

Legal Tips for Student Journalists

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Let's start with a 10-question true/false quiz...

- 1) Judges can easily gag media coverage of high-profile cases.
- 2) An open trial is the right of the public.
- 3) You should obey a gag order even if it looks like it will be overturned.
- 4) California has a shield law to protect reporters from revealing confidential sources.
- 5) You don't have to keep a promise of confidentiality to a source.

Quiz, part two

- 6) You have the right to inspect the President's personal files.
- 7) Your newsroom can be searched for any reason the administration wants.
- 8) Cameras are allowed in any courtroom.
- 9) The right to keep sources confidential is a guaranteed First Amendment right.
- 10) There are open meetings laws in California.

A Right to Report the News

- ★ The First Amendment
 - ★ Harsh criticism OK so long as truthful
 - ★ Libel – no right to defame with malice/negligence
 - ★ Right to access courts, but generally no FA right of access to gov't
 - ★ To report newsworthy, public concern info
 - ★ privacy, copyright
 - ★ Generally, right to publish truthful, lawfully obtained information about matters of public concern
- ★ State Law
 - ★ Open meetings/records laws provide access
 - ★ Constitutional shield law to protect confidentiality
 - ★ State education code for student rights

Special Rights for Reporters?

- ★ Fraud and Misrepresentation
 - ★ No right to lie during undercover reporting (*Food Lion v. ABC*, 4th Cir. 1999)
- ★ Investigating Illegal Activity
 - ★ No right to access child porn as part of investigation, (*U.S. v. Matthews*, 4th Cir. 2000)
- ★ Trespassing and Invasion of Privacy
 - ★ No right to police ride alongs (*Wilson v. Layne*, 1999)

What if reporting impinges on fair trial rights?

- ★ *Nebraska Press Assn. v. Stuart* (1976)
 - ★ Sensational case: in October 1975, Erwin Charles Simants murdered six members of the Henry Kellie family in Sutherland, NE
 - ★ Restrictive order relating to "matters that may or may not be publicly reported or disclosed to the public," because of the "mass coverage by news media" and the "reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial"
- ★ Court declared gag orders a form of prior restraint, presumed unconstitutional on their faces
 - ★ Three-part test is a tough standard

3-part test for gag

- ★ Gov't has burden of proof to demonstrate that:
 - ★ nature and extent of pretrial publicity would impair defendant's right to fair trial
 - ★ no alternative measures which could mitigate effects of publicity
 - ★ prior restraint would effectively prevent the harm
- ★ Judges must deal with media effects without gagging media
- ★ Since this case, valid gag orders are rare; three justices said prior restraints are always unconstitutional
 - ★ Simants' original conviction was overturned but he was found not guilty by reason of insanity on retrial and still serves time in a state mental health center

Should you obey a gag order, even one you think will be invalid?



- * Short answer: Yes, but two conflicting circuit views:
 - * **U.S. v. Dickinson** (5CA 1973): pretrial hearing gagged—reporters felt order invalid, published anyway; 5CA said order invalid but reporters must obey anyway; review of gags must be fast
 - * **In re Providence Journal** (1CA 1986): court decided that Journal entitled to disregard order prohibiting publication of mat'l from FBI wiretaps about murder—media could ignore order when failed on its face to satisfy test for prior restraints
- * High court has not resolved, so best to be safe and obey gag orders, and appeal them quickly!

Is there a right to attend trials?

- ★ **After NPA, judges couldn't gag, so judges tried other ways to control pretrial publicity—court closings rose after Court OK'd them**
- ★ **But *Richmond Newspapers v. Virginia* (1980): Court reversed itself: right of access to actual trial is covered by the First Amendment**
 - ★ Then the *Press-Enterprise* cases (*Press-Enterprise v. Riverside County Superior Court* (1984 & 1986)): expanded right of access to *voir dire* in P-E I, and to pretrial proceedings in P-E II (eliminating *Richmond Newspaper's* exceptions)

Closing the court today

- ★ Closure is occasionally allowed, but courts must follow precedent in the *Press-Enterprise* cases
 - ★ **Judge has burden of proof to establish compelling or overriding need for closed courtroom**
- ★ A case has been made under *P-E* cases for nearly every kind of judicial proceeding: plea hearings, sentencing, motion hearings, bail hearings
- ★ If closure is allowed, must be as limited and narrow as possible

Are cameras allowed in courts?

