whether the neutral reportage privilege applies in Arizona.

#### e. Constitutional Privilege

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that the First Amendment imposes certain limitations on the ability of states to grant judgment against publishers for libel, depending on the status of the person defamed. If the person defamed is a "public official" or "public figure," the standard of liability is "actual malice." If the person defamed is classified as a "private person," however, the standard of liability in Arizona is negligence.

When the standard of liability is "actual malice," no liability can be imposed without clear and convincing evidence that the publication was made with either actual knowledge of its falsity or reckless disregard as to its truth or falsity. Generally, "reckless disregard" is defined as publishing certain information with "serious doubts" as to truth of such information. *St. Amant v. Thompson*, 390 U.S. 727 (1968). The Arizona Supreme Court has stated that "[t]he disregard must be more than 'reckless'-*conscious* disregard would be a better description of the test." *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487, 724 P.2d 562, 572 (1986). Negligence or ill will does not constitute actual malice, nor does the deliberate alteration of a quotation amount to actual malice, unless the altered quote materially changes the meaning conveyed by the statement. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991). However, the Arizona Supreme Court has held that combined evidence of ill will, negligence, breach of journalistic standards, and ignoring warnings of inaccuracies may create "some evidence of actual malice" that is "enough to survive a summary judgment motion." *Currier v. W. Newspapers, Inc.*, 175 Ariz. 290, 294-95, 855 P.2d 1351, 1355-56 (1993); see also *Lewis v. Oliver*, 178 Ariz. 300, 873 P.2d 668 (App. 1993) (holding that evidence of current and past "vindictiveness" creates a jury question on actual malice).

## f. Public Officials

A "public official" may not recover for libel without a showing of actual malice. The public official designation applies at the very least to those government employees who have, or appear to have, substantial responsibility for the conduct of governmental affairs.

All elected officials are "public officials." As for non-elected officials, the applicability of the public official designation will depend on the tests set forth above. Police chiefs, a commanding officer of a United States Navy ship, and various public employees have been found to be public officials. In Arizona, the following categories of persons have been held to be "public officials" by the courts: (1) student senators, *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966); (2) police officers, *Turner v. Devlin*, 174 Ariz. 201, 848 P.2d 286 (1993); *Rosales v. Eloy*, 122 Ariz. 134, 593 P.2d 688 (App. 1979); (3) teachers, *Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (App. 1978); (4) narcotics agents, *Hansen v. Stoll*, 130 Ariz. 454, 636 P.2d 1236 (App. 1981); (5) county sheriffs, *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989); and (6) FAA inspectors, *Lewis v. Oliver*, 178 Ariz. 300, 873 P.2d 668 (App. 1993).

## g. Public Figures

The actual malice test also applies to "public figures." Individuals who have assumed roles of special prominence in the affairs of society or who occupy positions of power and influence are called "pervasive" public figures and are public figures for all purposes. Authors (William F. Buckley, Jr.), entertainers (Johnny Carson), tele-evangelists (Jerry Falwell), and even convicted murderers (James Earl Ray) have been held "pervasive" public figures.

The second and more common type of public figure is the "vortex" public figure, who is deemed to be a public figure only for a limited purpose. These are individuals who have voluntarily thrust themselves, or, under certain circumstances, have been involuntarily injected by events, into a particular matter under public scrutiny. Examples of vortex public figures would include (1) the agent of record for the health and life insurance program of county employees, *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986); (2) an organized crime enforcer who had "turned state's evidence" against an Arizona crime boss, *Scottsdale Publ'g, Inc. v. Superior Court*, 159 Ariz. 72, 764 P.2d 1131 (App. 1988); (3) an architect involved in the construction of controversial, publicly funded building projects, *McDowell v. Paiewonsky*, 769 F.2d 942 (3d Cir. 1985); (4) the president of Mobil Oil, *Tavoulaareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (en banc); (5) a scientist who became involved in a public dispute over fluoridation of drinking water, *Yiamouyiannis v. Consumers Union*, 619 F.2d 932 (2d Cir. 1980); (6) a secretary at the Democratic National Committee headquarters at the time of the Watergate break-in, *Wells v. Liddy*, 1 F. Supp. 2d 532 (D. Md. 1998); (7) a corporate spokesperson, *Thompson v. Nat'l Catholic Rptr. Publ'g Co.*, 4 F. Supp. 2d 833 (E.D. Wis. 1998); and former college assistant football coaches involved in a recruiting scandal, *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306 (Ala. 2007). Where an individual is drawn into a matter of public interest against his will, however, courts have been reluctant to characterize that individual as a vortex public figure.

Most people in the "public figure" category appear to be "vortex" rather than "pervasive" public figures. The United States Supreme Court has stated that, absent clear evidence of

general fame or notoriety in the community and pervasive involvement in the affairs of society, an individual should not be deemed a public figure for all aspects of his life. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Three United States Supreme Court decisions handed down since *Gertz* have narrowed the definition of "public figure." The first case, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), involved an incorrect report that a wealthy industrialist received a divorce because of his wife's adultery. When the wife sued for libel, the Court ruled that she was a private person because she had not thrust herself into the forefront of any public controversy, even though she was involved in a judicial proceeding that had received extensive publicity. In the second case, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), Senator William Proxmire was sued by the recipient of one of Proxmire's "golden fleece" awards. The Court determined that the plaintiff, who had received research grants and was the author of a number of articles in professional journals, was not a public figure and thus did not have to show actual malice. The Court reasoned that because the plaintiff's role as grant recipient and author did not place him in a position of public prominence in the broad question of concern about public finances, and since he did not have regular and continuing access to the media, he should not be classified as a public figure. The third case, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979), involved an individual who had been cited for contempt in 1958 for his failure to appear before a grand jury investigating Soviet espionage. The Court decided that the individual was not a public figure, despite the fact that he had been both convicted of a crime and a figure in a newsworthy event.

#### **h. Private Persons**

For those persons who cannot be characterized as either a public official or public figure, the United States Supreme Court has left the states free to fashion their own standards of liability, with the requirement that there must be some degree of fault shown before liability is imposed. In Arizona, liability can be imposed for a defamatory statement about a private person if the factual error resulted from negligence. *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 724 P.2d 562 (1986); *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977).

Because the standard of liability in libel actions brought by private persons is negligence, reporters should be aware that any individual mentioned in a story, no matter how peripheral to the story's theme, is a potential libel plaintiff. Loose or vague references to these individuals should not be made, and if there is insufficient time to check the accuracy of the facts involved, the reference should be deleted.

