FORWARD

By the summer of 1977, Pennsylvania newspapers were under siege. Proliferating libel suits were rampaging out of control, reporters were being subpoenaed to hand over their notes and even take the witness stand, governmental agencies on all levels were more and more meeting in secrecy, gag orders were becoming commonplace and courtrooms were being closed to the public.

Worse, because some newspapers could not afford to fight back or did not have ready access to lawyers who knew the issues and understood the needs of the press, many of those assaults on the public's right to be informed went unchallenged - which only encouraged further abuses of First Amendment rights.

That was the climate in which seven editors from newspapers in the southeastern part of Pennsylvania held informal discussions seeking a way to preserve the press' ability to gather and report the news. Their concerns were heightened by a Commonwealth Court decision that effectively emasculated the state's Sunshine Law.

Over that summer, they devised an action plan and in September called a meeting of the state's newspaper community to see if there was interest in joining together in a voluntary organization to protect and defend the interests of both press and public. While we expected that perhaps 20 editors might attend the Hotel Hershey meeting, to our astonishment more than 70 came. Instead of just discussing the problem, they banded together and on the spot created the First Amendment Coalition.

Thus began a remarkable period in which the Coalition, guided by Samuel E. Klein, then as now one of the state's pre-eminent First Amendment lawyers, spearheaded a coordinated effort to fight back. A "Media Survival Kit" was assembled and sent to lawyers for newspapers large and small, not only telling them what to do in moments of crisis but showing them how to do it. The Kit even contained the forms to file with the courts; all a lawyer had to do was fill them in.

Klein also offered a free Hot Line service where any newsperson or lawyer could call for instant advice. In some cases, the Coalition even provided free legal representation for reporters whose paper could or would not do so. The Coalition also was a repository for sophisticated legal analysis that was useful in drafting bills and testifying on pending legislation.

Over the succeeding years, Klein's courtroom advocacy won

many crucial legal decisions that protected reporters and their notes, slowed libel mania and helped create an informed citizenry that resulted in an improved legal and political climate. While those earlier crises have lessened, we now face new challenges, primarily in matters of privacy and secrecy.

The Coalition will mark its 25th anniversary next year. While the Pennsylvania Newspaper Association has assumed much of Coalition's work, the organization founded in a time of crisis remains in place, ready to act when needed.

This sixth edition of the Media Survival Kit was written by Sam Klein and Robert C. Clothier of the Dechert law firm in Philadelphia. We are extremely appreciative of their efforts. We also are grateful to PNA for publishing this book that can be carried by reporters for when they need instant guidance on what to do when a school board suddenly decides to meet in secret, when a judge abruptly closes his courtroom or when faced with other similar events.

And yet, our greatest hope is that it may never be needed.

John V. R. Bull
President
December 2001

I. ACCESS TO THE NEWS

The law regarding the right of the press and public to obtain access to newsworthy information controlled by government agencies continues to develop. Courts have recognized the special role played by the press in gathering information for dissemination to the public and that "news gathering is not without its First Amendment protections." In addition to this constitutional right of access, courts have also recognized a relatively strong and far-reaching common law right of access.

These rights are not absolute, however, and they are limited by important exceptions that can block media access to government proceedings and documents. The limitations on access vary from institution to institution; there is one set of rules for the courts, and another set of laws governing access to documents produced by governmental agencies. Indeed, as is the case with the Pennsylvania Right to Know Act, some "access" laws make less material available to the public than their titles would suggest.

For these reasons, it is important to keep in mind the distinctions the courts have made in the law of access. For example, when attempting to obtain access to court proceedings or documents, a number of important factors—such as whether a lawsuit is a criminal or civil proceeding; whether you are seeking access to criminal or civil documents; and indeed, even which stage of the proceeding and which type of document you wish to review—will help determine whether access will be granted in a given case. Each of these distinctions is discussed below.

A. COURT PROCEEDINGS

The press has virtually an absolute right to report all proceedings that take place in open court, for "what transpires in the courtroom is public property." There are times, however, when a court will close its doors to the public and press because of other legal concerns that, in the court's view, outweigh the general public interest in openness. Therefore, when the press seeks to open a proceeding that has been closed, the main legal question usually is: Did the court have the authority, under the circumstances presented, to close its doors to the public?

A growing number of legal decisions, summarized generally below, have addressed these questions of court authority. The federal courts have developed a law of public access to court proceedings grounded in the First Amendment and the common law. In Pennsylvania, public access to some court proceedings is required by the Pennsylvania state constitution, which declares in Art. 1, § 11 that, "All courts shall be open;" and in Art. 1, § 9, that all criminal defendants have a right to a "public trial." None of these rulings guarantees the media an absolute right of access to trials; each contains exceptions to the right of access.

The first step is to distinguish between criminal and civil proceedings. The First Amendment right of access is stronger in the criminal context. Nonetheless, there are particular phases of the criminal process where closure has been upheld.

1. Criminal Proceedings

▪ *Federal Court Proceedings*

In 1980, the United States Supreme Court recognized a First Amendment right of access to criminal trials in Richmond Newspapers, Inc. v. Virginia. The Court stated that "absent an overriding interest favoring closed hearings articulated in findings" criminal trials would be open. Justice Brennan, in a concurring opinion, provided ammunition for the press in stating that the "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." Read together, the opinions in Richmond Newspapers stand for the principle that the press and public should be allowed to watch criminal court proceedings as they unfold; allowing the public merely to read about them later does not satisfy the First Amendment.

Just a few years later, the Boston Globe sought review of a Massachusetts statute that banned the press and the public from sex-offense trials when a minor victim testified. The Supreme Court struck down the law, and ruled that criminal trials may be closed only when such closure is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. For example, broad closure of all trials at which minor sex crime victims testify would be constitutionally impermissible. A more limited closure might be permissible in a given case if, for example, a prosecutor could prove conclusively through psychological evidence that the minor victim would be unable to testify, or be irreparably harmed by testifying, in an open courtroom.

An example of a compelling governmental interest that could justify closure of a courtroom proceeding is the right of the defendant to a fair trial. When a jury is picked in a rape case, for example, it is conceivable that a potential juror would be reluctant to state in open court that he or she has been the victim of a sexual assault. If the person remains silent out of fear of publicity, it is possible that the person might be chosen to serve on the jury, despite legitimate concerns that could have been raised about the juror's ability to serve impartially. In these kinds of situations, courts have permitted portions of the voir dire to be closed and the name of the prospective juror to be deleted from the transcript, to which the press would then be given access.

In 1986 the Supreme Court ruled that the First Amendment protected the public's right to attend preliminary hearings in criminal cases. During preliminary hearings, the trial court decides whether the government has probable cause to hold a criminal defendant for trial. Once again, the court ruled that the public only could be denied access to a preliminary hearing where the trial court finds that the defendant's right to a fair trial will be prejudiced by the publicity that closure would prevent, and that reasonable alternatives to closure cannot adequately protect that right. The court's findings must be specific and on the record, and the mere possibility (as opposed to a substantial probability) that a defendant's rights might be harmed is not enough to justify a closure. The Supreme Court also made clear that where closure is ordered, it must be "narrowly tailored" — in other words, an entire hearing cannot be closed merely because one limited portion is likely to lead to prejudicial publicity.

The First Amendment right of access also has been extended to suppression hearings. During suppression hearings, criminal defendants seek to "suppress" or prevent the government from using certain evidence at trial, usually contending that the evidence in question was obtained illegally. The kinds of evidence at issue can range from drugs and other physical evidence to other kinds of proof, such as coerced confessions. Defendants frequently seek closure of such hearings out of concern that the public, including potential jurors, will be unduly influenced by the evidence they seek to suppress. Very often the most important evidence in the case is revealed during this hearing. If the defense succeeds in having the evidence suppressed during a closed hearing, the public may never learn about the police practices and/or abuses that led the court to prohibit the prosecution from using the evidence at trial.

The Supreme Court balanced the government's interest in deterring crime against the public's interest in access and concluded that the risk of prejudice to a criminal defendant does not automatically justify refusing public access to suppression hearings. It ruled that alternatives to closure must be considered and that any closure must be limited in duration. If all participants in the hearing do their jobs properly and carefully, the evidence or the confessions themselves need not even actually be introduced—the proper subject of the suppression hearing is the manner in which evidence/confessions were obtained, not the evidence or confessions themselves. Conducting the suppression hearing in this manner is a proper alternative to closure.

The United States Court of Appeals for the Third Circuit has ruled that the press and public have a right to attend suppression hearings in criminal cases as a matter of First Amendment law. In United States v. Criden, the Third Circuit ruled that motions to close these proceedings must be posted on the docket so that the press and public can intervene and object to the closure. The court also ruled that trial courts must consider alternatives to closure (such as sequestering the jury), and explain why such alternatives are insufficient. Thus, closure should occur only in the rare case where there is no other way to protect a defendant's right to a fair trial.

The Third Circuit also has ruled that the public is entitled to attend post-trial hearings on juror misconduct. In United States v. Simone, the defendant asked the court to question jurors in private to determine whether any had engaged in misconduct. The defendant, in asking for the hearing, had accused the jurors of reading press accounts and viewing newscasts concerning the trial, as well as having other acts that would have violated the court's orders. The trial judge in Simone granted the defendant's request for a closed examination of the jurors. In reversing the trial court and recognizing a First Amendment right of access to such a proceeding, the Third Circuit observed that opening post-trial jury examinations to the public helped to assure that "the system is fair to all concerned." The court also noted that the public's presence at such a hearing would in many cases discourage perjury on the part of the jurors who are being examined.

In 1987 the Third Circuit announced a procedure that trial courts must follow when access to a closed proceeding is requested.

The court ruled that it was a denial of due process to exclude the press and public from a criminal trial without affording a full and fair consideration to the public's interest in access. Any motions for closure are to be docketed immediately and a hearing is to be held at a reasonable time. add grand jury from version one

The United States Department of Justice has adopted guidelines which permit federal prosecutors to seek a closed pretrial hearing only when there exists a "substantial probability" or "likelihood" of prejudice to the defendant that cannot be reduced by use of other procedures.

▪ *Federal Court Documents*

Documents introduced as evidence in a criminal proceeding, or transcripts of the proceeding, are generally entitled to the same type of protection from closure as the actual criminal proceedings. As the Third Circuit said: "True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source. . . . Access to the documentation of an open proceeding, then, facilitates the openness of the proceeding itself by assuring the broadest dissemination. It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?"

Thus, the Third Circuit has held that "there is a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination." This right includes the right to inspect and copy the documents, so long as they are still on record with the courthouse. As with the rights to open proceedings, that right is presumptive, but not absolute. Trial courts are granted broad discretion to balance the potential danger to the defendant's fair trial rights against the educational benefits achieved by providing the public with broader access to the evidence introduced in criminal proceedings.

In subsequent cases the appeals court has balanced the public's right of access against the individual's right to a fair trial and privacy concerns. First, in a case where the press sought access to transcripts of tape-recorded conversations that had not been admitted into evidence at trial (the jury listened to the audio tape itself), the Third Circuit held that the media was entitled to the transcripts to aid the public's understanding of the judicial process.

In another case, the Third Circuit ruled that it was appropriate to seal a government document that contained the names of certain unindicted co-conspirators in a public corruption case because the reputational and privacy rights of these individuals outweighed the right of public access because of the "extremely serious, irreparable and unfair prejudice" to those whose names were listed as possible, but unindicted, co-conspirators. The scope of this "unfair prejudice" exception appears to have been limited by a later case, which held that a public official who testified at a criminal trial could not seal a side bar conference that revealed that the public official had been the target of a criminal investigation. The Court

reasoned: "As a high official in the state's Republican Party, he is a public person and subject to public scrutiny. . . ."

As with the right to attend criminal proceedings, the press is entitled to be heard through counsel regarding the propriety of sealing records relating to criminal proceedings. Before sealing such documents, the Court must make on the record findings that the closure advances a compelling governmental interest, and the sealing of the records is the least restrictive means of advancing that interest.

While there is a right to review judicial records, that right is not necessarily contemporaneous with the hearing — the judge does not need to interrupt the hearing to provide the public and press with documents. Thus, as a practical matter, the press may have to wait until the end of the day to review such records. Also, while there is a right to obtain transcripts, that right is also not contemporaneous. Rather, the press must make arrangements with the court reporter to obtain a transcript, and must pay a fee for the transcript, the same as any litigant.

■ *State Court Proceedings*

To the extent the federal cases on open criminal proceedings and records are based on the First Amendment to the United States Constitution, the rulings also apply in Pennsylvania state court criminal proceedings. Thus, the Pennsylvania Superior Court has ruled that while the First Amendment right to attend pretrial criminal proceedings is not absolute, public access is to be presumed except in extraordinary circumstances. In Commonwealth v. Buehl, the court ruled that notice and an opportunity to object must be given prior to any closure. Then, before closure can be ordered, the court must explain why alternatives to closure are inadequate to ensure a fair trial. Thus, closure should be permitted only in cases where other measures—like continuances, changes in venue (transfer the location of the trial to another county in Pennsylvania), change of venire (selection of a jury from another county to hear the case), voir dire, and sequestration—will not preserve a defendant's rights.

Even before Buehl, the Pennsylvania Supreme Court had ruled in Commonwealth v. Hayes that it is improper to close a pretrial suppression hearing merely because a defendant requests a closed hearing. The court explained that closure is warranted only where no other means exist to preserve the defendant's right to a fair trial. In summary, because of the availability of other procedures to negate the impact of any prejudicial publicity, closure of all or part of a criminal proceeding should be permitted only in rare cases. In those instances where closure is permitted, any closure must be limited in scope.

■ *State Court Documents*

In 1987 the Pennsylvania Supreme Court stated that documents filed with the court are public judicial documents, and thus are presumptively open to public inspection.

The Pennsylvania Superior Court has ruled that there is a presumptive First Amendment right of access to probable cause affi-

davits, the documents which detail the basis for issuing an arrest warrant. The court stated, however, that either the defense lawyer or the prosecutor may file a certified statement of reasons why the affidavits should be sealed from public inspection. If "good cause" is shown, the district justice may then seal the affidavits. A sealing order may be appealed by the media to Common Pleas Court.

Search warrant affidavits also are public, but may be sealed by a Common Pleas judge upon a sufficient showing. Access has been denied to the audiotape of intercepted communications of defendants, where the court had not ruled on the lawfulness of the interception and the underlying criminal case was dismissed.

2. Civil Proceedings and Documents

■ *Federal Civil Proceedings*

Although the United States Supreme Court has never addressed the issue, the Third Circuit has ruled that the First Amendment protects public and media access to civil trials. The court explained that just as in the case of criminal proceedings, "the bright light cast upon the judicial process by public observations diminishes the possibilities for injustice, incompetence, perjury, and fraud." The court also recognized the importance of providing the public with a better understanding of the judicial system and of ensuring public belief in the system's fairness.

The right of access to civil proceeding is not as strong as that given in criminal proceedings. A court may not limit the public's access to civil trials without a showing that the denial serves an important governmental interest and that no less restrictive way exists to serve that interest. The court also ruled that the party seeking closure bears the burden of justifying the closure by showing of "good cause." "Good cause" is shown by demonstrating that a party will suffer a clearly defined and serious injury if the information it seeks to protect is disclosed. The injury must be shown with specificity. Mere claims of confidentiality or of privileged information are insufficient to defeat the presumption of access. Typically, parties seek closure to prevent the disclosure of confidential, financial or business information and other private matters.

As in criminal proceedings, a trial court may not close a civil proceeding unless it both articulates the countervailing public interest it seeks to protect and makes findings specific enough to allow a reviewing court to determine that the closure was proper.

A deposition is not a "civil proceeding" to which the right of access attaches. Courts have consistently held that depositions are generally private proceedings and, therefore, the press and public have no right to attend a deposition.

■ *Federal Civil Documents*

The Third Circuit has likewise held that the right of access to "judicial records" is "beyond dispute." It is not entirely clear, however, whether the right to judicial records in a civil proceeding is grounded on First Amendment principles or the common law (judge made law). Whatever the basis for the right, however, once it is determined that a document is a "judicial record," the court

may not prohibit access to the document without making a finding that the interest in secrecy of the document outweighs the right of the public to view the document.

In the Third Circuit, the test for whether a document in a civil case constitutes a "judicial record" to which there is a presumptive right of access is whether the document has been filed with the Court (except for discovery motions discussed below). Even if a document has been reviewed by a Judge, and relied upon by the Judge in making a decision, the document is only a judicial record if it is filed with the clerk of court. While a recent case from the Third Circuit has questioned whether documents relied upon by the Court should be shielded from access merely because they were not filed with the Court, under the present state of law, filing with the Court appears to be a necessary requirement.

Documents introduced as evidence at a civil trial are clearly "judicial records." In Littlejohn v. BIC Corp., however, the Third Circuit held that once trial exhibits are restored to their owner after a case has been completely terminated and/or are properly subject to destruction by the clerk of court, they are no longer judicial records within the supervisory power of the district court. Thus, once records are no longer in the possession or control of the clerk's office, there is no longer a right to access the documents.