- ★ **Not historically permitted**
 - * *Estes v. Texas* (1966): Court said TV coverage of trial violated defendant's due process. Cameras in 1960s bright and obtrusive, interfered; Court also questioned impact of coverage on jurors, quality of testimony on camera, additional responsibilities of trial judge to monitor cameras, and adverse impact on defendant
 - * *Chandler v. Florida* (1981): Moved away from *Estes*—cameras now are less intrusive, thus disruption is weaker
- ★ **Generally up to judge whether to allow cameras in the court—no 1A right of access, but states are free to allow them without violating due process**
- ★ **All states now permit some cameras**
- ★ **Usually no cameras in federal courts**
- ★ **NO cameras in Supreme Court!**

What if reporting might invade privacy?

- ★ **Intrusion:**
 - ★ trespass into solitude
- ★ **Private facts:**
 - ★ publication of embarrassing private facts, particularly if true
- ★ **False light:**
 - ★ portraying someone in a false fictionalized or distorted way
- ★ **Appropriation/Misappropriation/Right of publicity:**
 - ★ unauthorized use of image or personal attributes (protection of property rights)

Hidden cameras

★ *Food Lion v. ABC (4 Cir. 1999)*

- ★ Two ABC reporters, using false resumes, got jobs at Food Lion supermarkets and secretly videotaped what appeared to be bad food handling practices
- ★ Allegations that employees ground out-of-date beef with new beef, bleached rotten meat to remove odor, and re-dated products not sold before printed expiration dates
- ★ Food Lion focused on how ABC gathered its info through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices—methods used to get the footage, not on the broadcast itself
- ★ ABC suffered \$5.5 million damages (later reduced)

Recording phone conversations

Barnicki v. Vopper (2001)

- ★ Frederick Vopper aired illegally-made tape of PA union members discussing controversy over school salaries on cell phones; tape was given to him
- ★ Court said that when even illegally-made tape concerns issue of public concern and media *lawfully* obtains from third party without participating in taping, 1A gives media right to air
 - ★ Stevens: "In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance"
 - ★ Relied on Pentagon Papers: focused on the character of the stolen documents and the consequences of public disclosure, not on fact that they were stolen

Is there a right to protect confidential sources?

- ★ It all depends ...
- ★ Sources of Protection
 - ★ The First Amendment and the press clause
 - ★ State Laws: Statutes and Common Law
 - ★ Federal Common Law
- ★ Elements of Qualified Privilege
- ★ Types of Situations
- ★ Who is a Journalist?

New Legal and Ethical Problems for Journalists

- ★ Increase in Subpoenas
- ★ Unsympathetic Judges
- ★ Aggressive Leak Investigations
- ★ Leaks as Crimes
- ★ Privacy Act Lawsuits
- ★ Bloggers as Journalists
- ★ Legal Costs
- ★ Personal Bankruptcy
- ★ Corporations in Contempt
- ★ Phone and Internet Records

Branzburg v. Hayes (1972)

- ★ Majority opinion: No F.A. Right
- ★ Powell's concurrence
- ★ Stewart test:
 - ★ In subpoenaing journalists, government has burden of proof, and it must demonstrate:
 - ★ 1. Journalist has information critical to decision in case—no "fishing expeditions"
 - ★ 2. No reasonable alternative sources to obtain information—no sources less destructive of 1A rights
 - ★ 3. Compelling and overriding public or personal interest in disclosure of information—essential to case to have that particular information

California Shield Law

- ★ Constitutional Provision
- ★ Passed in 1935, amended in 1980, 2000
- ★ protects a journalist from being held in contempt for refusing to disclose newsgathering information
- ★ Exception: balancing fair trial rights of criminal defendant



CA shield law

- ★ Info protected
 - ★ Source of any information, even without assurance/expectation of confidentiality
 - ★ Unpublished information
 - ★ Specific information obtained during newsgathering but not disclosed to public
 - ★ “All notes, outlines, photographs, tapes or other data of whatever sort”
 - ★ Newsgatherer's eyewitness observations in public place

CA shield law

- ★ Applies even if published info based upon or related to unpublished info
- ★ Protects *only information obtained during newsgathering*
- ★ Only protects journalist from being *adjudged in contempt* by judicial, legislative or administrative body, or any other body with power to issue subpoenas, for failure to comply with subpoena
 - ★ Does not protect journalist from other legal sanctions
 - ★ Generally does not apply when journalist or news organization is party to lawsuit and other sanctions are available