While it is important to have "reporting standards," it should be remembered that different situations call for flexibility and, accordingly, the development of a strict or uniform set of reporting standards may create problems for a publisher. Indeed, any deviation from such standards may well be deemed to be negligence in a defamation action brought by a private person.

#### **i. Immunity for Online Content**

Section 230 of the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by

another information content provider." 47 U.S.C. § 230(c)(1). Section 230 preempts state law claims that are inconsistent with this section. This provision of the CDA was generally enacted to encourage investment and free speech on the Internet.

The treatment of operators of websites as immune from content liability is consistent with the long-term distinction by courts between those who publish or create content versus those who distribute content. Distributors, such as bookstores, generally are not held liable for content published by others. Most court cases have broadly applied the protection of Section 230, and recent cases have upheld the immunity even for claims that are not related to libel or defamation, such as Fair Housing Act claims in *Chicago Lawyers' Comm. For Civil Rights Under the Law Inc. v. Craigslist Inc.*, No. 06 C 0657 (N.D. Ill. Nov. 14, 2006), and claims related to internet service providers for allegations of criminal acts. *Doe v. Bates*, No. 5:05-cv-91-DF-CMC (E.D. Tex. Dec. 27, 2006).

Media company websites generally exhibit a range of content, including content provided by the publisher as well as third-party content and user-posted content. Section 230 immunity has been upheld in the context of bulletin boards [*Zeran v. America Online Inc.*, 129 F.2d 327 (4th Cir. 1997)], purchased third-party content [*Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998)], social networking [*Klayman v. Zuckerberg*, 910 F. Supp. 2d 314 (D.D.C. 2012)], consumer reviews [*Seaton v. TripAdvisor LLC*, 728 F.3d 592 (6th Cir. 2013)], and individual users of interactive computer services who post defamatory statements made by another person on a newsgroup. *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006).

Some courts have expressed hesitation and discomfort with the scope of Section 230 immunity, in certain cases suggesting limits upon the types of claims that qualify or the scope of such immunity where the computer services provider makes edits to third-party content that are sufficiently extensive to be considered the publisher or author of the content. Whether Section 230 immunity applies to online content in a particular circumstance depends upon the source of the content and the editorial process related to that content prior to its posting on the site.

### **3. Damages and the Arizona Correction Statute**

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the United States Supreme Court held that the First Amendment prohibits states from permitting libel plaintiffs to recover either: (1) presumed damages (which had previously been allowed in Arizona) or (2) punitive damages, except upon a showing that the defendant knew the defamatory statement was false or had been made in reckless disregard for the truth. If the plaintiff cannot meet this higher standard of proof, he may only recover for his actual injury, which may include the impairment of reputation and standing in the community, personal humiliation, mental anguish, and suffering.

Although Arizona does have a correction statute, A.R.S. § 12-653.01 *et seq.*, the Arizona Supreme Court has ruled that it violates the state constitution. *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186 (1986). The correction statute provides that a libel plaintiff cannot recover punitive damages unless he has demanded a retraction within 20 days of learning of the offending broadcast or publication **and** the retraction is not published or broadcast within three weeks after its request. A.R.S. § 12-653.01 *et seq.* In *Boswell*, the Court held that the correction statute violates article XVIII, section 6 of

the Arizona Constitution, which provides that "[t]he right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." While a retraction may no longer eliminate a defamation plaintiff's punitive damages claim, it nevertheless may be considered as mitigating those damages. *Boswell*, 152 Ariz. at 19, 730 P.2d at 196.

A refusal to retract does not of itself establish actual malice. *Ross v. Gallant, Farrow & Co.*, 27 Ariz. App. 89, 551 P.2d 79 (1976); *Anderson v. Rocky Mountain News*, 15 Media L. Rep. (BNA) 2058 (10th Cir. 1988).

#### **4. Criminal Libel**

Under the old Arizona criminal code, libel was a crime. The criminal libel statute was repealed in 1978.

#### **5. How to Handle a Libel Claim**

If you receive a telephone call or letter regarding an alleged defamation:

- (a) Be polite. Nothing will provoke the filing of a lawsuit faster than a reporter or editor who is insensitive to the complaints of an individual who feels he has been wronged.
- (b) Do not admit error, but agree to check into the facts.
- (c) Do not volunteer any information as to how any mistake was made.
- (d) If the telephone call or letter is from an attorney, refer the matter to your own attorney.
- (e) Print "clarifications" and "corrections" freely. You should stress the use of "clarifications" and "corrections" and use "retractions" only in extreme circumstances.
- (f) When a "clarification" or "correction" is published, give it prominence. A "hidden" clarification for a front page story may be worse than no clarification at all. If an individual demands a correction of a statement that is clearly defamatory, such a correction must be made in as conspicuous a manner as the defamatory statement.

#### **D. Privacy**

The right of privacy is a fairly recent and still evolving development in tort law. The damage in privacy actions is injury to the plaintiff's feelings, such as the mental anguish and distress from having been exposed to the public view. Although injury to reputation may be an element of this damage, the publication need not be defamatory.

Arizona first recognized the tort of invasion of privacy in *Reed v. Real Detective Publ'g. Co.*, 63 Ariz. 294, 305, 162 P.2d 133, 139 (1945), which involved the unauthorized publication of the plaintiff's photograph in connection with a magazine story, and where the court held that "[t]he gravamen of [a privacy] action... is the injury to the feelings of the plaintiff, the mental anguish and distress caused by the publication."

Arizona has also a constitutional provision that guarantees a right of privacy. Article II, Section 8 of the Arizona Constitution provides that: "(n)o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision has been construed to apply only to actions of the state and is not intended to give rise to a cause of

action between private individuals. *Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 460 P.2d 666 (1969), *overruled on other grounds*, *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989). It has been applied primarily to searches and seizures by police or city governments. *See, e.g., State v. Ault*, 150 Ariz. 459, 724 P.2d 545 (1986); *Peterson v. City of Mesa*, 207 Ariz. 35, 83 P.3d 35 (2004).

The tort of "privacy" has evolved into four separate and analytically distinct causes of action discussed below:

### **1. Public Disclosure of Private Facts**

Disclosure of true, but private, facts about the plaintiff may give rise to a claim for which truth of the disclosed facts is not a defense. The tort is based on the idea that individuals have a right to be let alone, and to be free of publicity about their private lives.