Unlike criminal litigation, a great deal of civil litigation occurs outside the court room in the pretrial discovery materials context. Pretrial discovery is the process by which each side in a civil lawsuit obtains relevant documents and information from the other side in order to prepare for trial. Usually, the material produced in discovery is not filed with the court; the law presumes that litigants will manage this stage of a lawsuit with little judicial supervision. However, the information produced during this process may be made public by either party unless the information is sensitive, in which case a party will ask the judge to issue a protective order forbidding the parties from disclosing the material. The court can issue such an order if "good cause" is shown

In Seattle Times Co. v. Rhinehart, the United States Supreme Court ruled that civil discovery is not a public component of a civil trial. Thus, the press and public generally have no right of access to discovery materials. For this reason, as noted above, the press has no right to attend depositions. Further, although discovery materials may become judicial records if they are filed as part of a motion with the court, they do not become public records merely because they are filed as part of a "discovery motion" — a dispute between the parties over the scope of the parties respective obligations under the rules of discovery. And, in the Rhinehart case, the court held that there is no constitutional prohibition to a Court entered "protective order" which precludes one side of the litigation from disclosing materials garnered during the discovery process.

In a significant decision from the Third Circuit Court of Appeals, however, some limits were placed on the ability of parties in a civil dispute to enforce restrictions on the disclosure of discovery material. In Pansy v. Borough of Stroudsburg, several newspapers attempted to gain access to a settlement agreement between the Borough of Stroudsburg and a plaintiff in a civil rights suit under Pennsylvania's Right to Know Act. The newspapers, however, were unable to obtain a copy of the settlement agreement because of a

court approved confidentiality agreement between the plaintiff and the Borough barring disclosure of the document. Although the Court of Appeals noted that the confidentiality agreement was not a judicial record because it was not filed with the court, the court nevertheless held that the district court should not have approved the confidentiality stipulation without balancing the countervailing interests of the public to access this information. Specifically, the Court listed seven factors courts should consider before approving a protective order precluding the disclosure of material:

1. Whether the disclosure will violate any privacy interests;
2. Whether the information is being sought for a legitimate purpose or for an improper purpose;
3. Whether disclosure of the information will cause a party embarrassment;
4. Whether confidentiality is being sought over information important to public health and safety;
5. Whether the sharing of information among litigants will promote fairness and efficiency;
6. Whether a party benefiting from the order of confidentiality is a public entity or a public official; and
7. Whether the case involves issues important to the public.

While the Pansy case applies only to confidentiality agreements for which court approval is sought — not to private confidentiality agreements — it constitutes a significant victory for access, as it counsels courts to be very wary of approving court enforced confidentiality over discovery material. The ruling is especially helpful where the information might be available to the media through some alternative means, such as the Right to Know Act, but for a court enforced confidentiality agreement. The ruling also makes it much more difficult for one party to the litigation to force a confidentiality agreement on another party to the litigation.

At this stage in the law's development, the law surrounding a First Amendment right of access to documents filed in connection with civil litigation is still unsettled. Virtually all of the Third Circuit's cases in this area have based the right of access to documents in civil cases on the common law. Thus, until the courts rule definitively on the issue, the standard for determining whether access to court documents will be permitted is a lower one than the standard employed for a constitutionally protected right.

In describing these cases, the courts have balanced the strong common law presumption in favor of access and the factors weighing against access. The party seeking to overcome the presumption of access has the burden of showing that the interest in secrecy outweighs the presumption. An example of how this balancing test works is illustrated by a case in which a lawsuit was settled and the parties to the suit filed their settlement agreement under seal with the court. A party not subject to the settlement then moved to unseal the agreement. The parties to the agreement urged the trial court to deny the motion, asserting the strong judicial policy of promoting settlements. The trial court agreed, but was reversed on appeal. In reversing, the appellate court ruled that once the parties filed their agreement with the court the right of access became paramount, outweighing the interest in promoting settlements.

A pretty good test for determining when civil litigation docu-

ments should be available to the public is to ask whether the documents are filed with the court. In most cases, but not in all, a court will find such a document public. Another good rule of thumb weighing in on other side of the scale is that where a trade secret is contained in a sealed document, the courts will be very reluctant to permit access.

Unfortunately, a vast gray area remains in the common law right of access that courts can use to deny public access to documents. One unfortunate development appears to be a growing inclination of some trial courts to deny access to information that may be embarrassing to the parties to a lawsuit or to witnesses and other third parties. This trend goes against appellate court decisions with respect to parties, which state that a party's "potential embarrassment and injury to reputation" is not enough to rebut the presumption of access. For non-parties there must be a "risk of serious harm . . . and not []the potential for mere embarrassment" before access will be denied.

- *Pennsylvania Court Civil Proceedings and Documents*

As with criminal proceedings, to the extent the federal courts' rulings that civil proceedings should be open are based on the First Amendment to the United States Constitution the rulings should, in theory, also apply in state court proceedings. The Pennsylvania Superior Court has also recognized a right of access to civil proceedings. In Kurtzman v. Hankin, the Superior Court held that there is a presumptive right of access to civil proceedings and non-discovery judicial records under both the federal constitution and Pennsylvania common law. A trial court may not close civil proceedings or records without articulating the reasons for finding "good cause" for doing so. Courts should close proceedings only where it is the interest of "public good, order and morals" to do so. Thus, for example, the Superior Court held in Katz v. Katz that divorce proceedings may be closed to the public.

The Pennsylvania Superior Court ruled that pretrial protective orders providing for the filing of documents under seal may be issued upon a showing of "good cause," but access to discovery documents filed under seal may be available once the trial begins. In a different proceeding in the same case, the court said that unfiled civil discovery documents are not judicial records to which the public and the press have a presumptive right of access. Although some Pennsylvania trial courts have applied and adopted the analysis set forth by the Third Circuit in Pansy for state court proceedings, it is not clear that Pansy will always be applied in state court proceedings, as the Pennsylvania appellate courts have not yet ruled on the question.

3. What to Do When a Courtroom is Closed

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

- If you hear 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.
- If you are in the courtroom, object to the closing (on the

record, if possible) and ask for the right to be heard through counsel before proceedings commence. A statement should be made similar to the following:

> "I am (name), a reporter for (newspaper or broadcaster). On behalf of both myself and my (paper or station), I would like to note an objection to the closure of (or motion to close) this proceeding to the public and press, and I request the opportunity to be heard through counsel prior to any closure of the proceedings."

- If asked for the basis of your objection, state:

"I understand that under the First Amendment to the United States Constitution (and, if in state court, the Constitution of Pennsylvania) the press and public are afforded the right to attend court proceedings. At the very least, the law requires that a hearing be held, where the press and public are given an opportunity to participate, prior to closure. These arguments can best be made by counsel, and I request that our counsel be afforded an opportunity to be heard."

- If the court will not hear arguments from counsel, ask that the court stay further proceedings until application can be made to a higher court.
- If the closed proceedings already are in session, notify your editor, and through him or her your legal counsel, and send the judge a written objection and request for access to the proceeding. Also ask that the proceedings be stopped until either a hearing is held or an application can be made to a higher court. You should ask a sheriff or other court employee to carry the written objection to the judge. If they refuse, try to find another judge in the courthouse. Attempt to file your written objection with the Clerk of Court under the docket number of the case involved.
- Ask for a copy of the order closing the proceedings; if not in writing, ask that a written order be entered or that the court reporter be directed to provide you with a transcript of the oral order and your objection to it, if on the record.
- Do not refuse to leave when requested to do so by the judge or a court officer, and do not attempt to force your way into a closed courtroom. You may be held in contempt for failing to obey the order and for disrupting the proceedings.
- Do not make any agreement with the judge whereby you agree not to publish a report of the hearing in exchange for his agreement to let you attend.
- It is suggested that counsel petition to open the proceedings and seek to intervene formally in the action for the limited purpose of contesting the order closing the proceedings. Sample petitions to intervene for access are available from the Coalition.
- If the trial court denies or refuses to entertain a petition to open the proceedings, it is suggested that an appeal, motion for stay and petition for expedited consideration be filed. In federal cases, an appeal, motion for stay and motion for summary reversal may be filed.

- If a state court refuses to provide access, it may be possible to bring a civil rights action in federal court seeking to overturn the closure order.

4. What to Do When You are Denied Access to Court Records

If you are not permitted to inspect and/or copy documents of any court, you should do the following:

- Make a written request for access to the documents. If the records were sealed by a judge, make the request to that judge. If access to the documents was denied by the Prothonotary or Clerk of Court, the request should be presented to the Chief or President Judge.
- The request should identify the documents which you seek to inspect as narrowly and with as much detail as possible.
- Do not state the reasons you want to inspect the documents.
- If the written request is denied, ask that the denial be placed in writing, together with a statement of reasons for the denial.
- You may petition the court to open the records, following the same procedure as with closed courtrooms.

5. Juror Information

Some appellate courts have ruled that the First Amendment gives the public a general right of access to names and addresses of jurors. Until recently, anonymous juries (where information about jurors' names, addresses, ages or professions is sealed) were highly unusual and limited to cases where there was a credible threat to the safety of jurors. But in recent years, anonymous juries have become more common in highly publicized criminal cases on the courts' concerns not only about juror safety, but also about juror privacy. Courts occasionally believe that closing voir dire will encourage potential jurors to be more candid. And some courts have barred the news media from conducting post-verdict interviews with jurors.

6. Juvenile Proceedings

- ***State Juvenile Hearings***

As a general matter, the public can be excluded by state law from hearings on juvenile delinquent or dependent matters, except for contempt of court hearings. Put broadly, "delinquent" acts are actions that would be punishable criminally if taken by adults; "dependency" hearings involve decisions concerning the custody of children who, for any variety of reasons, may be without parents or other legal guardians to provide for them.

Despite this general prohibition, Pennsylvania law permits members of the press to attend juvenile proceedings when the court finds that the reporter has a proper interest in the proceedings or the work of the Court. In such cases, the judge may sometimes condition the reporter's attendance on the newspaper's agreement not to report the names of the juveniles. Reporters should be wary of agreeing to such restrictions even if they have no intention of publishing the names.

Furthermore, the relevant legislation was amended in 1995 to

allow the press and public to attend hearings involving certain delinquency matters. Where the child was at least 14 years of age at the time of the crime, the public is allowed to attend the hearing if the crime alleged would be considered a felony if committed by an adult. The public is also allowed to attend hearings for certain serious felonies (including murder, rape and robbery) if the child was at least 12 years of age at the time the crime was committed.

▪ *Federal Juvenile Delinquency Laws*

The federal courts also handle some juvenile delinquency cases. If the juvenile is not turned over to the state authorities, then the federal juvenile proceedings may be convened at any time or at any place in the district, including in the judge's chambers. Court personnel and government agency employees are prohibited from directly or indirectly disclosing any information or records relating to the juvenile delinquency proceedings to anyone other than the judge, the juvenile's attorney, the attorney for the government, or other authorized individuals. Disclosure of records is prohibited during the course of and after the completion of the proceedings, except to statutorily authorized individuals.

One section of this statute prohibits public disclosure of a juvenile's name or photograph in connection with a juvenile delinquent proceeding. One federal district court has found, however, that this provision is not applicable to the press.

7. Rules on Photographs

The media has lost virtually every case attacking as unconstitutional local rules prohibiting the taking of photographs in courtrooms. The rationale of these decisions is that photographs tend to "disrupt" the proceedings, particularly in criminal cases. This rule stands even though the United States Supreme Court has concluded that televised criminal court proceedings do not, in and of themselves, deny the defendant his constitutional right to a fair trial.

The Pennsylvania Supreme Court has prohibited the taking of photographs and radio or television broadcasting from the courtroom or its environs during criminal cases. This prohibition applies whether or not the court actually is in session. "Environs" is defined as the area immediately surrounding the entrances and exists to the courtrooms, although some counties have attempted to promulgate local rules that significantly expand the areas in courthouses in which photography is prohibited.

An example of how far this reasoning could extend is provided by a Superior Court case in which the court upheld a trial court's confiscation of a television station's film of proceedings that took place outside the courtroom. At the time of the events at issue, a cameraperson from the station was filming the trial of the judge and a jury as they visited the scene of a crime. Essentially ruling that the trial judge could extend the reach of his courtroom beyond the walls of the courthouse, the Superior Court concluded that the judge was justified in taking whatever steps he felt appropriate to ensure an orderly trial.

In federal court, while there has been some experiments allowing cameras in trial courts, nothing has been made permanent. A

proposed 1998 bill to allow concerns in a three year pilot project died in the Senate. Only two federal appellate courts (the Second and Ninth) have voted to allow cameras at oral argument. The Third court has not done so, however. A recent opinion from a New York state trial court granting access to cameras may spark renewed attempts in Pennsylvania to obtain camera access to courtrooms.

B. GOVERNMENTAL RECORDS

There is no constitutional right of the press to inspect documents from the executive and legislative branches of government. The Third Circuit Court of Appeals has held that there is no presumption of openness for such records. It rejected claims that the First Amendment applied to agency records and ruled that the right of access to government-held information was a political decision to be made by the legislature, not the courts. Thus, any access to non-judicial records is determined by reference to federal and state statutes.

When seeking to examine documents maintained by any government agency, you must distinguish between federal and state agencies, because there are separate statutes for each.

1. Pennsylvania Open Records Law

The Pennsylvania open records law, called the "Right to Know Act", gives every Pennsylvania citizen the right to examine and inspect every public record of an agency. While this description sounds expansive, the Act is a limited tool for journalists.

It exempts a great many public documents from disclosure, including documents that are protected by other state statutes or court decree. (Some of the other laws that govern disclosure of documents in Pennsylvania are described later in this chapter of the Survival Kit.) Moreover, court decisions have narrowly interpreted the definition of "public record" and broadly interpreted the exceptions in the law. Indeed, the vast majority of court decisions in the last five years have denied access to the records sought. Finally, as a recent study has shown, depending on the county from which records are sought, actually getting officials to follow the command of the Right to Know Act can be a challenging endeavor.

These problems have led to ongoing efforts to reform the Right to Know Act. At the time this edition of the Survival Kit is going to print, the legislature is considering the adoption of an entirely new open records bill. This edition of the Survival Kit, however, is based on the Act as it exists. A copy of the existing Act is set forth in the Appendix.

a. Scope of the Act

The Right to Know Act provides that "every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania." Thus, the act applies only to "agencies" and to "public records."

1. What is an "Agency" Under the Right to Know Act?

The Right to Know Act applies only to "agencies" defined as "any department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, … or any state or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has

for its purpose the performance of an essential governmental function." The Act does not apply to the judicial branch of government. Nor does the statute apply to the state legislature, or any committee or sub-committee of the legislature.

As a practical matter, most branches of the state government from which you will be seeking records — e.g., Department of Transportation, Department of Education, Pennsylvania State Police, Pennsylvania Insurance Department, Department of Public Welfare, Board of Pardons — constitute a "government agency." Similarly, cities, counties and townships, including their government bodies — e.g., city councils, boards of supervisors, boards of commissioners — are agencies under the Act. And other local boards, departments and commissions — e.g. school districts, police departments, housing authorities — are also subject to the Act.

The more difficult question involves state created entities that are not branches of the executive branch or political subdivisions of the Commonwealth. In one case, the Pennsylvania Supreme Court determined that community colleges were not "agencies" under the Right to Know Act. The court reasoned that because the community college is not a branch of the executive, or a political subdivision, it could only be an agency if it performs an "essential governmental function." Because no statute or constitutional provision identifies community colleges as "providers of essential services," and because it was not clear that in the absence of the services performed by community colleges, "the survival of the Commonwealth would be in jeopardy," the Court found that community colleges are not an agency under the Right to Know Act. Similarly, state related colleges and universities, such as Penn State and Temple, are not agencies subject to the Right to Know Act's requirements.

2. What is a Public Record?

Two types of "public records" are defined in the Right to Know Act:

a. "Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, material equipment or other property," and

b. "Any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties, or obligations of any person or group of persons."

Obviously, any document that, on its face, constitutes an "account, voucher, or contract" or a "minute, order or decision" constitutes a public record. The more difficult issue involves documents that do not themselves constitute such records, but are rather related to the account/voucher/contract or minute/order/decision.

A 1999 decision from the Pennsylvania Supreme Court, North Hills News Record v. Town of McCandless, reformulated the definition of "public records" for documents that, on their face, are not an account/voucher/contract or a minute/order/decision. In that case, a newspaper sought access to a 911 tape informing the police of a shooting. In its opinion,

the Court clarified the two definitions of public records. With respect to the account/voucher/contract prong, the court noted that, to constitute a public record, the material at issue must "bear a sufficient connection" to fiscally related accounts, vouchers or contracts. But with respect to minutes, orders or decisions, the court found that the language of the statute — which uses the term "fixing" the rights of a person — is narrower than the account/voucher/contract prong. In order to obtain documents that do not, on their face, constitute a minute, order or decision (such as the 911 tape at issue), the party seeking the materials must show that the material at issue is an "essential decisional component" of the agency's decision. Because the Court found that the 911 tape was not an "essential component" of the decision to investigate, arrest and prosecute the perpetrator of the crime, the 911 tape was not a public record.

In a 2001 opinion from the Supreme Court, Lavalle v. Office of General Counsel the Supreme Court reiterated that, under McCandless, the document sought under the minute/order/decision prong must bear a close correlation with an actual minute, order or decision. Significantly, the Court held that the minute/order/decision prong does not extend to records reflecting the "predecisional, internal, deliberative aspects of agency decisionmaking." It remains unclear whether this holding will effectively narrow the scope of this prong.