Newsroom searches

- ★ *Zurcher v. Stanford Daily* (1978): Court said newsroom searches did not violate 1A
- ★ **Privacy Protection Act of 1980**, overruled *Zurcher*
 - ★ Search OK only when probable cause to believe that individual involved in crime, to prevent imminent death, reason to believe that subpoena would mean destruction of materials, or materials not produced as result of court order overturned on appeal
 - ★ Outlawed most newsroom searches

Public Records Laws

- ★ Federal law: Freedom of Information Act
- ★ Applies to agencies, departments and government-controlled corporations of the executive branch of the federal government (not states)
 - ★ Examples: State Dept, FCC, FTC, SEC, FAA, FDA, Postal Service, CIA, FBI...
- ★ Not to President and staff or consultants, Congress, federal courts, or private corporations
- ★ Nine major exemptions

How to exercise FOIA rights

- ★ Steps:
 - ★ Informal phone call: ask for FOI officer, make request clearly
 - ★ Written letter, requesting reply within 10 days, by certified mail or fax
 - ★ Appeal to agency head, requesting reply within 20 days
 - ★ File suit in federal court nearest your area if all else fails
 - ★ Be clear about how much you are willing to pay before you order, and find out how much things cost
- ★ **Reporters Committee for Freedom of the Press**
<http://www.rcfp.org>: good resource

The nine exemptions

- 1) **National security**: difficult to dispute—release of info might cause harm to nat'l security or foreign policy of U.S.
 - ★ All agency must show is appropriate classification
- 2) **Internal rules and practices**: mat'l that might divulge agency's investigatory/prosecutorial practices
- 3) **Statutory exemptions**: fed. statutes exempt classes of info—courts balance statutes to determine release
 - ★ Example: provision of the Tax Code prohibiting the public disclosure of tax returns and tax law designating identifiable census data as confidential
- 4) **Trade secrets**: protects food formulas, etc.—info supplied by private firms for regulatory reasons that includes such info exempt from disclosure (includes customer lists, market share information, profit/loss statements)
- 5) **Executive privilege**: inter- or intra-agency memos or letters—pre-decisional documents not available; post-decisional documents are

The nine exemptions

- 6) **Personal privacy:** personnel files, disclosure of which would constitute invasion of privacy (medical exams, job evals)
 - 7) **Law enforcement investigations:** to extent releasing might:
 - ★ interfere with law enforcement
 - ★ deprive person of fair trial
 - ★ be invasion of personal privacy
 - ★ disclose identity of confidential source or of material in a case
 - ★ disclose guidelines for law enforcement or prosecutions
 - ★ endanger life/physical safety of any individual
 - 8) **Banks:** protects fed. agency reports about conditions of banks and financial institutions under federal regs
 - 9) **Oil wells:** protects against speculation based on info on maps and other geographical information that must be filed with gov't
- ** More info withheld under Exemption 7 than any other!

CA open meeting law

- ★ **Ralph M. Brown Act:** applies to **local government agencies and their boards and commissions**
- ★ **Counties, cities, school and community college districts and other special agencies**
- ★ **Section 54953:** "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter"
- ★ **Public agendas and meetings are required!**

Your rights under the Brown Act

- ★ **Non-discriminatory facilities (everyone may enter)**
- ★ **Right to not sign in**
- ★ **Right to testify (limited speaking)**
- ★ **Right to record and to copy of recording**
- ★ **Right to insist on a public vote**
- ★ **Right to request greater access**
- ★ **Right to copy of the material**
- ★ **Right to distribute the Brown Act to legislators (to familiarize them with provisions)**

Your rights under the Brown Act

- ★ **Right to written and oral notice of any closed session**
- ★ **Right to hear oral reports and receive documentation of actions taken in closed session**
- ★ **Right to complain about alleged violations**
- ★ **Right to seek relief (in superior court)**
- ★ **Right to remain in the room even if the public is asked to leave due to general disruption by public attendees**

Brown Act exceptions

- ★ **Four major exemptions where closed meetings are OK**
 - ★ Real estate negotiations
 - ★ Personnel issues
 - ★ Litigation
 - ★ Labor negotiations
 - ★ Some other exemptions
- ★ **Records documenting closed sessions (like votes or final actions) are public, but not individual votes!**
- ★ **Misdemeanor for public official to participate in closed meeting where action is taken OR he/she has reason to know should be open**