In order for disclosure of private facts to be actionable: (i) there must be sufficient publicity that the facts are substantially certain to reach the public and become a matter of public knowledge; (ii) the facts are truly private and not already a matter of public knowledge; and (iii) the disclosure is deemed to be highly offensive to a "reasonable person," as measured by community standards.

The United States Supreme Court has ruled that there is no liability for a truthful disclosure of information contained in a public record. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (disclosure of a rape victim's name did not give rise to an action for invasion of privacy); *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992) (newspaper's publication, as part of an article reporting on the prosecution of the former police chief charged with sexually abusing his child, of a photograph of the victim and information regarding her name and age and details of the offense did not constitute public disclosure of private facts because the facts were clearly within the public domain and part of the court record).

With regard to whether "public facts" may become "private facts" with the passage of time, the California Supreme Court has held that publication of facts obtained from public official records was protected even though the facts concerned a 13-year-old murder case and the offender had rehabilitated himself. *Gates v. Discovery Comm'ns, Inc.*, 101 P.3d 552 (Cal. 2004). *See also Uranga v. Federated Publ'ns, Inc.*, 67 P.3d 29 (Idaho 2003) (newspaper's publication of a 40-year-old statement implicating individual in homosexual activity not actionable because it was part of a criminal record, even though "the circumstances surrounding the publication... certainly evoke sympathy").

The determination of whether a disclosure of private facts is actionable must be weighed against the "newsworthiness" of the publication. For example, in a California case, the court refused to stop the publication of photographs showing the faces of soldiers involved in prisoner abuse; the story was newsworthy, and the "expressions on [their] faces form an integral part of the story." *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005). However, newsworthiness may be outweighed by the public's interest in protecting persons willing to testify. *Capra v. Thoroughbred Racing Ass'n of N. Am., Inc.*, 787 F.2d 463 (9th Cir. 1986). The wife and child of a man convicted of a federal offense, all three of whom had entered the witness protection program, sued when a press release revealed their true identities. The court held that the

press release was not sufficiently newsworthy at least to the wife and child, who did not voluntarily expose themselves to public notoriety. In *Foretich v. Lifetime Cable*, 777 F. Supp. 47 (D.D.C. 1991), the court allowed an action for public disclosure of private facts arising out of the network's broadcast of film that included scenes in which a child purportedly demonstrated how her father sexually abused her. The court reasoned that, even though the issue of child abuse is a matter of legitimate public interest, specific facts about the alleged abuse of one particular child are not necessarily of legitimate public concern and there was a dispute as to whether consent was given for the broadcast. *But see Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783 (3d Cir. 2005) (newspaper not liable for publishing name of minor rapist when officer unlawfully released the information).

The California Supreme Court in *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998), rejected a publication of private facts claim where one of the plaintiffs was videotaped at the scene of an automobile accident and during the helicopter flight to the hospital, on the grounds that the material was newsworthy; however, the court held that the plaintiff could proceed with a claim for intrusion (discussed in Section III(D)(3) of this Handbook) based on a reasonable expectation of privacy in the plaintiff's conversations with the nurse and inside the interior of the rescue helicopter.

## **2. False Light in the Public Eye**

False light invasion of privacy consists of publicity that places the plaintiff in a false light before the public. The action may arise by falsely attributing to the plaintiff some opinion or statement, by the unauthorized use of his or her name, or by the publication of true information that creates a false implication about the individual. *See Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (photographs of actress falsely implied that she was a lesbian and had consented to appearing in *Hustler Magazine*); *but see Steele v. Spokesman-Review*, 61 P.3d 606 (Idaho 2002) (holding that the publication must contain a material falsehood, not merely an implication). Although this tort is very similar to defamation, injury to the plaintiff's reputation is not a requirement of liability, as long as the publicity is unreasonable and objectionable and attributes false characteristics to the plaintiff. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. at 341, 783 P.2d at 787. A plaintiff's injury for false light may be mental distress from having been exposed to public view. *Flowers v. Carville*, 310 F.2d 1118 (9th Cir. 2002).

To succeed on a claim for false light invasion of privacy, a plaintiff must show: (1) the defendant knowingly or recklessly (2) gave publicity to (3) false information or innuendo about the plaintiff (4) that a reasonable person would find highly offensive; *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989); Restatement (Second) of Torts § 652E (1977).

The United States Supreme Court found in *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974), that the defendant was liable for false light invasion of privacy when it published an article "with knowledge of its falsity or in reckless disregard of the truth" that portrayed the plaintiffs as living in abject poverty, where the reporter falsely implied that he had interviewed the plaintiffs. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the United States Supreme Court held that an article about a play that fictionalized a family's being held hostage by three escaped convicts to be an actionable false light claim but that

a false light claim involving "matters of public interest" was precluded "in the absence of proof that the material was published with knowledge of falsity or in reckless disregard for the truth." However, an open question exists as to the proper standard for false light cases, and there is currently a division of authority among states on this question.

Furthermore, while a majority of states recognize false light invasion of privacy, a significant number do not. *Denver Publ'g Co. v. Bueno*, 54 P.3d 893 (Colo. 2002) (crime family member who had avoided participation in criminal activities was named in an article about the family; the jury awarded damages for false light but the supreme court reversed).

*Godbehere* also established that a public official cannot sue for false light invasion of privacy if the publication relates to performance of his or her public life or duties. Finally, to be actionable, the publication must involve a major misrepresentation of the plaintiff's character, history, activities, or beliefs, and not merely contain minor or insignificant inaccuracies.

### **3. Intrusion Upon Seclusion**

Intrusion consists of the intentional invasion of the solitude or seclusion of another in his or her private affairs or concerns, physically or otherwise, if the intrusion would be highly offensive to a reasonable person. Restatement (Second) of Torts § 652B (1977). Unlike other types of invasion of privacy, publication is not an element of the tort. The tort is complete when one obtains, or attempts to obtain, information by improperly intrusive means. In the context of the news media, intrusion is a news gathering tort rather than a news dissemination tort. It is concerned not with the subject matter of what is published, but with the method by which the information is obtained.