An agency covered by this law must permit inspection and copying of the public records under its control. The agency itself need not assemble or copy the documents; it need only make them available to the person requesting them. In addition, a municipality has been ordered to authorize its bank to make available checks no longer physically in its possession, but still under its control.

b. Exceptions

Even if a document is found to be a "public record" under the definitions described above, the statute provides for certain exceptions which, if satisfied, relieve the agency of the obligation of providing access to the documents. These exceptions are:

- Disclosure of the documents would operate to the prejudice or impairment of a person's reputation or personal security;
- Disclosure of the documents would disclose the institution, progress or results of an agency investigation;
- The documents are protected from disclosure under specific statutes or decrees of court; or
- Disclosure of the documents would result in the loss of any federal funds.

1. Personal Reputation / Security Exception

The most frequently asserted basis for refusing access to governmental records is that it would inflict harm on a person's reputation and/or security. Traditionally, the "personal security" exception was used to preclude access to information which, if in the wrong hands, could cause danger to individuals or the public. In more recent cases, however, the Commonwealth Court has construed the personal reputation / security excep-

tion as protecting the privacy rights of public employees.

Thus, in one case, the Court affirmed the denial of access to certain information contained in written applications for gun licenses. The court allowed access to a license applicant's name, race, reason for applying for a license, personal references and background information. However, citing privacy concerns, the court denied access to other information, such as the applicant's social security numbers. In another case, the Commonwealth Court held that an agency properly refused to provide access to payroll records that contained employees' addresses, telephone numbers and social security numbers, because disclosure of such information would invade the privacy of public employees. The Pennsylvania Supreme Court reached a similar conclusion in a 1998 case. In a 2001 case, the Commonwealth Court held that "victim impact statements" presented at a parole hearing are protected by the personal reputation/security exception.

Thus, although there is no explicit privacy exception in the Right to Know Act, the Pennsylvania courts have judicially created one.

2. Investigation Exception

The investigation exception has also been broadly applied, and is often upheld. This exception has been applied in the context of police investigations, investigations relating to the prosecution of a criminal defendant, the details of drug screening policies in a prison, personnel investigations, tape recordings made by police in the course of investigations, and even to a city's confidential tax information. The investigation exemption may be challenged, though, by offering redaction of sensitive material.

In a 1996 decision from the Commonwealth Court, Philadelphia Newspapers, Inc. v. Haverford Township, the court held that an audio tape that resulted in an investigation, but which was only preserved because of the investigation, fell within the scope of the field investigation exception to the Right to Know Act. The court rejected PNI's position that the field investigation exception does not include material that was the basis of the investigation. The impact of this decision should be limited because of the unusual facts of the case.

Further discussion of police investigations and criminal histories is discussed below, at section B.1.f.

3. Statutory Prohibition / Court Decree Exception.

An agency may also refuse to disclose documents where a separate state or federal statute prohibits disclosure of the documents. So, for example, a Pennsylvania statute prohibits the disclosure of social security numbers. There has been a considerable amount of recent legislation from the federal government purporting to protect the privacy interests of individuals by forbidding state governments and agencies from disclosing certain information. For example, the Pennsylvania Department of Transportation (and other Transportation departments throughout the country), are precluded from disclosing information related to the "driving record" of any person under the Federal Driver's Privacy Protection Act. The

Pennsylvania Department of Transportation has relied on this Act, as well as similar state statutes, to refuse to release accident data if that data could be used to identify the individual involved in the accident.

4. Loss of Federal Funding Exception

This exception is rarely invoked. The exception precludes disclosure only of documents where such disclosure would specifically result in the loss of federal funding. The federal law or regulation must actually state that the information is confidential and that disclosure forfeits the funding. The exception does not include information the disclosure of which may create some risk, usually very tangential, that federal funding would be lost.

c. Procedure

The Right to Know Act provides that public records must be available for inspection at "reasonable times." The agency is given considerable discretion in determining what constitutes a reasonable time. That Act allows citizens to make copies of public records, but the agency is entitled to charge a reasonable fee for copies. However, while agencies may charge a fee to make copies of documents, it appears that access to the documents may not be conditioned on paying a fee.

The Act does not require an agency to compile lists of information that do not exist; however, the Act does require that the agency make information available so that the requestor can compile his own list.

It remains unclear whether the Act requires the government to provide records in computerized or searchable format. In one case, the Commonwealth Court appeared to approve of access to computer data, when it required an agency to supplement a production of already produced computer data. A strong argument can be made that the Right to Know Act should be interpreted as catching up with technology, and that a "public record," in modern society, may well include computer formatted data. To the extent such data needs to be manipulated to comply with the request, however, it is likely that the requestor would be required to pay for that cost.

If an agency denies access, then that decision may be appealed to either the local court of common pleas or the Commonwealth Court, depending on whether the agency that denied access is a local agency or a commonwealth agency. When denying a request, and agency is required to state the basis for the denial, with citation to appropriate legal authority. Do not forget to ask this information.

d. Specific Examples

It is useful to canvass some of the documents Courts have held to be available under the Right to Know Act, and some that have been held to be protected from disclosure. The following non-exhaustive lists may provide some examples of what types of information is and is not available under the Right to Know Act:

1. Documents Held To Be Available Under the Act1

- Settlement agreement between city housing authority and utility business, notwithstanding confidentiality agreement. Morning Call, Inc. v. Housing Auth. of City of Allentown, 769

A.2d 1246 (Pa. Commwlth. 2001).

- Contracts actually awarded by a state agency. See, e.g., Envirotest Partners v. Department of Transportation, 664 A.2d 208 (Pa. Commwlth. 1995).
- Property records maintained by county board for assessment and revision of taxes, containing information as to construction specifications. Westmoreland County Bd. of Assessment Appeals v. Montgomery, 321 A.2d 660 (Pa. Commwlth. 1974).
- Accident reports prepared by Accident Investigation Division of police department. City of Philadelphia v. Ruczynski, 24 D&C 2d 478 (Phila. County 1961).
- Payroll records (at least those which do not disclose private information). Moak v. Philadelphia Newspapers, Inc., 336 A.2d 920 (Pa. Commwlth. 1975).
- Completed reports prepared by Department of Labor and Industry pertaining to safety and health in industrial plants. 65 P.S. § 66.1(2).
- The names of witnesses who attend an execution by lethal injection. Travaglia v. Department of Corrections, 699 A.2d 1317 (Pa. Commwlth. 1997).
- A list of contractors to whom a state agency sent a wage survey. Aronson v. Pennsylvania Dep't of Labor and Industry, 693 A.2d 262 (Pa. Commwlth. 1997).
- Insurance policies issued to Department of General Services in connection with a construction project. Associated Builders & Contractors, Inc. v. Pennsylvania Dep't of General Services, 747 A.2d 962 (Pa. Cmmwlth. 2000).
- A municipality's canceled checks. Carbondale Township v. Murray, 440 A.2d 1273 (Pa. Commwlth. 1982).
- A settlement agreement entered into by a township following the institution of a civil rights suit against it. The Morning Call v. Lower Saucon Township, 627 A.2d 297 (Pa Commwlth. 1993).
- Hearing transcript of testimony and evidence from a base rate case with the Public Utility Commission. Sierra Club v. Pennsylvania Public Utility Comm'n, 702 A.2d 1131 (Pa. Commwlth. 1997).
- Examination papers and scores of applicants for Civil Service jobs. Marvel v. Dalrymple, 393 A.2d 494 (Pa. Commwlth. 1978).
- Some records of retired state employees (excluding personal information). Mergenthaler v. Commonwealth, 372 A.2d 944 (Pa. Commwlth. 1977).
- Attendance record cards of professional employees of school district. Kanzelmeyer v. Eger, 329 A.2d 307 (Pa. Commwlth. 1974).
- Review and refund docket of Board of Finance and Review. Opinion of the Board of Finance Review Records, 13 D&C 2d 336 (1957).
- List of names and addresses of kindergarten children in school district (although recent case law has called this into question). Young v. Armstrong Sch. Dist., 344 A.2d 738 (Pa. Commwlth. 1975).
- List of persons taking CPA examination given by Commissioner of Professional and Occupational Affairs.

Friedman v. Fumo, 309 A.2d 75 (Pa. Commwlth. 1973).

- Address to which a school district forwarded the scholastic record of a former pupil. McKnight v. Beaver Area Sch. Dist., 30 D&C 3d 463 (Beaver County 1982).
- Subscriber list for a magazine published by the Commonwealth. Hoffman v. Commonwealth, 455 A.2d 731 (Pa. Commwlth. 1983).
- Names and addresses of public high school graduating class. McKnight v. Beaver Area Sch. Dist., 30 D&C 3d 463 (Beaver County 1982).
- Evaluation of a state psychiatric institution compiled by the commission which prescribes standards for hospitals in certain federally funded programs. Patients of Philadelphia State Hospital v. Commwealth, 417 A.2d 805 (Pa. Commwlth. 1980).
- Statistical data from the Pennsylvania Department of Education on the racial and ethnic composition, by school district, of programs for exceptional children. Pennsylvania Association for Children and Adults with Learning Disabilities v. Commonwealth, 498 A.2d 16 (Pa. Commwlth. 1985).

2. Records Held Not Available Under the Act

- Report prepared by accounting consultant to Department of Transportation in connection with litigation. Lavalle v. Office of General Counsel (Pa. 2001).
- Victim impact statements relied upon by Board of Probation and Parole. Cicchinelli v. Pennsylvania Board of Probation and Parole, 760 A.2d 914 (Pa. Cmmwlth. 2000).
- Emergency 911 tapes. North Hills Record v. Town of McCandless, 722 A.2d 1037 (Pa. 1999).
- The methods and specific procedures relating to executions by lethal injection. Travaglia v. Department of Corrections, 699 A.2d 1317 (Pa. Commwlth. 1997).
- Personnel records to the extent they reveal social security numbers or other personal information of state or municipal employees. Sapp Roofing Co., Inc. v. Sheet Metal Workers' Int'l Assoc., 713 A.2d 627 (Pa. 1998).
- Petitions that institute a Worker's Compensation claim with the Department of Labor and Industry. Della Franco v. Department of Labor & Industry, 722 A.2d 776 (Pa. Commwlth. 1999).
- A salary study performed by a consulting firm for county commissioners unless and until it is actually relied upon in creating a budget. Lewis v. Monroe County, 737 A.2d 843 (Pa. Commwlth. 1999).
- An audit performed by an accounting firm relating to damages paid out as part of a settlement of a contract suit against the Commonwealth. LaValle v. Office of General Counsel, 737 A.2d 330 (Pa. Commwlth. 1999).
- Delinquent wage, business privilege and mercantile tax records. Scranton Times v. Scranton Single Tax Office, 736 A.2d 711 (Pa. Commwlth. 1999).
- Results of an inmate's drug urinalysis test. Neyhart v. Department of Corrections, 721 A.2d 391 (Pa. Commwlth.

1998).

- Legal opinions of a Township Solicitor. Nittany Printing & Publ'g Co., Inc. v. Centre County Board of Commissioners, 627 A.2d 301 (Pa. Commwlth. 1993).
- Public School Teacher's personnel files. West Shore Sch. Dist. v. Homick, 353 A.2d 93 (Pa. Commwlth. 1976).
- Applications for positions as a public school teacher. Cypress Media, Inc. v. Hazleton Area Sch. Dist., 708 A.2d 866 (Pa. Commwlth. 1998).
- Medical and Mental Health Records of an executed inmate. Hunt v. Pennsylvania Dep't of Corrections, 698 A.2d 147 (Pa. Commwlth. 1997).
- An audio tape of a Township Commissioner's meeting. Tapco, Inc. v. Town of Neville, 695 A.2d 460 (Pa. Commwlth. 1997).
- Results of a Wage Survey of Pennsylvania contractors performed by the Department of Labor and Industry. Aronson v. Pennsylvania Dep't of Labor and Industry, 693 A.2d 262 (Pa. Commwlth. 1997).
- An audio tape recorded by the police in the course of an investigation. Philadelphia Newspapers, Inc. v. Haverford Township, 686 A.2d 56 (Pa. Commwlth. 1996).
- District Attorney investigative files relating to the prosecution of an individual for murder. Commonwealth v. Mines, 680 A.2d 1227 (Pa. Commwlth. 1996).
- Field investigation reports made by a staff member of the City Planning Department for purpose of a report to a city council member. Wiley v. Woods, 141 A.2d 844 (Pa. 1958).
- Departmental budget reports required to be provided to the budget secretary. Butera v. Commonwealth, 370 A.2d 1248 (Pa. Commwlth. 1977).
- Names, addresses, and amounts received by welfare recipients. McMullan v. Wohlgemuth, 308 A.2d 888 (Pa. 1973).
- Financial disclosure statements voluntarily submitted in response to executive order requesting such statements from members of the Governor's cabinet and members of certain agencies. Shapp v. Butera, 348 A.2d 910 (Pa. Commwlth. 1975).
- The name of a person who accused a police officer of receiving stolen property and the police department's file pertaining to its investigation of the complaint. Barton v. Penco, 436 A.2d 1222 (Pa. Super. 1981).
- "Raw data" compiled by the Pennsylvania health department to study whether the 1979 accident at the Three Mile Island nuclear power plant caused birth defects. Aamodt v. Commonwealth, 502 A.2d 776 (Pa. Commwlth. 1986).
- Information from tax returns filed with a municipality and results of tax audits. Elliot v. Commonwealth, 474 A.2d 735 (Pa. Commwlth. 1984).
- Plans for special education programs which had been submitted to, but not acted upon by, the Pennsylvania Department of Education. Pennsylvania Association for Children and Adults with Learning Disabilities v. Commonwealth, 498 A.2d 16 (Pa. Commwlth. 1985).

e. How to Obtain Records of a Pennsylvania Agency

If you are not permitted to inspect and/or copy documents of any agency, department, board or commission of the executive branch, you should do the following:

- Make a written request for the documents to the head of the agency involved. While a written request is not required, it may have a greater impact.
- The request should be drafted narrowly, identifying the documents sought with as much precision as possible.
- If the request is denied, ask that the denial be placed in writing, together with a written statement of reasons for the denial. If the agency refuses to place the denial in writing, record the date, time and place of the denial and how it was communicated to you. If the agency refuses to state its reasons for the denial in writing, request an oral explanation.
- If the denial of access is based upon a statute or regulation, ask for a copy and the specific section of the statute or regulation being relied upon. Ask for an explanation of how the law allows the agency to deny access.
- You may appeal the denial of access under the Right to Know Act. You must do so within 30 days of the denial.

f. Access to Information Relating to Police Investigations and Criminal Histories

Gaining access to police records continues to be difficult in Pennsylvania. Although some police departments routinely allow inspection of their crime and accident reports, other departments advise the media of information only through the issues of news releases, which often lack crucial facts. Still other departments "stonewall" the media.

The Commonwealth Court has ruled that "[t]he only information relating to police investigations that is discoverable under the [Right to Know] Act are the 'police blotters.'" A "police blotter" is simply a chronological compilation of original records of entry. In other words, they are the equivalent of incident reports. Other information gathered by the police during the course of an investigation are generally found either not to constitute public records at all, or to fall within the "investigative" exception of the Right to Know Act.

Access to criminal records in Pennsylvania is governed by the Criminal History Record Information Act. The Act provides for maintenance of a central repository for all criminal records on a state-wide basis and imposes certain limitations on public access to the information. In addition, criminal justice agencies, including state and municipal police departments, local and state detention facilities, probation agencies, district attorneys and parole boards, are repositories of criminal history information and are prohibited from disseminating the protected data.

The Act's limitations on disclosure are inapplicable to all documents and indices maintained by the judiciary. Thus, regardless of the Act's limitations, you may still check the docket or index maintained by the courts of each county to ascertain whether criminal proceedings were instituted against a particular individual; if so, the court file is available to you.

The Act's disclosure limitations are also inapplicable to "original records of entry, compiled chronologically, including, but not limited to, police blotters." Thus, the police blotter, which has historically been open to public inspection, has been deemed a "public record" and should remain open as a matter of right. Court dockets and press releases also are considered "public records."

The Act provides that the public may obtain access to "criminal history information" about a particular individual. This includes:

- descriptions, dates and notations of arrests;
- indictments;
- information on other formal criminal charges;
- conviction data; and
- dispositions.

However, the following information is not available:

- records of arrests or indictments that are more than eighteen (18) months old will not be disclosed where there has been an acquittal, dismissal of charges or where there has been no disposition of the charges.
- The Act provides for expungement of conviction data where the person convicted reaches the age of 70 and has been free of arrest or prosecution for a period of 10 years following release from confinement or where the individual has been dead for three years. However, expungement is not available for certain offenses committed against minors.
- Due to privacy concerns, the Act provides that "intelligence information" (information concerning the habits, practices, characteristics, history, possessions, associations, or financial status of an individual), "investigative information" (information assembled as the result of an investigation of a criminal incident, including modus operandi information) and "treatment information" (information concerning medical, psychiatric, psychological or other rehabilitation treatment provided or suggested) shall not be maintained in the central repository.

The method you will use to obtain criminal history information depends on the county in which you are searching. Information about specific criminal cases is often available from the county court's Prothonotary. Different local police forces keep criminal history information in different ways and, depending on the police force, it may be easier or more difficult to obtain the information. One way to obtain information from the Central Repository is through the Pennsylvania State Police. You can obtain a form from the State Police (SP 4-164) entitled "Request for Criminal Record Check." To complete the form, you will need to know the full name, social security number, and date of birth of the person for whom you are seeking the information. You must also pay a $10.00 fee.