CA open meeting laws II

- ★ **Bagley-Keene Open Meeting Act:** applies to all **state** government agencies and their boards and commissions, as well as CSU and UC regents
- ★ **Requires advance notice, agendas as part of public record, closed meeting justification, public meetings except for 24 exceptions (similar to Brown Act)**
- ★ **Misdemeanor for public official to participate in closed meeting he/she has reason to know should be open**

California Public Records Act

- ★ Applies to records maintained by state and local gov't agencies, all levels
- ★ Any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of the physical form or characteristic (paper, electronic, etc.)
- ★ If there is information that is exempt (personal data, for example) agency is required to redact or segregate the exempt information and provide the non-exempt if the task is not onerous

Exemptions

- ★ Personnel records
- ★ Preliminary drafts of final reports
- ★ Pending litigation (including attorney-client privilege)
- ★ Deliberative process/executive privilege (documents can be withheld that would hinder the agency's decision-making if public)
- ★ Public interest (a balancing test)
- ★ Law enforcement records – investigatory and arrest records, incident reports, arrest reports, accident reports, police or peace officer personnel records or citizen complaints (don't forget that many of these are available as public records through the courts!)
- ★ Other specific exemptions as described in the law

Requesting information

- ★ Make your request for information as clearly and specifically as possible
 - ★ Cite names, dates, locations or any other info that will help the government worker locate the data you want
- ★ Fees: they must be reasonable
- ★ Agencies are entitled to 10 working days if there is a question on a document's exemption (but this 10-day period cannot be used to intentionally delay obviously open records)



Student Censorship

- ★ Students have limited First Amendment rights in the school context
- ★ 1969: Students “do not shed their constitutional rights to freedom of speech and expression at the schoolhouse gate”
 - ★ Tinker v. Des Moines
- ★ 1988: F.A. rights “are not automatically coextensive with the rights of adults in other settings”
 - ★ Hazelwood v. Kuhlmeier
- ★ 2009: Justice Thomas: “As originally understood, the Constitution does not afford students a right to free speech in public schools”
 - ★ Morse v. Frederick

Student Speech Claims

3 general types:

- ★ Vulgar, lewd, obscene and “plainly offensive” speech
- ★ School-sponsored or curricular speech
- ★ Non-curricular student speech

Student Newspaper Censorship

- ★ Hazelwood v. Kuhlmeier (1988)
 - ★ Principal censors two articles in The Spectrum, about teen pregnancy and divorces
 - ★ Supreme Court upholds censorship
 - ★ “We hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns . . . A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.”

College Newspapers

- ★ *Hosty v. Carter* (7th Cir. 2003)
 - ★ Dean of students halts printing of *The Innovator*, at Governors State University, and requires prior approval for future issues
 - ★ 7th Circuit court applies *Hazelwood* to college newspapers
 - ★ Gave some wiggle room for college papers deemed to be “designated public forums”

CA law provides greater protections

- ★ State Education Code
 - ★ General provision: CA students have “right to exercise freedom of speech and of the press”;
 - ★ College specific: greater protection, prohibits discipline solely because of speech
 - ★ CA passed law to expand protections after *Hosty*

Quiz Answers

- 1) Judges can easily gag media coverage of high-profile cases.
 - **False: NPA says prior restraint**
- 2) An open trial is the right of the public.
 - **True: *Richmond Newspapers* guarantees**
- 3) You should obey a gag order even if it looks like it will be overturned.
 - **True: Supreme Court is presumed to agree**
- 4) California has a shield law to protect reporters' privilege.
 - **True: In the California Constitution**
- 5) You don't have to keep a promise of confidentiality to a source.
 - **False: *Cohen* says promissory estoppel applies to media**

Answers, part two

- 6) You have the right to inspect the President's personal files.
 - **False: FOIA does not apply to President**
- 7) Your newsroom can be searched for any reason the administration wants.
 - **False: Privacy Protection Act limits**
- 8) Cameras are guaranteed in any courtroom.
 - **False: Up to the judge, not guaranteed, but not assumed to be abridgment of fair trial anymore**
- 9) Reporters' privilege is a guaranteed First Amendment right.
 - **False: Majority opinion of *Branzburg* says no**
- 10) There are open meetings laws in California.
 - **True: Brown and Bagley-Keene Acts**

Whew!

* If you want to access this presentation online, visit jasonmshepard.com