Some examples of activities that may give rise to liability for intrusion include: (1) eavesdropping on a private conversation by means of an electronic device; (2) peering through the windows of someone's home (with or without the use of an electronic device); (3) going through someone's mail; or (4) secretly photographing, videotaping, or tape recording an interview. Although Arizona law allows reporters to secretly tape record their telephone conversations with sources (A.R.S. § 13-3005), that practice is prohibited in at least the following 12 states: California, Florida, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, Oregon, Pennsylvania, and Washington. Although the issue has yet to be decided by an Arizona court, Arizona reporters calling sources located in these 12 "two-party" states should err on the side of caution and notify their source that the conversation is being recorded. Recently, the California Supreme Court held that when a person calling from a one-party state, such as Arizona, secretly records a telephone conversation with a person in California, the caller from the one-party state could be held liable under California's privacy statute. *Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95 (2006). A Florida appellate court reached the same conclusion in *Koch v. Kimball*, 710 So. 2d 5 (Fla. App. 1998). In Massachusetts, a federal district court reached the opposite conclusion in holding that the law of the state of the person doing the recording should apply. *MacNeill Eng'g Co. v. Trisport, Ltd.*, 59 F. Supp. 2d 1999 (D. Mass 1999).

The use of hidden cameras in some circumstances may give rise to an intrusion claim, depending in part on the state where it takes place. In *Sanders v. American Broad. Cos.*,

978 P.2d 67 (Cal. 1999), the California Supreme Court held that the plaintiff, who was secretly videotaped in an open work area where co-workers could overhear his conversation, had a "reasonable expectation of visual or aural privacy against electronic intrusion by a stranger to the work-place." However, in *Medical Laboratory Management Consultants v. ABC, Inc.*, 306 F.3d 806 (9th Cir. 2002), the court affirmed a dismissal of an intrusion claim under Arizona law, as well as a claim under the federal eavesdropping statute, where defendants used false pretenses to gain access to the plaintiff's laboratory and secretly videotaped conversations. The court found significant differences between California and Arizona law in the area of electronic eavesdropping.

Journalists, private investigators and academic researchers may be liable for intrusion if they misrepresent themselves to obtain highly sensitive information. *Taus v. Loftus*, 40 Cal. 4th 683 (2007). In *Taus*, the California Supreme Court noted "that there are at least some types of misrepresentations that are of such an especially egregious and offensive nature—and are quite distinguishable from the types of ruses that ordinarily may be employed in gathering news—that they properly may be considered 'beyond the pale' for purposes of the intrusion tort." *Taus*, 40 Cal. 4th at 738-39. According to the California Supreme Court, one such example would be a reporter making a telephone call to a family member of a public official and misrepresenting himself as a physician or paramedic to learn from the family member if the public official has a particular medical condition or is taking a specific medication. *Taus*, 40 Cal. 4th at 739.

It is normally not an invasion of privacy to follow, film, or photograph someone in a public place—unless the method used is unusually harassing or offensive—because this amounts to no more than reporting what the general public could have seen. See *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (holding that conduct amounting "to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public, or 'semi-public' place," may nevertheless rise to the level of invasion of privacy). It is also generally permissible to photograph or record those parts of private life that reasonably could have been heard and seen from a public position. However, the so-called "ambush interview," in which a reporter and film crew come without prior warning to the subject's residence or place of business with "cameras rolling," may present issues concerning intrusion and the scope of consent or lack thereof. In a New York case, a court refused to dismiss a claim where reporters and a camera crew entered an exclusive restaurant with cameras rolling in response to an alleged health violation by the restaurant. The court reasoned that the consent to the public to enter was limited to entry for the purchase of food and services. *LeMistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815 (N.Y. App. Div. 1978). However, in *People for Ethical Treatment of Animals v. Bobby Berosini Ltd.*, 895 P.2d 1269 (Nev. 1995), modified on other grounds by *Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 127 (Nev. 1997), the Nevada Supreme Court held that the videotaping of an animal trainer by an animal rights activist trespassing backstage at a hotel did not give rise to an intrusion claim, due to the reduced expectation of privacy in the workplace.

For an intrusion of privacy to be actionable, the place invaded or intruded upon must usually be a private place, such as a home, office, or hospital. *Marich v. MGM/UA Telecommuns., Inc.*, 1136 Cal. App. 4th 415 (2003) (recording of parents being told their son was dead was aired on television show; court reversed verdict in favor of defendants

because of erroneous jury instruction); *Castro v. NYT Television*, 895 A.2d 1173 (N.J. Super. Ct. App. Div. 2006) (class certification denied when circumstances of videotaping of hospital patients varied, so that some would have claim for intrusion and others would not). However, courts have recognized that "reasonable people may find a legally protectable private environment in a multiple and varied array of physical settings." *Jensen v. Sawyers*, 130 P.3d 325 (Utah 2005)

No liability will attach to the publication of information obtained illegally by third parties but not actively sought by the publisher or reporter. In *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), the court held that columnist Drew Pearson was not liable for intrusion merely by printing confidential information taken from Senator Thomas Dodd's files by others.

The Arizona Court of Appeals has held that a claim based solely on intrusion into a plaintiff's solitude or private affairs can succeed only if all the elements of the tort of intentional infliction of emotional distress are present. *Davis v. First Nat'l Bank of Ariz.*, 124 Ariz. 458, 605 P.2d 371 (App. 1979); *Cluff v. Farmers Ins. Exch.*, 10 Ariz. App. 560, 460 P.2d 666 (1969). This standard requires a plaintiff to prove that the defendant's conduct was extreme and outrageous and that the plaintiff suffered genuine and serious mental harm. This standard was been called into question by *Godbehere*, where the Arizona Supreme Court rejected the intentional infliction of emotional distress standard as applied to a claim of false light invasion of privacy, applying instead the "highly offensive to a reasonable person" standard. However, in a more recent case, a federal court judge in Arizona applied the higher standard to an invasion of privacy claim. *Robinson v. Fred Meyer Stores, Inc.*, 252 F. Supp. 2d 905 (D. Ariz. 2002).

#### **4. Appropriation of Name or Likeness**

The fourth type of invasion of privacy is the appropriation, without consent, for defendant's benefit or advantage, of the value of the plaintiff's name or likeness. This "right of publicity" is not limited to appropriation of the plaintiff's name or likeness, but also includes such things as the plaintiff's distinctive voice or overall identity. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). The interest recognized by this form of invasion of privacy is similar to a property right, in that the interest protected is an individual's interest in the exclusive use of his name or likeness. This tort also called "commercial appropriation" because frequently it involves the use of the plaintiff's name or likeness for a commercial purpose such as advertising a business or product. However, it is not strictly limited to appropriations for pecuniary gain, but may include appropriations for political or other purposes involving nonpecuniary exploitation.