2. Federal Freedom of Information Act

The Federal Freedom of Information Act (FOIA) governs access to federal executive agency records. Although complex, the Act provides in general that records in the possession of agencies of the Executive branch of the federal government must be made available for public inspection unless the information fits within one or

more of nine specified and narrowly drawn exceptions. According to the United States Supreme Court, "Disclosure, not secrecy, is the dominant objective of the Act."

The Act allows the government to withhold information related to matters that are:

1. Properly classified by Executive Order as national defense or foreign policy information.
2. Related solely to the internal personnel rules and practices of an agency.
3. Specifically exempted from disclosure by statute, but only if the statute mandates withholding with no discretion on the issue or establishes specific criteria or refers to particular types of information.
4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential information.
5. Agency memoranda and/or letters that would be unavailable by law in civil litigation to a party besides a party in litigation with the agency.
6. Personnel, medical or other files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."
7. Records and information complied for purposes of law enforcement but only to the extent that one or more of six specified forms of harm would result.
8. Certain records/reports prepared by or for use by an agency regulating or supervising financial institutions.
9. Geological and geophysical oil well data.

In 1996, in an effort to update FOIA to the "electronic age," Congress passed the Electronic Freedom of Information Act Amendments of 1996. In addition to numerous changes in the procedure by which agencies process requests (which are not discussed here), the Amendments generally require agencies to make information available "on-line." As a result, considerable information about the federal government is now available on the internet.

Prior to the amendments, agencies were required to have "reading rooms" available to review certain specified types of documents. The Electronic Freedom of Information Act Amendments now require that those reading rooms be available "on line," usually through a World Wide Web address on the internet. The Amendments also now require an agency to place in its reading rooms (including electronic reading rooms) materials that are subject to FOIA requests that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."

The Electronic Freedom of Information Act Amendments also require agencies to search for records requests by automated means, unless such efforts "would significantly interfere with the operation of the agency's automated information system." The Amendments also require agencies to "provide the [requested] record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format," including electronic format.

How to Obtain Records of a Federal Agency:

- Before making a request, you may wish to access the agency's electronic reading room to see if the material requested is already available on-line.
- If the material is not already available, make a written request to the agency for access to the documents. Each agency must publish its specific procedures for obtaining documents under FOIA in the Federal Register.
- The request must "reasonably describe" the records sought. The request should describe the desired files with as much detail as possible. Avoid requests employing language like "all files relating to," which tend to send the agency looking for ways not to answer.
- The initial request must be answered by the agency within 20 working days. The agency may extend the response period by 10 working days upon written notice to the requestor. If the request is denied in whole or in part, you may appeal to the head of the agency. The appeal is in the form of a letter, and it is advisable, although not required, to state a legal basis for the appeal. Accordingly, it makes sense to have the appeal letter prepared by an attorney. Sample appeal letters are available from the Coalition.
- If the administrative agency denies the appeal, a complaint can be filed in the federal district court challenging that determination. Sample complaints are available from the Coalition.

C. OPEN MEETINGS — GENERALLY

Your right to attend meetings of governmental agencies is determined by statute. Accordingly, you must proceed under either the Pennsylvania act for state agencies, or the federal act for federal agencies.

1. Pennsylvania Meetings

Pennsylvania's "Sunshine Act" is the statutory basis for open public meetings in Pennsylvania. The law begins with a strong statement of intent, stressing the right of the public to witness the decision-making process to ensure that the democratic process functions properly.

The Sunshine Act provides that if a quorum of a public agency meets at a prearranged gathering to take official action or to have a discussion in order to take official action, such a meeting must be held in public. Before the meeting takes place, notice shall be given to the public. During the meeting, minutes shall be kept (which are subject to the Open Records Act), and all votes shall be both made publicly and recorded. The courts have carefully parsed the language of the law, however, eroding the potential force of the Act.

a. Who is Covered?

The Sunshine Act applies to public agencies, which include Pennsylvania executive branch agencies, the General Assembly (excluding a caucus or ethics committee meeting), and municipal authorities, such as township boards of supervisors and local school boards. The Act also covers commissions and educational institutions, whether they are owned by the state or merely receive state

funding pursuant to a statute making them state-related. The Act also covers any organization created by statute that declares in substance that it performs an essential governmental function, exercises governmental authority and takes official action; this may extend the Act's requirements to certain "quasi-governmental" entities that meet the test. Any private non-profit corporation that leases lands, offices or accommodations to the Commonwealth with a rental amount in excess of $1,500,000 per year also is subject to the Sunshine Law's provisions. The Act does not apply to individuals, such as the Governor.

The Commonwealth Court has ruled that the only meetings of the General Assembly covered are: i) general sessions; ii) meetings where bills are considered; or iii) meetings where testimony is taken. So, for example, conferences by the Rules Committee to set the amount of the legislature's own per diem allowances are not open to the public on the theory that no "bills" are considered during such meetings.

b. What Must be Done in Public?

Any time "official action" is taken and/or "deliberation" occurs, the meeting must be open, unless one of the exceptions applies.

As defined by the Act, "official action" means

(a) recommendations made by an agency pursuant to statute, ordinance or executive order; (b) the establishment of policy by an agency; (c) the decisions on agency business made by an agency; (d) the vote taken by any agency on any motion, proposal, resolution, rule, regulation, report or order.

Agencies are also required to conduct their deliberations in public. The definition of "deliberation" is, however, a source of legal dispute. The Act defines "deliberation" as "the discussion of agency business held for the purpose of making a decision." This broad definition of deliberation was a compromise, designed to exempt from public view the very early stages of private conversation and informal discussion. Thus, "agency business" deals with the creation of laws, policy or regulations, the creation of contracts, and the adjudication of rights and obligations.

"Deliberations" does not mean any discussion held by the agency. One court ruled that a school board's informal discussion of a budget did not violate the Act. A more recent case, with little reasoning, held that a meeting with county supervisors and a water authority was not deliberation because it concerned the water authority, not the supervisors. Mere questions and inquiries into various proposals and matters do not constitute "deliberation" for purposes of the Act. Also, the development of non-binding recommendations by a task force for township supervisors did not have to be made in public, although a vote by the supervisors on those recommendations would have to be publicly cast. Some agencies may attempt to use this broad definition, however, to shield discussions that are more accurately characterized as "deliberations." This creates problems for those who would challenge a public agency's decision to close a meeting: if the challenger is not invited to the meeting in question, how can he or she be expected to marshal the evidence necessary to prove that "deliberations" took place as opposed to mere "discussions?"

Deliberation and agency business do not include more mundane

or everyday matters, which the Act calls "administrative action." Administrative action is the execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency. In other words, discussions held for the purpose of arriving at a decision are covered by the Act and must be made in public, whereas merely taking steps towards implementing a decision made publicly is not.

The broad definition of "deliberation," when combined with the difficulties that parties excluded from meetings face in obtaining evidence, can result in inconsistent decisions from the courts.

- In one case, for example, a court ruled that a private conference among three members of a township board of supervisors constituted a violation of the Act because they discussed amendments to a zoning ordinance — clearly agency business — and therefore deliberated for purposes of the Act.
- In another case, however, the Commonwealth Court dismissed a Sunshine Act case against a local school board because the plaintiff could not prove that the board members had "deliberated" during an informal meeting on its budget. The plaintiff — who had not attended the meeting — based her claim on a newspaper account of the board meeting, which reported that members had met together in groups during a recess of the board's public proceeding. The court rejected the idea that such meetings could be considered "deliberations" based solely on the newspaper's description of the meetings in dispute.
- In a 1998 case, the Commonwealth Court also held that the taking of witness testimony by a city Council in executive session did not violate the Sunshine Act because the witness testimony did not constitute deliberations. While part of an investigative proceeding, the testimony "will produce no votes or decisions on agency business, nor will any recommendations or establishment of policy take place."

c. Exceptions to the Sunshine Act

The Act does not cover executive sessions, conferences, and certain working sessions of the boards or auditors. Also, caucuses or ethics committee meetings of the Pennsylvania General Assembly are not subject to the requirements of the Act.

The executive session exception to the Act is the most extensive and requires careful attention. An executive session is "a meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting." An agency may hold a meeting which is not subject to the Sunshine Act to discuss personnel matters; conduct or discuss collective bargaining sessions; consider the purchase or lease or real estate (although once an option to purchase or lease the property is obtained this exemption no longer applies); or consult with an attorney or other professional advisor in connection with litigation (either pending or threatened). In addition, public colleges or universities need not discuss matters of academic admissions or standing in public. Although these are all exceptions to the Act, any official action taken on any of these discussions must be done in public.

The following executive session exceptions are the most frequent subjects of litigation under the Act.

- The personnel matters category tends to be a catchall raised to avoid having a meeting in public. Note, however, that the discussion must be limited to a "specific" current or prospective public officer or employee. For example, if the agency is discussing department-wide raises, then the meeting must take place in public. Also, the employee or public officer under discussion must be from the same agency holding the meeting, and not, for example, a consultant or an employee or public officer from another entity. In addition, the exception applies only to persons employed by or appointed by the agency, and not to publicly elected officers. An employee or appointee adversely affected, however, may request that the matter be discussed in an open meeting.
- Collective bargaining is another category with less than precise contours. This exemption covers information, strategy and negotiation sessions or arbitration of a collective bargaining agreement or, in the absence of a collective bargaining unit, sessions related to labor relations and arbitration. In one case, the decision to close a nursing home — made during an executive session of county commissioners after negotiations over a new collective bargaining agreement reached a stalemate — was held to be a decision related to the labor negotiating process and thus exempt from the openness requirements of the Act. In another case, a tentative agreement between a teachers' union and the school district, reached at a closed session, was found to fall within this exemption.
- A 1993 Commonwealth Court decision addressed a challenge to the litigation exception to the Sunshine Act. In the case, the Reading City Council announced at a public meeting that it was going into an executive session to discuss matters "of litigation." A reporter objected and brought a Sunshine Act violation claim because the litigation matters were not announced with specificity. The court agreed with the reporter, stating that citizens must be given the basis for the decision to enable them to determine whether they are being properly excluded from a meeting. "To permit generalized fluff would frustrate the very purpose of the Act." The court ordered that when announcing executive sessions under the litigation exception to the Act, the agency must provide the names of the parties, the docket number of the case and the court in which it is filed. If there is no pending litigation, but there are identifiable complaints or threatened litigation, the agency must state the nature of the complaint, but not the identity of the complainant. The appellate court affirmed this ruling.

d. Community Participation

A new provision of the Sunshine Act requires the agency to "provide a reasonable opportunity at each advertised regular meeting and advertised special meeting for residents of the political subdivision or authority created by a political subdivision or for taxpayers of the political subdivision or of the authority created by a political subdivision or for both to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action." The Commonwealth Court has held that an agency may limit public comment to "current business". The law specifically provides that recording devices can be used by persons attending the meeting, subject to the agency's rules for maintaining order. This includes the right to videotape meetings.

e. Sunshine Act Challenges

Any challenge to an agency concerning its alleged noncompliance with the Sunshine Act must be filed within 30 days of the closed meeting or within 30 days of discovery of an alleged infraction, so long as no more than one year has passed. If the law was violated, the court may find any action taken at the disputed meeting to be invalid.

Several courts have determined that Sunshine Act violations may be cured merely by having essentially the same meeting in public that previously was held in secret. In this way, of course, the agency can simply ratify at an open meeting the official action taken after extensive discussion behind closed doors without repeating or revealing any of the prior discussions. This is a glaring loophole to the Act's requirements.

f. What To Do When A Meeting Is Closed

If you are excluded from a meeting that you believe should be open to the public and press, you should do the following:

- If you hear in advance that a meeting will be closed, notify the agency in writing that you (1) object to any closed meeting and (2) want a written explanation of what will be discussed at the closed meeting and the legal justification for closing the meeting. You may also want to contact your organization's attorney so that he or she can contact the agency and complain.
- If you are at the site of a meeting that will be improperly closed, object to the closing and ask an explanation of why the meeting will be closed. A statement should be made similar to the following:

> "I am (name), a reporter for (newspaper or broadcaster). On behalf of both myself and my (paper or station), I would like to note an objection to the closure of this meeting to the public and press. I ask that you provide to me an explanation of what will be discussed at the closed meeting and the legal justification for it. I also request the opportunity to be heard through counsel prior to any closed meeting."

- If asked for the basis of your objection, state:

"The Pennsylvania Sunshine Act gives the press and public the right to attend all meetings of an agency. I understand

that this meeting is to discuss (explain understanding of purpose of meeting). Such discussions must be at an open meeting. I request that our counsel be afforded an opportunity to be heard on this matter."

- If the closed meeting is already taking place, you should try to make it known to those conducting the closed meeting that you object to the closure, that you want to know what will be discussed at the meeting and the legal justifications for it, and that you want the meeting postponed until the legality of the closed meeting can be determined. You should also notify your editor, and through him or her your legal counsel, and send to the agency a written objection and request for access to the meeting.
- Do not refuse to leave when requested to do so by those conducting the closed meeting, and do not attempt to force your way into a closed meeting. You may be arrested for disrupting the meeting.
- Do not make any agreement with the agency whereby you agree not to publish a report of the meeting in exchange for permission to attend.
- If the closed meeting will last a period of time, it may be possible to bring a lawsuit seeking to enjoin the closed meeting. It is difficult, however, to get courts to act quickly enough to make a difference.

2. Federal Meetings

a. Federal Open Meetings Law

A Federal Open Meetings Act was enacted in 1976. The Act covers any federal agency meetings at which deliberations resulting in the disposition of official agency business take place. Ten exceptions to the Act exclude the public from meetings:

1. Disclosing matters determined by Executive Order to be kept secret in the interests of national defense;
2. Relating solely to the internal personnel rules and practices of an agency;
3. Disclosing matters specifically exempt from disclosure by statute;
4. Disclosing trade secrets or confidential financial information;
5. Involving accusations against any person of criminal acts;
6. Disclosing information which would constitute a clearly unwarranted invasion of personal privacy;
7. Disclosing investigatory records compiled for law enforcement purposes;
8. Disclosing certain information relating to banks;
9. Disclosing information likely to lead to current, commodities or securities speculation; or
10. Disclosing the agency's issuance of a subpoena or participation in a civil action, arbitration, international tribunal, or action on a case of formal agency adjudication involving a determination on the record after opportunity for a hearing.

This statute regulates the activities of all advisory committees, which have been defined to include any committee, subcommittee,

board, panel, or other similar group, utilized or established by statute, the President of the United States, or a government agency. All advisory committee meetings must be open to the public, except where either President or agency head determines that a portion of the meeting may be closed for one of the reasons listed above under the Federal Open Meetings law.

3. What to Do If You are Excluded from a Meeting

- Object to any closed meeting, and ask that your objection be recorded in the minutes of the meeting.
- Ask the reasons for the closed meeting. If minutes of the proceedings are kept, ask that the statement of reasons be recorded in the minutes.
- Advise the participants that any official action taken at a closed or non-advertised meeting may be void, and that as participants they may be subject to criminal penalties.
- If the closed meeting is already in progress, send in a written objection and request that it be incorporated in the minutes of the meeting.
- Do not volunteer to leave. Let the agency order you to leave.
- Do not refuse to leave a meeting when ordered to do so. However, ask that a vote be taken on whether or not to close the meeting, and that the vote of each member be recorded in the minutes. If minutes are not kept, record the votes in your notes.
- Never agree not to report on certain portions of the meeting. Do not agree to permit "off the record" remarks.
- If the public meeting is adjourned for a closed "executive session," ask that the chairperson state the reasons for the executive session. Also request that these reasons be recorded in the minutes of the meeting.
- If you have been excluded from a meeting, make a written request for a transcript of the proceedings or copies of the minutes.
- You are free to report anything which transpired at a closed meeting if one of the participants consents to be interviewed.
- If you are excluded from a meeting you may file suit under the Pennsylvania or Federal Open Meetings laws. If the meeting has been completed, you may seek to void any action taken at the closed meeting. Sample complaints for both state and federal agencies are available from the Coalition.

D. PRISONS AND OTHER PLACES FROM WHICH THE PUBLIC IS GENERALLY EXCLUDED

1. Prisons

The United States Supreme Court has ruled that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. . . . The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally." Thus, the Court upheld a ban on interviews with individual inmates specifically designated by representatives of the press.

The denial of access to a specific prisoner was predicated upon finding of "substantial access" granted by prison authorities to the

prison facility in general. Thus, unless the media can demonstrate that the prison facility has failed to provide a plan of general access to and inspection of the facility by the general public, by guided tours or otherwise, there is no right to demand an interview with a specific prisoner.

The Pennsylvania Bureau of Corrections has issued regulations that govern media requests for interviews of inmates at state institutions and residents of Community Service Centers. These regulations basically give the media with the same visitation rights with prisoners as enjoyed by the public at large.

In the case of in-person inmate interviews, the request must be made to the superintendent of the institution, who will consider "the subject of the interview, the inmate's emotional stability and whether or not the interview would present a clear and present danger to the security and good order of the institution." If the superintendent denies the request, the reporter is entitled, upon request, to have the negative decision and the reasons for it placed in writing. If the superintendent approves the interview request, the reporter must obtain the written consent of the inmate by sending a letter, telegram or mailgram to the inmate, with a copy to the superintendent, setting forth: the purpose of the interview; how it will be used; a request that the inmate respond to the reporter either refusing or granting the interview request; and a request that the inmate notify the superintendent's office if he agrees to the interview. If the inmate consents, the reporter then contacts the institution to arrange a date and time.