Right of publicity claims are often brought by celebrities whose identities have a well-established commercial value, but claims may also be brought by those who are not famous, who either suffered mental anguish and distress as a result of publication, or whose identity had value in a particular context and thus they sue for pecuniary loss. In some states, such as California, there are separate statutory and common law claims addressing these different types of claims, but either are available in Arizona. *See In re Estate of Reynolds*, 327 P.3d 213 (Ariz. App. 2014).

In the "Human Cannonball" case, the United States Supreme Court found a violation of a circus performer's right of publicity for a news report to broadcast plaintiff's *entire* 15-second act because it went to the very heart of the plaintiff's ability to earn a living. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). Use of a picture by a newspaper or magazine which appears in the newspaper or magazine in connection with a newsworthy story, however, and which is later used for promoting the newspaper or magazine does not constitute a commercial appropriation. *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (1975), *aff'd*, 386 N.Y.S.2d 397 (1976).

## **5. Statutory Provisions**

A number of states have enacted statutes specifically granting a right to privacy, at least with regard to specific types of information, such as the name of rape victims or, as in Arizona (A.R.S. § 36-668), the disclosure that a person has AIDS.

#### **IV. PROMISES OF CONFIDENTIALITY TO SOURCES**

The use of confidential sources for anything from unattributed quotes to "deep background" is a necessary tool of reporting. However, a reporter's promise of confidentiality to a source may create a contract, which may give rise to an action for breach of contract if the reporter reveals the source's identity. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), a political consultant named Dan Cohen offered documents relating to a candidate in an upcoming election to reporters on the condition that those reporters promised to keep his identity confidential. Despite the reporters' promises, however, their newspapers identified Cohen as the source of the documents. On the same day the articles appeared, Cohen was fired by his employer.

Cohen sued for breach of contract and won a jury verdict awarding him \$200,000 in compensatory damages. After the Minnesota Supreme Court held that the First Amendment barred Cohen's breach of contract claim, the United States Supreme Court reversed, holding that "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.* at 670; *see also Doe v. Univision Television Group, Inc.*, 717 So. 2d 63 (Fla. Dist. Ct. App. 1998) (reversing trial court's dismissal of claims for invasion of privacy and breach of contract, in a case where defendant allegedly failed to conceal the plaintiff's identity after having agreed to do so for a television interview in which she spoke about being badly scarred by plastic surgery).

In light of *Cohen*, reporters should be careful about making any promises to sources and should, when doing so, make sure that the source clearly understands what is and is not being promised. It is suggested that a reporter not promise confidentiality without the permission of an editor and that any promise of confidentiality be recorded on tape or in writing. However, for the source's protection, any memorialization of the confidentiality agreement should be kept in a secure place.

## V. COPYRIGHT

### **A. Introduction to the Law of Copyrights**

A copyright is an intangible right granted by federal statute to authors of certain types of literary and artistic works. This right grants the owner, for a limited period of time, the sole privilege of copying, publishing, and selling the copyrighted work.

#### **1. Subject Matter**

Copyright protection extends to original works of authorship that are fixed in a "tangible medium of expression." "Works of authorship" include literary works, sound recordings, and moving pictures. A "tangible medium" is any means by which the work can be preserved, reproduced, or otherwise communicated, whether perceivable directly by the human eye or with the aid of a machine. Thus, protection effectively extends to all forms of newspaper and broadcast journalism (so long as any broadcast is simultaneously recorded by the broadcaster) as well as works contained in audio tapes, films, videotapes, computer disks, and computer databases. Additionally, any work stored on a server or CDs disseminated to the public via the Internet will be considered fixed in a tangible medium so long as the work remains retrievable.

Copyright protection extends only to the *expression* of an idea or concept. The expression is the form in which the idea is presented such as the style, language, and structure of the work as a whole. Ideas (including facts, procedures, processes, methods of operation, principles, and discoveries), no matter how original, are not protected by copyright. The U.S. Supreme Court held in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), that the contents of a white pages telephone directory were not protected by copyright. The Court found that the selection, coordination, and arrangement of facts in the directory pages were not sufficiently creative or "original" to warrant copyright protection no matter how much effort goes into the compilation of the facts. Prior to *Feist*, courts tended to provide protection to compilations of facts under the "sweat of the brow" theory.

It is important for journalists to know that facts about historical and news events are considered "ideas" and are not copyrightable. As long as a later competing article or broadcast segment is created independently (and is not a copy or substantial paraphrase), it is not an infringement of a prior work, even if the journalist learned of the news event in question from someone's prior work. After *Feist*, it is clear that courts will no longer reward the industrious efforts of researchers with a grant of copyright protection. Any copyright protection given to a compilation of factual information will protect only the originality of the work's organization and not the facts themselves.

#### **2. Ownership**

##### **a. Copyright Ownership and the Employment Relationship**

The ownership of a copyright vests in the author of the work. In most circumstances, the author of a work will also be the person who created the work. But, when a work is considered a work "made for hire," the employer is considered to be the author and therefore the employer owns the copyright. Ownership of copyrights is an important question for members of the media. For all works, the owner of the copyright is

determined by the nature of the relationship between the creator (e.g., journalist, photographer, camera operator) and the media entity.

A "work" made for hire" is either: "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101. Therefore, a media entity will be the owner of the copyrights for: (1) publications and broadcasts created by employees and (2) publications and broadcasts created by nonemployees contracted to create works in the above-listed categories.

The ownership situation for freelance journalists is different. When work is created by a nonemployee, such as a freelance journalist or photographer, the individual will usually own the copyright. In order for the work to be owned by the media entity: (1) the work must have been specially ordered by the media entity; (2) it must have been created as a contribution to one of the types of works listed in 17 U.S.C. § 101; and (3) the parties must have agreed in writing that the work would be a work made for hire. If a freelance journalist's work does not meet these requirements, the media entity holds only the contractual rights obtained through its relationship with the freelancer. Generally, this only gives the media entity the right of first publication.

In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) ("*CCNV*"), the United States Supreme Court discussed the meaning of "employee" as used in 17 U.S.C. § 101. The Court defined "employee" literally as meaning only an employee in a traditional agency relationship. Under *CCNV*, the status as an employee or independent contractor will be determined by examining several factors: (1) the right of the person to control the manner and means by which the job is accomplished; (2) the skill required for the job; (3) the source of the tools used in the job; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects; (7) the method of payment; (8) the ability of the hired party to determine when and how long to work; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the structure of employee benefits; and (13) the tax treatment of the hired party. Prior to *CCNV*, courts arbitrarily made employee/nonemployee determinations based on varying factors.

*CCNV* is seen as a substantial victory for freelance authors because it mandates a careful scrutiny of the relationship between the parties applying the above factors. Accordingly, a journalist seeking to secure freelance status should seek a relationship with media entities in which: (1) the journalist controls the manner and means of completing the job; (2) the media entity does not have the right to assign additional jobs; (3) the journalist uses his or her own resources and hires and pays all assistants; and (4) the entity does not deduct payroll taxes or provide employment benefits to the journalist.

#### **b. Joint Works**

Another important yet complicated aspect of copyright ownership arises when two or more authors share in the ownership of a single copyright. It is important for anyone

considering entering such an arrangement or already possessing a portion of an existing copyright to keep certain aspects of copyright law in mind. First, a "joint work" exists when a work is created by "two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. Intention is the key part of this section of the statute. A joint work is not created unless the authors intend to create the work as a joint work. The contributions by the various authors need not be equal in quantity or quality, but each author, in order to share in the copyright, must contribute something independently copyrightable. Second, the owner of a copyright interest in a joint work owns an undivided interest in the entire work. The joint author can license or use the entire work as he or she wishes. The joint author is not required to get permission to license or use the entire work from the other joint authors, but has a duty to account for profits to other joint owners. Joint authors must share all profits earned from exploitation of the joint work. Finally, the joint author cannot assign or transfer his or her interest in a joint work without the written consent of the other joint authors.

### c. Collective Works

When a journalist contributes a work to a collective publication in which a number of separate and independent contributions are collected, the author retains the copyright in his or her contributed work unless there is a contract stating otherwise. The publisher of the collective work has the right to publish the collective work and any revision of the collective work without the permission of the individual authors so long as the publisher does not publish any single work individually. 17 U.S.C. § 201(c). For example, a magazine publisher that publishes an issue consisting of several independently copyrighted articles can republish the issue or a variation of the issue without the consent of the individual authors. But, the publisher cannot publish any single work from the issue alone. An author of a work used as part of a collection does not have a right to revise the work when it is used in further collections by the publisher.

In *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), the U.S. Supreme Court reviewed the collective works provision of the Copyright Act, 17 U.S.C. § 201(c). Tasini and several other freelance journalists were in the business of providing articles for publication to publishers of periodicals such as the *New York Times*, *Time*, *Newsday*, and *Sports Illustrated*. The journalists operated under contracts that provided the publisher with the right of publication, but placed copyright ownership in the journalist. The publishers later licensed rights to copy and sell the published articles to electronic databases such as LEXIS/NEXIS. The electronic databases of the type addressed in this case contain text-only formats of articles from hundreds of periodicals spanning many years. A subscriber to the database can search the articles using different criteria and download desired articles. Each article is presented in isolation and without connection or reference to any other articles appearing in the original periodical edition. The journalists argued that their copyrights were infringed when the articles were placed in the databases. The publishers argued that publication in the databases constituted a revision of the collective work under section 201(c) and therefore did not infringe the copyrights. The U.S. Supreme Court held that publication in the database was not a revision of the published collective work because the articles were essentially published alone as opposed to in a revised collective work. *Tasini*, 533 U.S. at 503-04.

Because a publisher of a collective work cannot publish any single contribution to the collective work individually, the publishers' placement in the database infringed the copyrights of the authors. *Id.* at 504. Consequently, under *Tasini*, unless the freelance contract states otherwise, a freelance journalist controls the right to place his work in a database independent of any contract for publication of the work as part of a collective work.

### **3. Rights**

A copyright owner has the exclusive right under federal law to reproduce or copy his or her work, to adapt the work (prepare derivative works, such as abridgements, translations, and adaptations from one medium to another, for example, adapt novels into movies), to publish the work (distribute copies), and, in the case of certain types of work, to perform or display the copyrighted work publicly. Moreover, under the Visual Artist Rights Act of 1990, 17 U.S.C. § 106(A), authors of certain kinds of visual arts have an inalienable right to have authorship of the work attributed to them and their work is protected against destruction, mutilation, and distortion.

For works created after January 1, 1978, or created but not published or relegated to the public domain before that date, the above-discussed exclusive rights vest at the creation of the work (i.e., at the time the work is fixed in a tangible medium). The rights last for the life of the author plus 70 years for individual authors and for either the shorter of 95 years from the date of publication or 120 years from the date of creation for works made for hire and anonymous/pseudonymous works. 17 U.S.C. § 302.

For works published after March 1, 1989, copyright notice is not necessary to preserve an author's exclusive rights in the work. Works published prior to March 1, 1989, however, must have been published with proper notice. It is a good idea to publish all works with proper notice even though notice is no longer required for protection. If an infringer can prove that he was misled by the omission of a copyright notice on a post-1989 work, the copyright owner may not recover actual or statutory damages for infringing acts committed before the infringer received actual notice that the work is copyrighted.

A proper copyright notice consists of three elements: (1) the whole word "Copyright," the abbreviation "Copr.," or the symbol "©", (2) the year of first publication, and (3) the owner's name. A proper copyright notice might look like this: © **Jane Doe 2007**. 17 U.S.C. § 401(b).

### **4. Infringement**

A copyright is infringed when a third party violates one of the copyright owner's exclusive rights. 17 U.S.C. § 501(a). A party is infringing if it reproduces, adapts, distributes, publicly performs, or publicly displays a copyrighted work. It is important to note that the right of reproduction protects the work from exact duplication and the making of works which are substantially similar to the copyrighted work. Additionally, the entire work need not be copied. It is an infringement to reproduce a small portion of a book, article, or motion picture if the reproduced portion is qualitatively substantial.

Often, it is difficult to prove that a copyrighted work has been copied. A copyright owner must show evidence of copying because independent works of authorship, no matter how similar to copyrighted works, are not considered infringements. Direct evidence of

copying is extremely difficult to find in most infringement cases. In these cases copying is shown by inference. Copying will be inferred when: (1) the alleged infringer had access to the copyrighted work and (2) the works are substantially similar.