The superintendent may grant requests for telephone interviews with inmates; however, the inmate's written consent still must be obtained.

Requests for inmates sentenced to death are handled the same way, unless the Governor's Warrant has been issued; in that case, interviews are permitted only by court order.

Interviews with inmates in the Diagnostic and Classification Center are not permitted during the initial 15-day medical quarantine period.

Requests for interviews with residents at Community Service Centers must be addressed to the regional director (the supervisor of a group of centers). These requests are handled in the same way as requests for inmate interviews, except that the regional director also must consider whether the interview could adversely affect the resident's ability to continue successful participation in the Community Service Center program.

Media visits to state institutions are permitted with the permission of the superintendent or regional director. A photo identification, such as a driver's license, and proof of employment by a news organization (a press pass, for example), are required. Reporters are subject to the same security procedures and regulations (searches, for example) that govern other visitors.

2. Private Property

Generally, the courts have held that the press has no more right to enter private property without permission than does the public at large. It has been held that representatives of the media may be prosecuted criminally for following demonstrators into a restricted area at a nuclear power plant. The fact that the reporters were pur-

suing a story did not justify violation of the criminal code.

Reporters and their employers have been subjected to trespass and/or invasion of privacy suits for entering private property, such as the scene of a fire or other emergency. Courts have split over whether police or fire officials have the right to permit third persons, such as members of the media, to enter private property. Pennsylvania courts have not addressed the issue in written opinions.

Please refer to the section on "invasion of privacy" for further discussion of the possible legal consequences of trespassing on private property.

3. Hospital Records

The Pennsylvania Department of Health has promulgated regulations creating a Patient Bill of Rights. The regulations provide that a patient has the right to have all records pertaining to his medical care treated as confidential, requiring consent of the patient or next-of-kin prior to release of medical information.

However, each hospital is free to adopt its own procedures on disclosure of emergency room information. The identity and condition of the patient may be released after the next-of-kin have been notified.

The regulations neither require nor prohibit release of "identity" and "condition" information; rather, they require that the hospital adopt a policy on the matter.

Traditionally, the type of information released to the public, and which may be released under the guidelines, includes:

1. Identification — name only. However, address, age, sex, occupation and marital status may be released as necessary to avoid mistaken identity.
2. General condition — good, fair, serious, or critical.
3. Disposition information — treated and released or admitted
4. Nature of accident or injury.

4. Other Restrictions on Records and Deliberations

There are, of course, a number of other Pennsylvania statutes, regulations, and policies that either grant or restrict the media's access to information from the government. Although it is impossible for you to be familiar with every statute, regulation, and policy, it is important for you to know that such laws exist and that you should consult counsel whenever you have a question about the scope and effect of a particular law.

- Abortion Consent Proceedings
  Under the current version of Pennsylvania's abortion control statute, a pregnant woman who is less than 18 years old must obtain the consent of a parent, a guardian, or the courts before she can have an abortion. Court proceedings under the Act are confidential; the public is required to be excluded. In addition, all records of such proceedings are to be sealed, and the name of the person seeking court consent for an abortion may not be entered on a docket.
- Abortion Facility Listings/Maternal Death Rate Data
  According to the Abortion Control Act, every facility which performs abortions in Pennsylvania must file a quarterly report showing the number of abortions performed there.

These reports are available to the public if the facility has received State-appropriated funds within the twelve months before the filing. Also, a statistical report is compiled annually and submitted to the General Assembly regarding maternal death rates arising from pregnancy, childbirth or intentional abortion, which is available to the public for inspection and copying.

- Adoption Records
  The Pennsylvania Adoption Act limits the ability of the adoptee and parties to the adoption to access information contained in adoption records, and it generally prohibits the inspection of adoption records by the public.
- AIDS (Acquired Immune Deficiency Syndrome) Information
  Records of AIDS-related testing, treatment and counseling are confidential and may not be released except as specified by the Pennsylvania Confidentiality of HIV-Related Information Act. The person who is the subject of such records may give his or her written consent to disclose HIV-related information, but the form, content, and expiration dates of such consensual disclosures are strictly regulated by law. Courts also may release AIDS records when the person seeking the information or the person seeking to disclose the information establishes a "compelling need" for the information. This is a very high standard of proof that rarely will be met.
- Board of Adjustment Reports
  Under Pennsylvania law, if a city of the first or second class, or an incorporated town decides to appoint a board of adjustment that can make special exceptions to the terms of ordinances, then all minutes and other records of the board's examinations and other official actions will be filed in the office of the board and be available to the public.
- Board of Claims Hearings
  According to the Commonwealth Procurement Code, all hearings before the Board of Claims or a hearing panel shall be public, and all papers filed in accordance with such hearings are available to the public.
- Boat Registration Documents
  All records relating to registration, titling, and numbering of boats shall be public records.
- Campus Security Information
  According to the College and University Security Information Act, the campus police or campus security officers of each institution of higher education must maintain a daily log as a public record. These logs will include all complaints and crime reports, the disposition of any charges filed, the names and addresses of only those adult persons arrested and charged, and the charges filed against those persons.
- Charitable Organization Information
  According to the Solicitation of Funds for Charitable Purposes Act, registration statements and applications, reports, notices, contracts or agreements between charitable organizations and professional fundraising counsels, professional solicitors and commercial coventurers, and other simi-

lar documents are generally available to the public for review. In addition, these charitable organizations, professional fundraising counsels and professional solicitors are required to keep accurate fiscal records of their activities in Pennsylvania, which will be made available to the public after removing any information that could identify specific contributors.

- Child Abuse Reports

  State law requires that persons who work with children on a regular basis (such as physicians, day-care center workers or police officers) report suspected instances of child abuse to county child welfare officials. These reports, the identity of reporting individuals, and other information compiled in connection with investigations of child abuse allegations are confidential and may be disclosed only to certain persons or agencies as provided by law.

- Civil Service Commission Records

  The civil service commission in each city of the third class must keep, for ten years, minutes of its own proceedings, records of its official actions, and recommendations of applicants for employment, and all such documents must be made available to the public for inspection. The commission must also make an annual report to the mayor, showing its own actions and rules and regulations, which is made available for public inspection five days after being delivered to the mayor.

- Criminal Histories

  While Pennsylvania's Criminal History Record Information Act classifies records maintained in a central repository as confidential, it expressly reserves the public's right to access certain other information. For example, a criminal justice agency can disclose any information that can be found in police blotters, documents prepared or maintained by or filed in any court in Pennsylvania, posters, announcements, or lists for identifying or apprehending fugitives or wanted persons, or announcements of executive clemency. For more information regarding access to information relating to police investigations and criminal histories, see section I.B.1.f. above.

- District Justice Records

  The general policy of the Administrative Office of Pennsylvania Courts ("AOPC") is to make case indexes, dockets, and files for all matters originating in a District Justice office available to the public for inspection and photocopying. Access to certain information may be limited due to personal privacy and security concerns, such as the protection of the identity of child victims of sexual or physical abuse.

- Grand Juries

  Prosecutors, court officials, law enforcement officers, and grand jurors are prohibited by both federal and state law from disclosing information about proceedings before grand juries. Grand jury witnesses are not barred from speaking publicly about their participation in such proceedings.

- Hazardous Substance Information

  According to the Hazardous Sites Cleanup Act, most records, reports or other information obtained under the Act that relate to health or safety effects of a hazardous sub-

stance or contaminant can be obtained from the Department of Health for inspection and copying during normal business hours.

According to the Worker and Community Right-to-Know Act, any person living in Pennsylvania who is not a competitor may request from the Department of Health a copy of any Material Safety Data Sheet or Hazardous Substance Fact Sheet on file for a particular workplace.

- Health Care Cost Containment Council Data

The Health Care Cost Containment Act requires the council to issue reports to the general public, by publishing them in the Pennsylvania Bulletin and at least one newspaper of general circulation in each subregion within Pennsylvania, and by advertising annually the availability of these reports. These reports include information regarding health care providers and services available in the area, such as comparisons among providers of provider service effectiveness, inpatient and outpatient charges and payments, ancillary services provided, and incidence rates of selected procedures. The council may also, at its discretion, provide the public with access to special reports derived from its raw data for a reasonable fee.

The Act also sets out rules that the Health Care Cost Containment Council must follow when holding meetings. All meetings of the council, except for special "executive sessions" during which no action will be taken, must be open to the public, and the council must publicly advertise such meetings on a quarterly basis in the Pennsylvania Bulletin and at least one newspaper in general circulation in Pennsylvania.

- Health Care Facility Registration

Under the Health Care Facilities Act, the Department of Health must annually prepare and publish a report, which is available to the public, that includes information on the volume and types of applications submitted to the department requesting registration as a health care facility, the assessment of the competition in specific service sectors that affected the decision, and the average time for review.

- Higher Education Gift Disclosure

According to the Higher Education Gift Disclosure Act, every college and university must disclose, and make available to the public for review and copying, information regarding gifts of at least $100,000 that are given to the institution from a foreign government, foreign legal entity or foreign person.

- House of Representatives Employee List/ Voucher Submission Information

According to Pennsylvania law, a central personnel file for all House of Representatives employees must be maintained and kept available for public inspection and copying during normal business hours. The file must contain the employees' job titles, description of duties, and compensation.

All vouchers submitted for reimbursement from any House Appropriation Account are available for public inspection and copying during normal business hours.

- Information Regarding Disposal of Refuse from Mines

All papers, records, and documents of the Department of Mines, and applications for permits pending before the department that relate to the disposal of refuse from mines, except for information pertaining only to the chemical and physical properties of coal, are available to the public for inspection during business hours.

- Insurance Information

  According to Pennsylvania law, working papers, recorded information, and documents produced or obtained by the Insurance Department or any other person in the course of an insurance examination are generally treated as confidential. The only exception to this rule is that thirty days after an examination report is adopted it may be treated as a public record, as long as no court has stayed its publication.

- Liquor License Information

  According to Pennsylvania's liquor code, the public should be able to access the names and addresses of all persons that have a pecuniary interest in the conduct of business on premises that are licensed for the sale of liquor, alcohol, and malt and brewed beverages.

- Lists of Large Political Contributions from Business Entities

  According to Pennsylvania law, any business entity, which has received any non-bid contracts from the Commonwealth or its political subdivisions during the previous year, must submit to the Secretary of the Commonwealth an itemized list of all political contributions made by any officer, director, associate, owner or member of their immediate family when the contributions exceed an aggregate of $1,000, and all political contributions made by any employee or members of his immediate family when contributions exceed $1,000. It is the responsibility of the Secretary of the Commonwealth to publish and make available to the public a complete list of all contributions for inspection and copying.

- Mental Health Records

  Under the Pennsylvania Mental Health Act, the records of patients who have been admitted or committed to mental health care institutions, or who have received services covered by the Act are confidential. Pennsylvania law restricts access to such records to staff members who have been designated by the director of a mental health facility, to courts in some circumstances, and to other officials who have been designated by statute and state administrative regulations. Unlawful dissemination of mental health records is a misdemeanor punishable by a fine no greater than $1,000, no more than one year in jail, or some combination of both.

- Noncoal Surface Mining Permit Information

  All papers, records, and documents of the Department of Mines, and applications for permits pending before the department that relate to noncoal surface mining, except for information pertaining only to the chemical and physical properties of the mineral, are available to the public for inspection during business hours.

- Oil and Gas Conservation Commission Documents

  According to the Oil and Gas Conservation Law, all rules, regulations, and orders issued by the Oil and Gas

Conservation Commission must be kept in writing, entered in full and indexed in books to be kept by the commission, which are public records open for inspection during reasonable office hours.

- Overdue Support Information

  According to Pennsylvania law, the domestic relations section will provide the prothonotary of the county the identity of and the amount of overdue support owed by any person who has failed to pay his or her support obligation. Absent a court order stating that disclosure of such information would unreasonably put a child or party's health, liberty or safety at risk, this information will be made available to the public either by a paper listing, diskette or any other electronic means, and it will be updated at least monthly.

- PENNDOT Motor Vehicle Records

  According to applicable federal and state statutes, information contained in state motor vehicle records is generally considered confidential, absent the express consent of the person who is the subject of the record. Under federal law, however, personal information in connection with a motor vehicle record may be disclosed for use in research activities, such as the production of statistical reports, "so long as the personal information is not published, redisclosed, or used to contact individuals."

- Precious Metal Dealer Licensing Information

  According to Pennsylvania law, all applications for licenses to become a dealer in precious metals are public records available to the public for inspection.

- Public Employee Retirement Study Information

  All reports and analyses compiled by or filed with the Public Employee Retirement Study Commission shall be available for public inspection at the offices of the commission during normal business hours.

- Public Utility Information

  Under the Public Utility Code, there are a number of reports which the Public Utility Commission must make available to the public. First, records of the names of each of consultant hired, the services performed for the commission, and the amounts expended for these services are to be made available for public inspection at the office of the commission during normal business hours. Second, copies of reports regarding increased rates charged by public utilities due to fluctuations in fuel costs and copies of similar reports regarding tariffs filed by natural gas companies due to fluctuations in natural gas costs shall be made available to any person upon request.

- Public Welfare Information

  According to the current version of the Pennsylvania Public Welfare Code, the identities of and other personal or confidential information regarding welfare recipients should be protected from “improper publication.”Therefore, the Department of Aging will only furnish such information to adult residents of the Commonwealth of Pennsylvania who will not use the information for commercial or political pur-

poses.

- Records Relating to the Removal or Reduction of Civil Service Employees

  Under Pennsylvania law, in every case of removal or reduction of an officer, clerk or employee in the classified civil service, a copy of the statement of the reasons therefor and of the written answer thereto is available to the public from the civil service commission. If a hearing is held in connection with any such removal or reduction, all records of the hearing will be made available to the public.

- River Basin Commissions' Records

  According to each commission's respective River Basin Compact, both the Delaware River Basin Commission and the Susquehanna River Basin Commission must make the minutes of their meetings available to the public for inspection at their respective offices during regular business hours. They must also make available annual reports discussing their programs, operations, and finances, and annual audits of the financial accounts of each commission.

- Senate Employee Lists/ Voucher Submission Information

  According to Pennsylvania law, the following information regarding Senate employees must be made available to the public: full name of employee, address of employee, job title, description of duties, and compensation. The public also has access to all vouchers submitted for reimbursement or payment for any appropriation made to the Senate.

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- Sentencing Data

  The Pennsylvania Commission on Sentencing, through the Inter-University Consortium for Political and Social Research, releases entire sentencing data sets for each year. The names and social security numbers of the offenders, as well as the names of the sentencing judges, will be removed from any data sets that are made available to the public. The Commission also makes a variety of standard reports, which include specific types of information, available to the general public. The following standard reports are compiled each year: Type of Sentence, Conformity of Sentence, Mandatory Sentences Imposed, Place of Confinement, and Offense-Specific Information.

- State Ethics Commission

  Under the Public Official and Employee Ethics Act, the State Ethics Commission is authorized to investigate potential violations of the Act, to make findings of fact regarding violations, and to hold hearings to determine whether a violation of the Act has in fact occurred. In general, the Commission is required to keep most of its investigative records, including records of its proceedings, confidential. There is one exception to this rule. Commission "determinations," which consist of

final orders and findings of fact that are entered after the conclusion of an investigation, must be made available to the public.

Hearings of the Ethics Commission are closed to the public "unless the subject [of the Commission's investigation] requests an open hearing." However, the names and votes of Commission members on alleged violations must appear on the final order, which is a public record.

- Tax Information

  State law requires that information gained by the Department of Revenue or any administrative department, board or commission, as a result of a tax return, investigation or hearing required or authorized under Pennsylvania statutes that impose taxes or provide for the collection of taxes, is to be kept confidential. Such information may only be disclosed under limited circumstances, such as for official purposes or pursuant to a court order.
- Tenement-house licensing information

  According to Pennsylvania law, the mayor must maintain a public record of all tenement-house licenses issued, and the original applications must be preserved for one year.
- Veterans' Grave Registration Records

  According to Pennsylvania law, the county commissioners of each county in Pennsylvania are directed to compile a list, known as the Veterans' Grave Registration Record, of the burial places within such county of service persons. The record is available for public inspection, and it should include the name of the service person, the location and characteristics of the gravesite, and other information relating to his or her service in the military.
- Vital Statistics

  Vital statistics records, such as birth and death certificates, are generally not available to the public. At the least, the applicant is required to show a direct interest in the content of the record and that the information is necessary for the determination of personal or property rights.
- Voter Information

  The following documents are generally open to public inspection: records of a registration commission and of district registers, street lists, official voter registration applications, petitions and appeals, witness lists, accounts and contracts, and reports.

  Street lists are compiled at least fifteen days prior to each election in each election district, and they include a list of the names and addresses of all registered electors as of that date residing in the district. These lists can be inspected during ordinary business hours, or a photocopy or computer-generated data record can be provided at cost, although the information gathered may not be used for "commercial or improper purposes."

  Public information lists contain the name, address, date of birth and voting history of each registered voter in the county, and they may also contain information on voting districts.

While the commission must supply a printed record in response to inquiries about individual registered voters, it is within the agency's power to decide whether it will make available printed or computerized public information lists that include information about each registered voter in the county. Any individual who inspects the list, or who acquires names of registered voters from the list, must state in writing that any information obtained from the list will not be used for purposes unrelated to elections, political activities or law enforcement.

Each commission must preserve computer lists used as district registers for five years. The department and each commission must preserve for two years and make available to the public, for inspection or photocopying, all records pertaining to the implementation of programs and activities conducted for the purposes of ensuring the accuracy and currency of official lists of eligible voters.

- Water Right Acquisition Records

  According to the Pennsylvania statutes dealing with water rights, an up-to-date "Water Acquisition Record" must be available for public inspection. This record will contain information on all confirmed water right acquisitions and all permits for the acquisition of water rights.

II. PRIOR RESTRAINTS AND "GAG" ORDERS

A. "No print" or prior restraint orders against the press — Backgroud

1. What is a Prior Restraint?

A prior restraint directs the press not to publish or broadcast information it already knows. The order can affect information already stated in open court.

This is what happened in the Nebraska Press Association case. The effect of this United States Supreme Court decision is that there may be virtually no prior restraints on reporting what takes place in open court, whether before or during trial. With respect to prior restraints on pretrial publicity, no such order will be upheld unless the court finds, after holding a public hearing, that:

- Pretrial publicly would impair the right to a fair trial;
- No alternatives - such as change of venue, postponement of the trial, close questioning of jurors, jury instructions, sequestering of the jury - would ensure a fair trial; and
- The prior restraint order would accomplish the desired result, i.e., a fair trial.

Given the Supreme Court's findings that the test was not met in the Nebraska Press Association case — a mass murder and sexual assault trial in a small community in which defendant's "confession" attracted nationwide press coverage — it is doubtful that any prior restraint can be upheld. Indeed, while trial courts occasionally grant prior restraints since the Nebraska Press case in 1976, no prior restraints survived review by an appellate court.

There are interests other than fair trial rights that have been asserted to justify prior restraints, typically without success. Most notable is national security. While national security did not win the day in the Pentagon Papers case, courts have occasionally allowed prior restraints, in particular those imposed on government employees with knowledge of state secrets. Individuals have also sought to restrain publication on the ground that dissemination of the content would irreparably damage their right to privacy. Generally, however, courts have resisted such attempts, finding that any alleged harm too speculative or inadequate to justify "so drastic a remedy." Similarly, courts, including the Pennsylvania Supreme Court, have generally declined to prohibit the publication of allegedly false and defamatory information unless the plaintiff can establish truly exceptional circumstances.

While business interests are also typically insufficient to justify a prior restraint, courts have enjoined the publication of copyrights, trademarks and trade secrets in certain circumstances. In 1995, a federal court ordered Business Week magazine not to publish information from sealed pretrial discovery documents containing business information. The court said that Business Week knew the documents were under seal when it obtained them. But in 1996, federal appellate court ruled that the gag order was not justified, holding the trial court failed to make any of the requisite findings that

irreparable harm to a "critical government interest" would occur if publication was not stopped.

In 1990, for the first time, the Supreme Court refused to void a gag order barring a news organization from disseminating material it obtained legally. The case arose when Cable News Network obtained tape recordings of telephone conversations between deposed Panamanian dictator Manuel Noriega and a number of people, including his attorneys, while he was in prison awaiting trial. Noriega's lawyers asked the federal court to stop CNN from airing them. The court issued a temporary restraining order. The U.S. Court of Appeals in Atlanta upheld the order November 10, and seven justices of the Supreme Court signed a brief order eight days later refusing to dissolve it. While the court later lifted the gag order, CNN suffered a criminal contempt conviction four years later for airing the tapes during the pending of its appeal. The CNN case raised troubling questions about the continued vitality of the Supreme Court's 1976 ruling in Nebraska Press Association v. Stuart. Nonetheless, such orders continue to be overturned in most cases on appeal.

One word of caution, however. Even if the judicial order is invalid as an unlawful prior restraint, a violation of the order may still result in a contempt citation. At the very least, every possible effort to obtain an immediate reversal of the order should be made before any decision is made to publish. A judicial edict should never be ignored, even if you are fairly sure it is wrong.

2. What To Do When A "No Print" Order Or Prior Restraint Order Is Entered Against The Press

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

- Ask for a copy of the order. If it is not in writing, demand that it be put in writing. If entered orally on the record, ask that a copy of the transcript be prepared immediately and signed by the judge and formally filed with the Clerk of Court.
- Your requests should be made on the record. If no court reporter is available or if the judge refuses to go "on the record," deliver a letter setting forth your requests.
- Object to the order and ask for the opportunity to be heard through counsel on an immediate basis.
- Advise the court that it is your understanding that no such order is valid until, at the very least, a full hearing is held.
- Notify your editor and, through him or her, your legal counsel immediately.
- Do not enter into agreement with the judge not to print, even if your access to the hearing is conditioned on such agreement. If such agreement is sought, respectfully advise the court that you have no authority to make such decisions, even if the refusal results in a closed hearing with all members of the public excluded.
- It is suggested that legal counsel move immediately to vacate the order as a prior restraint and, if denied, demand an immediate hearing. If unsuccessful, an immediate appeal to an appellate court should be sought.
- If you decide to challenge the order by violating it and publishing it, the court may hold you in contempt. Even if the

order is later found unconstitutional, you could be fined or even imprisoned.

B. "Gag" Orders directing that trial participants do not speak to the press

1. What is a "Gag Order"?

With direct restraints on the press as to what to print or broadcast now virtually a thing of the past (see the previous sections on "Prior Restraints"), courts have turned to alternative means of controlling the dissemination of the information to the public. One frequently employed device is a "gag" order that restricts the right of participants in court proceedings to discuss the case with media representatives.

No definitive guidelines have been developed to test the validity of gag orders. Many courts have held that these orders are not prior restraints, but rather are a constitutionally permissible means of ensuring that prejudicial and judicially inadmissible statements do not reach the jury. Because no restraint of any sort is placed directly on the media, those orders have been upheld if, after a public hearing, the court finds that there is a reasonable likelihood that prejudicial news will jeopardize a defendant's right to a fair trial (or threaten some other protected interest), and that there are no less restrictive alternatives to the gag order.

In 1998, the Pennsylvania Superior Court upheld a trial court's order requiring attorneys and their associates to comply with Rule 3.6 of the Rules of Professional Conduct. Rule 3.6 generally limits the sort of out-of-court statements that attorneys may make, and specifically prohibits any statements that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Thus, courts have imposed greater restrictions on the First Amendment rights of attorneys than would be permissible for laypersons (e.g., the parties or witnesses). And by exposing attorneys to contempt for violation of their ethical rules, the decision may make it more likely that attorneys may be chilled from making even permissible statements where, as is increasingly common in highly publicized cases, courts have ordered compliance with Rule 3.6.

Other "gag" orders, however, have been stricken as overly broad or as a violation of the trial participants' First Amendment rights. The Third Circuit Court of Appeals' decision in the First Amendment Coalition's case against the Judicial Inquiry and Review Board may be cited to argue that gag orders may be imposed on witnesses only in extraordinary cases where such an order can be shown to be necessary to ensure a fair trial.

2. What To Do When a Gag Order Is Entered Against Trial Participants

In cases where the court orders trial participants not to discuss the case with the media, do the following:

- Attempt to obtain a copy of the order, if in writing. If the order was entered orally but on the record, request a copy of the transcript.
- You may continue to ask questions of trial participants.
- Get trial participants to say that they would speak with you

but for the gag order.

- Notify your editor and, through him or her, your legal counsel.
- Because this type of order is not directed against the media, there is little else that the reporter on the scene can do.
- The legal procedure for challenging a "gag" order is similar to that of attacking closed courtrooms. The chances of success, however, are not as great.

III. ATTEMPTS TO ACQUIRE NEWS SOURCE MATERIALS:

Subpoenas, seach warrants & confidential sources

A. Background

Journalists often receive subpoenas served by a party in either a criminal or civil case. A subpoena is a demand either issued or authorized by a court for the testimony of an individual and/or for production of documents. Because a subpoena is a court order, journalists must take care in responding to it.

Fortunately, journalists have the benefit of certain privileges that may mean that compliance with the subpoena is not required. The existence and extent of the reporter's privilege not to reveal sources of information, including production of documents prepared or obtained in preparing a news article or broadcast, depend upon the laws of the jurisdiction. Thus, when determining how to respond to a subpoena, whether you are in a Pennsylvania state court or in a federal court is a critical factor.

Even in non-confidential source cases, journalists may oppose appearing as a witness. The theory is that once the journalist takes the witness stand, he or she has been injected into the legal proceeding as a witness for one side of the case. The journalist's neutrality is thereby destroyed, at least in the public's view, and he or she can no longer report on events associated with the legal proceeding. Requiring repeated court appearances of a single journalist, or of journalists in general, could well destroy their ability to act as neutral parties disseminating information to the public. Moreover, once it is widely known that reporters are useful witnesses whose testimony is easily obtained, the probability is that greater numbers of subpoenas will be issued.

For these reasons, virtually all subpoenas should be resisted forcefully. In addition to the reporters privilege, many defenses can be used. The rules covering the service of subpoenas are technical, and any defect can undermine enforceability of the subpoena. While reporters should never "duck" subpoenas, they are under no obligation to make it easy by agreeing to meet the subpoena server at a particular time. Go about your normal routine and make the party seeking to serve the subpoena find you.

One more point: journalists often say too much. When a lawyer calls about a matter on which you have written, always remember that the attorney is probably seeking information useful to his or her case. If the reporter discloses anything not previously published, it may be impossible to avoid testifying later.

B. PENNSYLVANIA COURTS

1. The Pennsylvania Shield Law

In Pennsylvania, a strong shield law serves to protect a reporter's sources. The Shield Law provides:

42 P.S. § 5942. Confidential communications to news reporters

> (a) General rule. — No person engaged on, connected with, or employed by any newspaper of general circulation or any

> press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.
> (b) Exception. — The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

In In re Taylor and Selby Appeals, the Pennsylvania Supreme Court stated that the Shield Law "is a wise and salutary declaration of public policy … which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare than the disclosure of the alleged crime or the alleged criminal." The court also interpreted "source of information" to include documents as well as individuals. Thus, journalists have successfully argued that they need not disclose either the name of an undisclosed source or any unpublished documents or information obtained during the news gathering process. Where the Shield Law applies, its protection is absolute; there is no consideration given to the need for the information by the party who served the subpoena.

Since Taylor, Pennsylvania's appellate courts have limited the breadth of the Shield Law as it applies in defamation actions. They have ruled that in defamation cases, the plaintiff may gain access to all documents maintained by the reporter, including notes and outtakes, as long as the confidential source's identity is not revealed. Thus, in defamation actions, reporters will likely have to produce their notes and outtakes after deleting any information that either identifies or that could lead to the identity of a confidential source. This is so regardless of whether the reporter, publisher or broadcast station is a party to the lawsuit. Although not yet required by the appellate courts, the production of such materials may involve an in camera review by the trial judge.

In several cases, lower Pennsylvania courts have confined the Shield Law's privilege to confidential source material in all cases, not just defamation cases. In one recent criminal homicide case in Philadelphia County, Commonwealth v. Tyson, the trial judge held that the Shield Law did not protect unpublished statements made by the defendant, who was a non-confidential source. That ruling, which is currently on appeal, shows that courts may be reluctant to uphold reporters' privileges in criminal cases.

Until the scope of the Shield Law in non-defamation cases is expressly confined to confidential source information by a Pennsylvania appellate court, however, reporters should continue to argue that a reporter need reveal only that portion of the information supplied by the named individual that has actually been published or broadcast. The remaining information, or reporter's notes, tape recordings or outtakes recording such information, is protected by statute.

A reporter can be required to assert the privilege, and decline to answer, in front of the jury. Of course, whether the jury believes that there was in fact a source will be a credibility determination. In the trial of a defamation action itself, the Pennsylvania Supreme Court has ruled that the trial judge must instruct the jurors that they can draw no inference, one way or the other, from the journalist's assertion of the Shield Law privilege. Thus, the jury is not to presume that a source either exists or does not exist, but is to treat the assertion of the privilege by a journalist as neutral.

2. First Amendment Reporter's Privilege

Pennsylvania courts have also adopted the First Amendment reporter's privilege. Since this privilege is largely based on cases arising in federal court, it is discussed in the next section.

C. FEDERAL COURTS

1. The First Amendment Reporter's Privilege

The Pennsylvania Shield Law is not applicable in most federal court cases. The Shield Law applies in defamation actions and other civil lawsuits involving claims under Pennsylvania law. In most federal civil cases, however, as well as in all federal criminal prosecutions, the Shield Law does not apply.

However, there is a First Amendment newsgatherer's privilege that is recognized in Pennsylvania state and federal courts. Unlike the Shield Law, this privilege is not the result of a legislative enactment. It is a judge-created privilege, based on the First Amendment, and originated in the case of Branzburg v. Hayes. There, the United States Supreme Court ruled that the First Amendment did not protect a news reporter who observed the commission of a crime from revealing his sources before a grand jury. It generally has been held, however, that the Branzburg decision did create a limited qualified privilege for the protection of confidential sources, although the continued vitality of the Branzburg decision is open to some question.

The First Amendment privilege applies in both criminal and civil cases and extends to confidential source information, unpublished information and, according to several court decisions, even published information. Under the privilege, such information need not be revealed unless the party seeking the information proves that the information is "crucial" to the case, that all alternative sources of the information have been exhausted, and that the only source of the information is the reporter. The privilege's protections are at their weakest when a reporter is subpoenaed to testify at a grand jury proceeding. Similarly, the privilege will usually provide no help when a reporter personally witnessed the criminal activity at issue. On the other hand, the privilege's protections are stronger in civil cases, especially when the reporter is not a party. In such cases, the subpoenaed information is usually only marginally relevant, or can be obtained elsewhere.

A reporter should always assert the First Amendment privilege in response to a subpoena, even though Pennsylvania's strong Shield Law will alone often enable a reporter to resist a subpoena successfully. There are cases, however, where the Shield Law will not apply, and the reporter may have to rely on the constitutional

privilege in order to avoid testifying and/or producing documents. For example, the reporter should be sure to argue the First Amendment privilege in at least two situations: (1) in a defamation case, where a party has subpoenaed unpublished information and/or documents not likely to lead to the identity of a confidential source, and (2) where the information sought has been published (e.g., the reporter is being subpoenaed to verify that a published statement is accurate), although there is some conflicting authority in Pennsylvania cases as to whether the reporter's privilege applies to published information.

In order to enable the court to apply the First Amendment test, the journalist's notes or outtakes may have to be produced to a judge for in camera inspection which is where the judge, and not the party seeking the documents, reviews the subpoenaed documents to determine the applicability of the privilege. This means that if it can be shown that the news reporter interviewed an individual whose remarks may be relevant to the case, the court can require production of the notes or outtakes for the judge's personal scrutiny; thereafter, the judge would decide if the documents produced were in fact so critical to the case that their release to the parties in the case was warranted.

Remember that the First Amendment privilege, like the Pennsylvania Shield Law, belongs to the journalist, not the source. If the source takes the witness stand and is questioned about conversations with the reporter, the source must respond truthfully and cannot assert the privilege. But if the source acknowledges speaking with a reporter and relates the gist of that conversation, the reporter may be compelled to testify fully about the conversation if the other elements of the First Amendment test are satisfied. Thus, even though the reporter never publicly disclosed whether the individual was in fact a source, or what that individual said, the reporter may be forced to testify.

2. Subpoenas By Federal Prosecutors

Federal prosecutors are limited by regulation in their ability to subpoena reporters. That is because the United States Justice Department has issued regulations governing when a federal prosecutor may issue a subpoena for a reporter or for a reporter's telephone records. Those regulations provide that the need for the subpoena must strike a balance between the public's interest in free dissemination of information, effective law enforcement and fair administration of justice. The subpoena should normally be limited to obtaining published information. All reasonable attempts should be made to obtain the information from alternative sources before considering issuing a subpoena to a member of the news media, and all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of news media. There should be negotiations with the media prior to issuance of a subpoena in an attempt to accommodate any particular concerns of the media, unless such negotiations would compromise the integrity of the criminal investigation. No subpoena may be issued without the express authorization of the Attorney General. Thus, local federal prosecutors must seek the Attorney General's approval for a subpoena and cannot proceed on their own. For more details, see Appendix E.

D. DEALING WITH SOURCES

In several cases, claims have been made that journalists have violated their promises of confidentiality or otherwise "burned a source." In a case decided by the United States Supreme Court, a newspaper's editors chose to reveal the identity of a source to the public, believing that it was important for the public to know that one side of a political campaign was "leaking" derogatory information about the opposing candidate. The Court rejected the journalists' claim that their conduct was protected by the First Amendment, and ruled that reporters can be sued for breaking their promise not to disclose a source's identity.

In order to avoid potential misunderstandings, reporters should know the news organization's policy with respect to sources and follow it. For example, does the organization require that the reporter reveal the identity of the source to editors? If so, do the editors have the right to approve (or disapprove) any promises made by the reporter? In addition, reporters should be careful to avoid the use of ambiguous terms, like "unidentifiable" and "confidential," and instead should stress the process that will be followed. For example, reporters should outline the steps that they and their editors will take in processing the information through and into news stories. Reporters should be careful not to promise results, such as a promise that the source will not be identifiable. Special care should be taken to avoid ambiguous terms when dealing with people who are not media savvy.