## **5. Registration**

Copyright registration is the legal act that makes a public record of a copyright. It is important to note that a work need not be registered in order to be protected. On the other hand, registration provides key advantages: (1) registration is necessary in order to file an infringement suit (registration need *not* occur prior to the infringing activity); (2) if made within five years of publication, registration serves as prima facie evidence of validity of the copyright; (3) registration within three months of publication allows an author to claim statutory damages and attorneys' fees in court actions; and (4) registration allows an author to register with the United States Customs and Border Protection for protection against the importation of infringing goods.

. To register a work, the author may register through the Copyright Office online system or through use of paper forms. There are certain advantages to registering a work through the Copyright Office online system, including a lower online filing fee for a basic claim and faster processing time. Information about registration and access to both the online system and to paper forms are available at [www.copyright.gov/eco/](http://www.copyright.gov/eco/).

## **B. Limitations on Copyright Protection**

### **1. The Fair Use Doctrine**

The fair use doctrine is a legal defense that allows a third party to use copyrighted material without the consent of the copyright owner. The Copyright Act states that the following four factors should be considered in determining whether a use of copyrighted material is a fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the market for or value of the copyrighted work. The application of the fair use doctrine to the media is generally limited to book and film reviews where the doctrine allows a reviewer to quote from a copyrighted book or show clips from a copyrighted film for purposes of comment or criticism.

In *Harper & Row Publications, Inc. v. Nation Enterprises, Inc.*, 471 U.S. 539 (1985), the United States Supreme Court considered the extent to which the fair use provision permits the unauthorized publication of excerpts from an unpublished manuscript. In *Harper & Row*, a book publisher contracted with former President Ford to obtain the exclusive right to license prepublication excerpts of Ford's autobiography. Pursuant to the contract, the publisher, Harper & Row, negotiated a prepublication licensing agreement with *Time* magazine. Another magazine, *The Nation*, having obtained, without authorization, a copy of Ford's manuscript, published a 2,250-word article about the book in which a 300-word section of the copyrighted manuscript was used. As a result, *Time* cancelled its piece and refused to pay the remainder of the advance owed to Harper & Row. The Court found that *The Nation* "effectively arrogated to itself the right of first publication, an important marketable subsidiary right." *Id.* at 549. In holding that *The*

*Nation's* publication did not constitute a fair use, the Court observed that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use." *Id.* at 555. Importantly, *Harper* should not affect the right of book reviewers to use direct quotations pursuant to the fair use provision so long as they do not publish the quotations simply to make "news" and preempt lawful serialization.

## **2. Parody**

A parody imitates a serious work of literature, art, or music for the purpose of comedy or satire. Parody, by its nature, makes use of another's work. Therefore, a tension exists between the rights of the person creating the parody and the copyright rights of the author of the work being parodied. A work of parody will often offend the author of the original work. This is why most authors refuse to license their works for the purpose of parody. Therefore, a parodist must rely on a fair use defense when a substantial use of the original work is used in a parody. The four factors used in traditional fair use examinations are also used in examining parody uses.

In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the United States Supreme Court specifically noted the importance of parody as a mechanism for criticism and a means of "shedding light on an earlier work, and, in the process, creating a new one." In *Acuff-Rose*, the rap group 2 Live Crew made a parody of Roy Orbison's song "Oh, Pretty Woman." The parody copied the song's repeated bass riff and the words of the first line. The Court held that fair use can be a defense even when a parody is for a commercial purpose, *id.* at 584, and, that "the parody must be able to 'conjure up' at least enough of [the] original to make the object of its critical wit recognizable," *id.* at 588. Under *Acuff-Rose*, a journalist creating a parody can borrow from a copyrighted work those elements necessary to "conjure up" the work being parodied.

It is important for any writer or journalist operating in Arizona to know that the Ninth Circuit has narrowly interpreted *Acuff-Rose*, and thus has limited its application in Arizona, by refusing to permit the fair use defense to the alleged infringements in *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997). In *Dr. Seuss*, the defendants published a book about the O.J. Simpson murder trial in the rhyming form of Dr. Seuss and using a depiction of Mr. Simpson, as narrator, dressed up as the Cat in the Hat. The Court rejected the fair use defense because it found that in order for a work to be a parody, the work must ridicule the original work and exhibit an "effort to create a transformative work with new expression, meaning or message." *Id.* at 1401. Consequently, under *Dr. Seuss*, a parody must criticize, ridicule, or otherwise comment on the work being parodied. A satire using a copyrighted work, but not otherwise directed at the copyrighted work, will not be considered a fair use.

## **C. The Digital Millennium Copyright Act**

In 1998, Congress passed the Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.*, to protect digitally transmitted works of authorship. The Act provides legal remedies against people who circumvent technological measures utilized by an author to control access to a work. Additionally, the Act prohibits the manufacturing or the making available of technologies that are designed to circumvent technological measures which

control access to copyrighted works. Journalists should consider these new provisions when engaged in investigation.

## **VI. TRADEMARK**

### **A. What Is a Trademark?**

A trademark is a distinctive word, name, design, or combination used by a person or entity to identify the source or origin of the goods provided and to distinguish them from goods offered by others. A service mark serves the same function for services (e.g., BUDGET for car rentals or AMERICAN EXPRESS for financial services). There are several types of trademarks. Brand names such as COCA-COLA or KLEENEX designate the source or origin of certain goods or services. Collective marks are used by members of an association or cooperative. For example, the SUNKIST mark is used by a group of independent orange growers to signify fruit produced by members of the association. Certification marks are marks used by a person other than the owner to certify certain qualities of its goods or services. For example, the GOOD HOUSEKEEPING SEAL OF APPROVAL is used by third parties to designate goods and services approved by the Good Housekeeping organization.

Trademark law is not exclusive to the federal government. The federal statute, the Lanham Act, co-exists with state statutory law and state common law. Therefore, it is important for anyone confronting a trademark issue to consider both federal and state law issues.

### **B. Registration**

One need not register a trademark in order to have exclusive rights in it, but trademark registration provides the owner with certain benefits. Only marks federally registered in the United States Patent and Trademark Office may bear the circle-R symbol (®). Federal registration is prima facie evidence of the validity of a trademark. Registration serves also as constructive notice of the claim of ownership. Finally, registration allows an owner to claim attorneys' fees and costs in infringement suits.