Once a promise of confidentiality has been made, the reporter should be sure to make his agreement, or description of the process, known to the editor. Editors should take care to make specific inquiries as to whether promises have been made, and ensure that reasonable measures are taken to enforce any such promises, such as staying in touch with copy editors, photographers, and others in the news organization who, if not aware of the promise, may insert information which will either identify or lead to the identity of the source. Editors who think a reporter has exercised poor judgment in making a promise should consider killing the story. If the story is deemed to be so important that the promise has to be broken, the media must recognize that there may be monetary consequences that flow from a breach of confidentiality.

E. WHAT TO DO WHEN A REPORTER IS SUBPOENAED OR REQUESTED TO TESTIFY

1. General

- Do not agree to appear voluntarily as a witness in any proceeding.
- If an attorney calls you or asks in person for "background" or additional information about a published or broadcast story, exercise great discretion. Any information disclosed may encourage the attorney to issue a subpoena in order to get testimony helpful to his or her case. Worse, any disclosure to the attorney may be deemed a waiver of the Shield Law.
- If you are served with a subpoena, record precisely when and how it was served.
- Always demand a check from the subpoena server to cover your expenses; if no check is received, ask the subpoena serv-

er to note that fact on the subpoena itself.
- Do not contact the attorney involved.
- Report the receipt of a subpoena to an editor.
- The editor or the company's lawyer should contact the attorney involved and find out the nature of the proceeding and the testimony sought. In many cases, it is possible to talk the attorney out of the subpoena, especially if he understands from a polite editor or lawyer that the broadcaster or newspaper will not cooperate and may seek to formally quash the subpoena
- Do not agree to produce any documents requested by the subpoena in advance. The attorney has no right to these documents until the reporter is actually on the witness stand.
- Do not accept service of the subpoena on behalf of someone else. Simply tell the process server that you are not authorized to accept service on behalf of the individual named in the subpoena. Above all, do not sign anything indicating that the subpoena has been received.
- If efforts to quash the subpoena are unsuccessful, consider carefully whether you will refuse to comply. A court may impose civil or criminal sanctions, including fines or imprisonment, for failing to comply with a subpoena.

2. Types of Subpoenas

- Subpoenas Requesting a Reporter's Factual Testimony Only
  If the testimony of a reporter is sought (no notes are requested and no confidentiality is involved), you may ask the court to quash the subpoena on the ground that injecting a reporter in a legal dispute will forever taint the reporter and may preclude him or her from reporting on the story again. This may deprive the public of reports from the most knowledgeable reporter. In addition, compelled testimony will limit the reporter's future effectiveness regardless of the limits placed on the required testimony. The reporter's sources, who may not be present in the courtroom, may not perceive the difference between the reporter's testifying merely as to matters which were reported in published articles and general testimony concerning sources of matters which had been published. This will raise questions in the minds of sources as to the reporter's ability to maintain their confidence.
  Although the Branzburg decision rejected this argument when made in an attempt to prevent a reporter's testimony before a grand jury, it has been argued with some limited success in Pennsylvania.
  A reporter who is nonetheless required to testify should be accompanied by an attorney. Even if it appears that the testimony to be elicited is no more than a statement that the facts set forth in a published article are true, you cannot predict when a "source" question will be raised concerning information not contained in the story. Sometimes, reporters can escape giving testimony by providing an affidavit that states what was in the article is true and correct.
- Subpoenas for a Reporter's Sources, Notes, Tapes, and Other Materials Not Published or Broadcast

These subpoenas should be strongly resisted because they seek to uncover a reporter's work product and confidential sources.

Petitions or motions to quash subpoenas should be filed as quickly as possible. As discussed more fully above in the background section, a reporter's ability to defeat a subpoena may depend on the testimony and/or documents sought and whether the subpoena is issued out of state or federal court.

- Subpoenas for Library Files

  Copies of newspaper articles that have been published and of radio and television programs that actually have been broadcast are usually produced in response to a proper subpoena, although one Pennsylvania trial court quashed a subpoena for published newspaper articles on the ground that the articles were publicly available on the newspaper's website. The first line of defense, therefore, is to refer the requisition to your paper's website. That will often be successful.

  In the past, it was sometimes necessary for a newspaper to make a witness available to "authenticate" the library files that is, testify that the articles are what they appear to be. That is no longer the case. In both state and federal court, newspapers and periodicals are now "self-authenticating."

- Subpoenas for Photographs and Videotapes

  For photographs or videotapes actually published or broadcast, follow the same procedure as for library files.

  Photographs not published and film clips not actually broadcast may constitute a "source" of news. One Pennsylvania trial court reluctantly ruled that unpublished photographs of an accident scene are protected by the Pennsylvania Shield law, a result the court described as "unfair." Another Pennsylvania trial court quashed a subpoena for unpublished photographs on the basis of the First Amendment newsgatherer's privilege. There are, however, several Pennsylvania trial court opinions denying motions to quash subpoenas seeking photographs, especially where the photographs depict a crime scene or accident site.

  The reporter or his counsel should contact the attorney who served the subpoena and seek an agreement to accept only the materials actually published or broadcast. If the attorney refuses, careful consideration should be given to filing a motion to quash.

F. SEARCH WARRANTS

1. Background

In *Zurcher v. Stanford Daily,* the Supreme Court ruled that nothing in the First Amendment prohibited the search of a newsroom pursuant to a validly issued warrant for evidence of a crime, even in cases where neither the newspaper nor any of its reporters were alleged to be involved in the criminal activity. Thus, police may apply for a warrant to obtain a reporter's notes, unpublished photographs, outtakes, or other materials that may contain information helpful to the law enforcement agency. The problem for the news agency is that unlike subpoena cases, where there is an opportunity to argue in court against production of documents, search warrants are issued by a judicial officer on application by

government officials, without affording the party whose property is to be seized an opportunity to be heard. In short, when a search warrant is served, the government may seize confidential materials before the seizure can be challenged in court.

In response to the Zurcher decision, Congress enacted the Privacy Protection Act of 1980, regulating searches by all governmental officers. The Act is applicable to federal agents, and to state police when the documents seized or the newspaper or broadcast in which they would be used affect interstate commerce. Because many court decisions have defined interstate commerce very broadly, virtually every newspaper or broadcaster will be covered by the Act.

Under the Act, "work product materials" — which consist of documents prepared and maintained with the intent of disseminating the contents to the public, and which contain the mental impressions, conclusions, opinions or theories of the person who prepared it — may be searched for and seized pursuant to a search warrant only when:

1. There is probable cause to believe that the person in possession of the materials has committed or is committing the criminal offense to which the documents relate, except for offenses consisting of the receipt or possession of information (other than offenses concerning certain national defense or classified information or offenses concerning child pornography or the sale or purchase of children);

OR

2. There is reason to believe that immediate seizure is necessary to prevent death or serious bodily injury to a human being.

Other forms of documents, photographs or tapes upon which information is recorded, which are maintained with the intention of public dissemination, be searched for and seized pursuant to a search warrant only when:

3. Either of the conditions for seizure of work product materials has been met; or
4. There is reason to believe that service of a subpoena would result in destruction, alteration or concealment of the materials; or
5. The materials have not been produced pursuant to a court order directing compliance with a subpoena; and

a. all appeals have been exhausted; or
b. there is reason to believe that further delay through appeals would threaten the interests of justice.

These requirements make it unlikely that newsroom searches will occur except in the rarest of cases.

2. What to Do When a Search Warrant Is Served

- Be polite and businesslike in dealings with the police.
- Make no attempt to physically impair the search or interfere in any way with the officers. Make no threats of force or other references to possible retribution. Remember, a judicially issued warrant is presumed valid and law enforcement officers have every right to execute it. You can and should make the requests outlined below, but if they are refused you may not impede the search.
- Internal procedures should be established to ensure that top management and legal counsel are notified immediately of the presence of police armed with a search warrant. Officers should be greeted by the executive editor/managing editor or ranking newsroom editor before entering the newsroom.
- Photographers should be notified immediately. Every available photographer should be on the scene to record the events and make the police aware that their every movement is being recorded. A tape recorder should also be present to record the officers' voices and conduct. If possible, TV stations should be asked to make their videotape equipment available to further monitor the search.
- The search warrant should be accepted by the ranking newsroom editor.
- Once the search warrant is received by the ranking editor, all future communications should be between the editor and the officer in charge. The editor should review the warrant slowly and carefully. The Supreme Court has stated that the warrant must identify the property to be seized with "particular exactitude." Thus, broad generalized descriptions or categorizations are unacceptable, and the description must be so limited as to prevent the searchers from rummaging among files and making value judgments as to particular documents.
- Advise police that the area to be searched contains confidential information.
- The editor should ask that execution of the warrant be delayed until the paper can contact its attorney. The editor should pledge to the officer in charge that the objects sought will not be destroyed or removed from the premises.
- Delay is your most effective weapon. Since you may not physically prohibit a search, time is necessary to permit legal action to block execution of the warrant. Careful and detailed questioning of the officers in a respectful manner may be of help in this regard.
- Once a search begins, the officers should be accompanied at all times by editorial personnel and photographers, if possible. The paper does not have the right to demand that the search party be limited to a reasonable number. This should be negotiated with the police officer in charge.
- Staff members should attempt to continue their work and ignore the police. If any staff member's work is interrupted by the police, the incident should be recorded photographically. Staff members should neither assist nor hamper the search, but simply attempt to ignore it. They should not answer any

questions and let the editor in attendance do all of the talking.

- You should demand a formal inventory of every document seized and of every document or object examined during the search. The editor should keep his own inventory as the search proceeds.

IV. LIBEL

This Survival Kit does not present a detailed analysis of the law of defamation. Rather, this chapter sets out a memo list to aid reporters and editors in understanding the parameters of libel law and in identifying potential libel problems.

A. WHAT IS DEFAMATION?

A "libel" is a written defamation and "slander" is oral defamation. A publication is considered "defamatory" if it tends to blacken a person's reputation, to expose the person to public hatred, contempt, or ridicule, or to injure the person in his or her business or profession. To put it another way, the issue is whether the communication complained of tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Because it involves damage to reputation, deceased persons have no cause of action for defamation under current Pennsylvania law.

To determine whether a publication may be considered defamatory, a court must read the article as a whole, considering its content in its entirety and weighing it in connection with its structure, nuances, implications, and connotations. The mere susceptibility of the publication to an innocuous interpretation does not make it non-defamatory. If there is both an innocent interpretation and an alternate defamatory interpretation, a jury will decide if the statement is defamatory. The test is the effect the article is fairly calculated to produce, the impression it would naturally engender, in the minds of average persons among whom it is intended to circulate. The nature of the audience is critical in non-media cases.

Always remember that a publication not defamatory on its face may be made so by an innuendo that is warranted, justified, and supported by the publication. Therefore, it is important to "step back" from the article and read it as a whole, asking whether it is "fair." Given these considerations, it is generally better to describe than to characterize. For example, it is safer, and probably more accurate, to describe a zoning map as having been "changed" rather than to characterize it as "illegally altered."

The omission of words and/or potentially important facts can also create defamatory meanings if the omission significantly alters the conclusion to be drawn from the facts reported. Every word in the article may be true, but a court or jury might nonetheless find the article defamatory if it is likely to leave a false impression in the minds of the reader. For example, it is not necessary for an article to state directly that a plaintiff actually committed a murder; if the article is written so as to leave the average reader with the impression that the plaintiff was indeed a murderer, then the article may well be judged defamatory. It is also important to remember that, although the general rule is that the article should be considered in its entirety, specific language in an article may be defamatory even if the article as a whole is favorable to the plaintiff.

In order to be actionable, the words used must be both false and defamatory. In the case of Philadelphia Newspapers, Inc. v. Hepps, the United States Supreme Court struck down a Pennsylvania law which required the media to prove the truth of an article as a

defense to a libel claim. Thus, at least when the speech is a matter of public concern, the burden is on the libel plaintiff to prove falsity. It is not necessary that the publication be completely true. Substantial truth is sufficient. The critical issue is whether the publication has the same gist or sting as the precise truth.

Pennsylvania courts have held that claims of libel by "implication," i.e., liability for defamatory implications from literally true statements are fact, are actionable. In other words, even if what was written was true and correct, there may still be liability for defamation if a reasonable reader would conclude that those literally true statements implied something false and defamatory about a person. The omission of words and/or potentially important facts can create defamatory meanings. Thus, even where a report as printed is wholly truthful, the omission of material facts that would significantly alter the conclusion to be drawn from the facts reported may render the report defamatory. Headlines and illustrations that do not capture the full meaning of an article are a continual problem . They can communicate a defamatory meaning even where nothing false or defamatory is stated. Again, the focus must be on the probable meaning of the publication read as a whole.

Use of file photography can also be problematic. For example, a photograph of children from the paper's files used to illustrate an article on children's need for psychological help can be defamatory of the children in the photograph, implying their need for psychological help. Never use a file photograph for illustration purposes unless you have fully considered all possible implications attributable to the persons in the photograph. For broadcasters, this same rule should apply to the use of file footage.

Remember that every individual identified in a story or broadcast is a potential libel plaintiff, even if the person had only a minor role, was mentioned only briefly at the end of a long story, or was peripheral to the theme of the story. Every individual is entitled to the same degree of care as the lead of a story, and a failure to investigate cannot be excused by the "minor" role any one particular individual played. Loose or vague references to these individuals should not be made and if you do not have the time to follow normal journalistic techniques, consider deleting the reference.

The words must also refer to some ascertained or ascertainable person. A defamed person need not be named, only identifiable. Where the publication refers to a group whose membership is so numerous that no one individual member can reasonably be deemed an intended object of the defamatory matter (usually groups of 25 or more), there can be no action for defamation. For example, no individual lawyer can prevail on a libel claim premised on a statement like "all lawyers are crooks," because "all lawyers" is too general a category. However, where the group is small, loose language can result in defamation problems (e.g., "every member of City Council is on the take"). While governmental entities cannot bring libel claims, corporations can if the publication casts doubts about the entity's veracity or solvency.

In Pennsylvania, the statute of limitation for libel is one year from the time of the first publication of the allegedly defamatory statement. If a libel plaintiff fails to sue within one year, the lawsuit is barred.

B. DOES THE PUBLICATION MAKE OR IMPLY A STATEMENT OF FACT OR IS IT A PURE OPINION?

The pure expression of opinion is wholly protected from actions for defamation, as are statements that are no more than rhetorical hyperbole (such as referring to a real estate developer's bargaining position with a local government body as "blackmail"). Nonetheless, where the statement sets forth or implies facts that are false and defamatory, the statement can be actionable even though designated as opinion. The fact that the statements are contained in an editorial, column, or letter to the editor does not mean they are protected by the opinion privilege; any express or implied statements of fact must be accurate.

It has always been difficult for courts to distinguish between protected opinions and actionable assertions of fact. In Milkovich v. Lorain Journal, a 1990 United States Supreme Court case, the court determined that the United States Constitution gives no special protection to publications designated as "opinion." In the court's view, expressions of opinion already are protected by existing state and federal law. For example, the Court concluded that protections for rhetorical hyperbole, and the other protections granted by the New York Times v. Sullivan case and its progeny, would ensure wide debate on issues of public concern.

In many cases, a court's analysis in this evolving area of the law will begin with whether the language that a libel plaintiff claims is defamatory is capable of being proven true or false. Language that is not capable of being proven true or false is protected both by the First Amendment and by the opinion privilege. For example, the phrase "Jones has a lot of strange ideas on this issue" is clearly an expression of opinion, because reasonable people may disagree on what ideas should be considered "strange" On the other hand, a court might say that phrases such as "I believe that Jones is a thief," or "in my opinion, Jones is probably connected to the Mafia," may be libelous depending on the context. A court could find that in a given context such expressions convey factual assertions — "Jones is a thief" or "Jones is part of an organized crime family" — that can be proven true or false by evidence.

It has been held that a writer cannot be held liable simply for expressing an opinion about another person, however unreasonable the opinion may be. However, where the negative opinion is coupled with a false implication that the author has private, first-hand knowledge to substantiate the opinion, such an expression can become as damaging and as actionable as an assertion of fact. And, where the author sets forth facts to justify the opinion, those facts may create defamation problems.

Some expressions are regarded as mere "name calling" and therefore not capable of defaming someone in the legal sense. For example, courts have held that characterizing someone as "scurrilous scum," "paranoid," "bigot," or "abusive" may not be defamatory, even though the use of such words can be hurtful or embarrassing. This is because the courts have chosen not to recognize defamation claims for every use of a harsh word.

As one Justice of the Pennsylvania Supreme Court has explained, would-be libel plaintiffs must recognize that,

[T]here is a great deal of unkindness in the world and considerably more loose talk ... It is not enough that the victim of the "slings and arrows of outrageous fortune," be embarrassed or annoyed, he must have suffered that kind of harm which has grievously fractured his standing in the community of modern society.

However, the Pennsylvania Supreme Court held that the statement that the plaintiff was "electioneering" as "the David Duke of Chester County" may be defamatory because a reasonable person could conclude that it implied that the plaintiff was abusing his position as district attorney to further racism and his own political aspirations. A concurring judge noted that this did not change the general rule that a mere allegation of racism cannot be defamatory. When a publication or broadcast states or implies that a public official has acted out of racist motives, that is more than simple name-calling. Rather, it is an accusation that the public official carried out his official duties in a racially-motivated manner, a violation of both state and federal law.