Federal trademark registration is obtained by filing an application with the United States Patent and Trademark Office. An application for registration can be filed when a mark has been used in commerce. Additionally, an "intent to use" application can be filed by a party intending to use a mark and wanting to reserve the mark for an extendable six-month period of time. The "intent to use" application will result in a registration only when evidence of actual use is filed with the Trademark Office.

Once a mark has been registered, it is a good idea that it be used only with the circle-R symbol (®). The TM and SM symbols (<sup>TM</sup>, <sup>SM</sup>) are informal symbols used by many trademark and service mark owners to indicate their claim of exclusive rights in the marks, but these symbols do not have any formal legal significance. While owners of registered marks may face adverse consequences by not using the ® symbol, journalists and other persons may include the symbol at their discretion.

### **C. Consequences for the News Media**

#### **1. Parody**

Similar to copyright, a limited right to use trademarks in parodies is protected. In *L.L.*

*Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir. 1987), the court expressed a First Amendment interest in protecting a writer's ability to use the L.L. Bean trademark in a parody of the company's catalog. The *L.L. Bean* court based its decision, in part, on the fact that the parody was noncommercial.

A journalistic use of a trademark will almost always be seen as a noncommercial use. Therefore, an article which criticizes the employment practices of a corporation can use the trademarked name of the corporation in the article. Additionally, a political cartoonist is permitted to use a company's trademark or logo in a drawing intended to comment on, criticize, or ridicule the company. The general rule is that a company cannot use trademark law as a means of suppressing criticism of the company or its products.

## **2. Generic Use**

It is unlikely that a journalist would ever be sued for trademark infringement. Nonetheless, journalists may, however inadvertently, undermine the rights of trademark owners in their trademarks by using the marks "generically," i.e., as the common, ordinary term for a good or service rather than as an identifier of a particular source of the good or service. Thus, using "coke" as a generic term for a cola beverage or "xeroxing" for photocopying may encourage or evidence generic usage by the public. Journalists should avoid using such terms.

## **3. Innocent Infringement**

Where a newspaper, magazine, or broadcaster innocently publishes or carries paid advertising that infringes a trademark, any injunction sought under the federal trademark statute would be limited to preventing any future publication or broadcast of the offending advertisement. Injunctions to prevent trademark infringement cannot be obtained if they would delay the routine delivery or transmission of a publication or broadcast as measured by the customary distribution or transmission practices of the publisher or broadcaster.

## APPENDIX A

*(Newspaper or Broadcast Station Letterhead)*

*(Date)*

*(Subject Matter Reference)*

Dear Sir or Madam:

Pursuant to A.R.S. §§ 39-121 through 39-121.03 (the "Arizona Public Records Law"), as a reporter for *(name of media entity)*, I request that you, in your capacity as *(name of public officer's title or function)*, make available to me for examination and/or copying the following documents (which include electronic records): *(identify documents as narrowly as possible)*.

As you know, state law provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed. While I expect that you will send me all non-exempt portions of the records I have requested, I respectfully reserve the right to challenge your decision to withhold any materials.

*(Optional paragraph)* Since some of the documents listed above may be more readily available than others, please provide the documents that are available as soon as possible without waiting to provide access to all the documents.

The foregoing request is for the noncommercial purpose of gathering the news, and copies of the foregoing documents will not be used for a commercial purpose.

*(Option 1—Inspect records first without purchasing a copy)* I wish to inspect the documents first before I determine whether I would like a copy. If I wish to have a copy, I may choose to copy those records with my scanner, camera or smartphone.

*(Option 2—Obtain copies)* If you can provide copies of the records electronically, please send them to me at this email address. If they can be made available by disk, I would be happy to make arrangements to pick up a copy. I will pay reasonable costs of photocopying or reproducing the records up to  $\$(insert\ cost\ you\ are\ willing\ to\ pay)$ . If you anticipate that copying costs will exceed \$\_\_\_\_, please call me or reply to this email before incurring any copying charges. Also, I would be happy to make copies of the records with my scanner, camera or smartphone.

Please provide me a response to my request by no later than the close of business on *(fill in reasonable date)*. Your failure to deliver the foregoing documents *(optional phrase)* or so many of such documents as are readily accessible) to me by the close of business on *(date)* will be deemed as your refusal to provide the documents. *(Optional sentence)* Please be advised that, in the event my request for the foregoing documents is denied, I shall take whatever action I deem appropriate, including the filing of a special action in Superior Court, to secure my rights under Arizona law.

I would appreciate your communicating with me by telephone or email *(provide phone numbers and/or email address)*, rather than by mail, if you have any questions regarding this request.

Thank you for your anticipated cooperation in this matter.

Sincerely,  
(Signature)

## APPENDIX B

*(Newspaper or Broadcast Station Letterhead)*

*(Date)*

*(Subject Matter Reference)*

Dear Sir or Madam:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), I request as a reporter for *(name of media entity)*, that you, in your capacity as the information officer for *(name of agency)*, make available to me for inspection and/or copying the following documents (which include electronic records): *(identify documents as narrowly as possible)*.

As you know, FOIA provides that if portions of a document are exempt from release, the remainder must be segregated and disclosed. Therefore, I will expect you to send me all non-exempt portions of the records which I have requested, and ask that you justify any deletions by reference to specific exemptions of FOIA. I reserve the right to appeal your decision to withhold any materials.

*(Optional paragraph)* Since some of the documents listed above may be more readily available than others, please provide the documents that are available as soon as possible without waiting to provide access to all the documents.

If you can provide copies of the records electronically, please provide them on a disk or send them to me at this email address. I promise to pay reasonable search and duplication fees in connection with this request. However, if you estimate that the total fee will exceed \$\_, please notify me so that I may authorize expenditure of a greater amount.

*(Optional paragraph)* I am prepared to pay reasonable search and duplication fees in connection with this request. However, FOIA provides for waiver or reduction of fees if disclosure could be considered as "primarily benefiting the general public." I am a journalist employed by *(name of media entity)* and intend to use the information I am requesting as a basis for a planned article. *(Add arguments here in support of fee waiver)* Therefore, I ask that you waive all search and duplication fees. If you deny this request, however, and the fees will exceed \$\_, please notify me of the charges before you fulfill my request so that I may decide whether to pay the fees or appeal your denial of my request for a waiver.

As I am making this request in my capacity as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone or email *(provide phone numbers and/or email address)*, rather than by mail, if you have any questions regarding this request. Thank you for your assistance, and I look forward to receiving your reply within 20 business days, as required by federal law.

Sincerely,

*(Signature)*