C. IS THE PUBLICATION A FAIR AND ACCURATE SUMMARY OF OFFICIAL PROCEEDINGS?

Reporters have a conditional privilege to fairly summarize and report on the proceedings of local governments, legislative bodies and judicial tribunals. As a result, the media may publish accounts of charges made on the floor of the legislature, or allegations made in court documents or during court proceedings, without fear of libel, so long as the reports are fair and accurate summations of the charges.

The report need not be a verbatim account of the charges, but must have the same "gist" or "sting." In other words, it must produce the same effect on the mind of the recipient which the precise truth would have produced. Some Pennsylvania courts have held that, even if the report is fair and accurate, the privilege does not apply if it was published solely for the purpose of causing harm to the person defamed. Because some courts have suggested that the publication must expressly identify the record or proceeding, it is advisable to do so to ensure the privileges' protections.

Pennsylvania courts have taken a broad view of the categories of proceedings and documents covered by the fair report privilege. To give two examples, the courts have held that the privilege applies to reports on initial pleadings in civil cases, even though no answer has been filed and no court action has taken place, and to reports based on actions of a foreign government.

Whenever possible, if you are writing reports on allegations contained in government documents, you should try to see and read the records yourself. It is helpful to be able to demonstrate that the writer of an allegedly libelous report or broadcast has actually seen the government report at issue when arguing that the "fair report" privilege applies. If what is said in the document or proceeding amounts to allegations, then you should make it clear that they are only allegations, not proven facts. Do not go beyond what was said

in the document or proceeding. That will not be protected by the privilege.

D. ATTRIBUTION AND THE USE OF QUOTATIONS — LETTERS TO THE EDITOR

Remember, the republisher of a defamatory comment stands in the same shoes as the person uttering the initial defamation. Although truth is an absolute defense in a libel suit, the defense of truth is not made out merely by attributing the statement to someone else and establishing that person made the statement. Nor is the defense of truth met through the use of qualifiers such as "it is reported that" or "it is rumored that." For example, if a newspaper states "It is reported that Mrs. Smith is an alcoholic," or "It is rumored that Mrs. Smith is an alcoholic," or even "Mr. Brown said Mrs. Smith is an alcoholic," truth is a defense only if the newspaper can prove that Mrs. Smith is in fact an alcoholic. It is not sufficient to prove that there were reports or rumors that Mrs. Smith was an alcoholic or even that Mr. Brown said that she was.

The same "republication" rules apply to letters to the editor. The fact that a letter writer wishes to cast aspersions on another individual does not give the publisher the right to print the letter free from defamation concerns. While the publisher may escape responsibility under the application of the appropriate "standard of liability" (see below), in order to establish "truth" the publisher must be prepared to prove the truth of the charges set forth in the letter. For example, if a letter writer asserts that his neighbor is illegally stealing gas from the utility company, the newspaper which publishes the letter stands in the same shoes as the letter writer for purposes of a defamation action.

When a responsible, prominent person or organization makes serious charges against a public official or public figure, the accurate and disinterested reporting of those charges may be protected regardless of the reporter's private views on the validity of the charges. The rationale for this rule is that the accusations, because they were made by a responsible person or organization, are newsworthy simply because they are made, regardless of their truth. Although it has not yet been firmly established in Pennsylvania, this rule may protect the media even if it knows or believes the speech to be false. The principle does not apply if the charges are distorted in order to launch an attack on a public figure.

Care should be taken when using quotation marks. In Masson v. New Yorker Magazine, Inc., the United States Supreme Court found that, although there is some leeway for literary license and grammar, an altered quote which changes the meaning of the words uttered by the speaker can give rise to both defamation and false light privacy claims. That the altered quote is a "rational interpretation" of what the speaker said is not enough, because the quotation marks indicate that the author is not interpreting an ambiguous statement by the speaker, but attempting to convey what the speaker said.

E. FAULT AND STANDARDS OF LIABILITY

Defamation liability is not shown merely by proof that what was said was false and defamatory. It must also be shown that the publisher or author of the statement at issue did not act appropriately. In New York Times Co. v. Sullivan and progeny, the United States Supreme Court has held that the First Amendment requires a different standard of care where the person defamed is a public official/public figure, or a private person. Put simply, a public official or public figure must prove what is called constitutional or actual malice, while a private figure usually need prove only negligence.

When the standard of law is negligence, a libel plaintiff must prove only that the reporter did not act the way a prudent journalist would have acted. Typically, that means a showing that the reporter did not follow standard journalistic practices in investigating and writing the story at issue. By contrast, a public official or public figure must show actual malice. That term does not mean ill will or intent to harm. Rather it means the publication was made with either actual knowledge of its falsity or with reckless disregard of whether it was false or not. "Reckless disregard" is defined as publishing with "serious doubts" as to truth; in other words, with a high degree of awareness of probable falsity. For this reason, the quality of the publisher's investigation prior to publication is not necessarily crucial, unlike for negligence. As the United States Supreme Court held in Harte-Hanks Communication Inc. v. Connaught, even an extreme deviation from professional standards, or the publication of a story to increase circulation, do not by themselves establish actual malice.

And hate, ill will, or even intent to inflict harm are irrelevant concepts unless there is a showing of intent to harm through falsehood. Nonetheless, the fact that in some circumstances evidence of a reporter's animosity toward a plaintiff may be admissible at trial explains why reporters should be concerned about animosity towards the subject of a report: it may lead a jury to conclude that the reporter acted with actual malice. In one Pennsylvania case, evidence that an allegedly defamatory article was written by a reporter whom the plaintiff had successfully prosecuted and who made it known that he sought revenge against plaintiff supported an actual malice finding.

Despite the clear language of the United States Supreme Court, however, lower courts, particularly in Pennsylvania, appear to have imposed actual malice liability upon publishers and broadcasters for failure to adhere to normal or usual journalistic practices. Failure to obtain comment from the person about whom you are reporting is often cited as such a deviation from standard practice and causes difficulty in defending defamation suits. In such instances plaintiffs argue that the newspaper or broadcaster did not want to obtain both sides and intentionally closed its eyes to the truth to avoid detracting from an otherwise "juicy" story. The expansion of the concept of actual malice in Pennsylvania courts continues. In one case, the inability of the newspaper to name the headline writer of an allegedly defamatory article was considered evidence of actual malice.

Because juries often have difficulty understanding the concept of

"actual malice," independent review of the facts by appellate judges is essential. In Bose v. Consumers Union, the United States Supreme Court ruled that all libel verdicts must receive special attention on appeal. Rather than giving great weight to the jury's finding, as is the case in most civil actions, the court mandated that appellate judges independently conduct an exhaustive review of the entire trial record. Liability against the publisher or broadcaster will be upheld only when the appellate court's own review of the evidence demonstrates that a public official or public figure plaintiff "proved" actual malice with "convincing clarity." This opinion — along with the court's reaffirmation of the need for exacting proof before liability can be found — results in reversals of jury verdicts.

Based on these same considerations, some Pennsylvania trial courts have stressed the need for summary proceedings in defamation cases, and have issued opinions dismissing cases before trial. However, there is a trend developing among Pennsylvania appellate courts of reversing pretrial dismissals of defamation actions and remanding for trial.

- Public Officials

  Public officials may not recover for defamation without proof of actual malice. The public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs. The employee's position must be one which invites public scrutiny and discussion of the person holding it.

  Certainly all elected officials and candidates for office fit within this designation. As for appointed officials, the applicability of the public official designation will depend upon the tests set out above. Courts have ruled that governmental officials having the right to exercise any discretion or make decisions are public officials. It appears, however, that the trend is to limit the applicability of this designation somewhat. Pennsylvania courts have split on the question of whether police officers are public officials, although most other courts have ruled that they are.

  If the public official designation is applicable, the actual malice test will apply to virtually any publication concerning the official, even if not directly related to his public duties. The rationale is that the public's interest extends to anything which may touch on an official's fitness for office. Thus, facts which affect the official's private character may well affect fitness for office, and such reports are within the protection of the "actual malice" standard.

- Public Figures

  The "actual malice" test also applies to individuals who fit within one of two types of public figures. The first of these types consists of "pervasive" public figures. These are individuals who either have assumed roles of special prominence in the affairs of society, occupy positions of such persuasive power and influence, or have achieved such general fame and notoriety that they are deemed public figures for all purposes. An example of the "classic" pervasive public figure is the politician George W. Bush. Well-known entertainers and ath-

letes (like Jay Leno and Eric Lindros) are also examples of pervasive public figures.

The second and far more common type of public figure is the "vortex" or limited purpose public figure, who is deemed to be such for a limited range of issues only. These are individuals who have voluntarily thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved, and as such have invited attention and comment. The Supreme Court has stated that:

> We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. 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 personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

The Supreme Court has identified several elements to be considered in deciding whether an individual may be deemed a "public figure." First, the individual must have sufficient access to the media to utilize "self-help" to counter criticism and expose falsehoods. There must be an ability to secure "regular and continuing access" to the media; the limited ability to be quoted in responding to a particular allegation is insufficient. Thus, in Hutchinson v. Proxmire, a research scientist's ability to publicly respond to receipt of Senator Proxmire's Golden Fleece Award and defend his research was deemed insufficient media access to warrant a finding that the scientist was a public figure.

Second, the individual must have been injected into a particular public controversy. Thus, general public concerns or mere newsworthiness is insufficient. The controversy must involve a dispute the outcome of which affects the general public or some segment of it. For example, in the Proxmire case, the court held that the Golden Fleece Award involved at most a general concern about public expenditures. In Wolston v. Readers Digest, where the alleged defamation concerned the report of an individual's contempt conviction for failure to appear before a grand jury investigating Soviet espionage, the Supreme Court questioned the existence of a particular public controversy, noting that there was no controversy about the undesirability of permitting espionage.

Third, in most cases the individual must have voluntarily injected himself or herself into the particular controversy in order to influence the issues involved. It is now clear that an individual may not be automatically transformed into a public figure merely by becoming "involved" in a newsworthy matter. For example, a person who pleaded guilty to a criminal contempt charge was not transformed from a private citizen into a public figure by the fact that he was involved in litigation attracting media attention. To be a public figure, the

individual generally must voluntarily seek to influence the resolution of public issues.

In Pennsylvania, the following persons have been held to be public figures: a well-known entertainer; a former professional football player; an attorney who associated with notorious motorcycle gangs; the president of a taxi company who voluntarily involved himself in a public debate over fare increases; a person who sought to bring a professional baseball team to the area.

The following were held not to be public figures: a participant in the Mummer's parade; a dentist who received state reimbursement for dental work performed on lower income patients, because he did not invite attention or public comment prior to the publication of the allegedly defamatory article; and a landowner who planned a party on his private land, despite the fact that the newspaper had printed a neighbor's comments that the party might involve drug activities.

It is important to remember that, for those classified as vortex "public figures," the protection of the "actual malice" test will apply only to the extent of the individual's public involvement, and will not, as in the case of public officials, apply to other aspects of his or her life. For example, the owner of a garage who leased space to robbers was determined to be a public figure only for the issues of where the robbers stayed and whether other persons were involved in the robbery.

- Private Persons

For those who cannot be characterized as either public officials or public figures, the Supreme Court has left the states free to fashion their own standards of liability, with the provision that there must be some degree of fault — negligence — to warrant the imposition of liability. Thus, even if a private person is involved or "caught up" in an event of great public importance, liability can be imposed for a defamatory untruth if the factual error was negligent.

Some states have decided to retain the "actual malice" test for private individuals in certain cases, such as where the subject matter of the article is of public interest and concern. Other states permit recovery by private individuals upon a showing of "gross negligence" while still others have adopted the "simple negligence" standard. In Pennsylvania, a private person needs to show only negligence. Thus a private person can recover compensatory damages merely by showing some degree of fault.

This means that libel plaintiffs who are neither public officials nor public figures may recover if they can show that they were defamed by the publication of a factual error caused by some lapse in newsgathering techniques. Because many defamation cases are brought by private persons, this rule has a major impact in Pennsylvania. It is possible for such a plaintiff to recover for investigatory failures and for "failing to do more" in preparing an article.

Thus, no matter how routine the story, failure to follow all of the traditionally accepted journalistic techniques, and

exhaustion of all leads, could lead to a finding of liability. Publishers and broadcasters should consider the impact of a negligence standard when attempting to develop a strict or uniform set of "reporting" standards. Even though no set of written standards can possibly cover every situation which might be faced by a reporter or editor, any deviation from written standards may well be deemed negligence.

F. DAMAGES

1. Generally

Plaintiffs in defamation actions may recover compensatory damages for impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering, as well as for out-of-pocket pecuniary losses. Presumed damages, which are damages that are awarded without proof of harm because it is "presumed" that injury took place from the fact that defamatory matter was published by the defendant, are available in public figure cases or in private figure/public concern cases only if the plaintiffs have established actual malice. Nominal damages of one dollar are available to any plaintiff if he or she prevails.

Defendants may be liable not only for damages resulting from the publication of the defamatory statement by the defendant, but also for damages resulting from the republication of the statement by third parties. While some cases require that the defendant participate in or direct the republication, others hold defendant liable for all foreseeable republications.

Punitive damages can be recovered only upon proof of actual malice and common law malice, which is defined as "conduct that is outrageous (because of defendant's evil motive or his reckless indifference to rights of others) and is malicious, wanton, reckless, willful or oppressive." Although appellate courts in Pennsylvania will find that a punitive damages award is excessive if it "shocks the conscience," Pennsylvania courts have upheld punitive damages awards of up to $21.5 million in defamation actions.

Evidence that a retraction was printed may be admitted to mitigate damages. However, Pennsylvania does not allow defendants to introduce mitigation evidence of unrelated misconduct by the plaintiff.

2. Common Factors in High Awards to Plaintiffs in Actual Malice Cases

Studies of libel cases governed by the "actual malice" standard from around the country reveal some of the factors that commonly have led to high plaintiff's verdicts:

- failure to consult obvious available sources or documents that could confirm the published facts or provide contrary information;
- interviewing with leading questions and pushing sources toward desired responses;
- failure to confront the plaintiff with the charges;
- surreptitious recording of conversations and other "sneaky" news-gathering techniques;
- reliance on sources who are disgruntled, who bear a grudge against the plaintiff, or who are not credible for "obvious reasons";

- reporter emotionally involved in the story;
- use of language that carries a greater sting than the facts as known to the publisher (alteration of quotes is in this category);
- failure to report known, significant countervailing facts;
- defendant denies awareness of a defamatory implication which appears obvious to the jury; and
- defendant destroys or "loses" notes, tapes, or any other significant evidence, particularly during the post-complaint stage.

G. HOW TO HANDLE A LIBEL COMPLAINT

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

- Be polite! Nothing will force the filing of a lawsuit faster than a callous or indifferent reporter or editor who appears insensitive to the complaints of an individual who believes that he or she has been wronged.
- Do not admit error, but agree to check into the facts.
- Do not volunteer any information or speculate as to how any mistake may have been made.
- Print "clarifications" or corrections freely when warranted.
- Remember, a retraction is not a defense to a libel action, but it does serve to mitigate or lessen damages.
- If the telephone call or letter is from an attorney, then refer the matter to your own attorney.

V. PRIVACY

The right of privacy is a concept still developing in the courts. The damage in privacy actions is usually the mental anguish that results from having some public aspect of the plaintiff's life wrongfully exposed to public view. Although injury to reputation may be an element of this damage, the publication need not be defamatory — and, indeed, may be laudatory — and still support a verdict for the plaintiff.

To understand the legal developments in the privacy area, it is important to understand that the term privacy covers many analytically different types of torts.

A. Disclosure of Private Facts

Under this claim, one who gives publicity to a matter involving the private life of another is liable if the publicity is highly offensive to a reasonable person, and not of legitimate concern to the public. Pennsylvania courts, therefore, require plaintiffs to prove four elements: (1) publicity given to (2) private facts, (3) which would be highly offensive to a reasonable person, and (4) is not of legitimate concern to the public.

The fact that a statement is truthful is not a defense. Although not yet tested in the United States Supreme Court against a First Amendment attack, the standard seems to be that truthful disclosure of private facts may be actionable, but only when the disclosure is deemed "unconscionable" by community standards. The determination of whether the disclosure is unconscionable must be measured against the "newsworthiness" of the publication.

The disclosure of private, sensational facts about someone's sexual activity, health or finances may be actionable under this claim. For example, one federal court applying Pennsylvania law held that the disclosure of the name of a minor who had been sexually abused by her father, a former police officer, was permissible because it was a matter of public concern. Similarly, the United States Supreme Court has ruled that because of the special role of open judicial proceedings, there can never be liability for a truthful disclosure of something set forth in a judicial record. Thus, disclosure of a rape victim's name stated in open court was held not actionable. Not all information maintained by public agencies, however, is part of or public record.

One court has suggested that the "newsworthy" line should be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable public has no concern. It is clear, however, that there is no distinction between "news for information" and "news for entertainment." Courts have held that an item is newsworthy if its addresses "relatively current events such as in common experience are likely to be of public interest."

To be actionable, publicity must be given to "private facts." By definition, a private fact is one that has not already been made public. For example, a photograph taken in a public place does not disclose private facts. Moreover, facts contained in a public record — convictions, birth and marriage records, etc.— are generally not private facts. It is important to be aware, however, that some courts have decided there are situations where "public facts" may become

"private facts" with the passage of time.

For example, if a man is convicted of a criminal offense at the age of 20, and thereafter rehabilitates himself and becomes a respected citizen, does the media have the right to report the prior conviction when the man is 50? The answer may depend upon the circumstances of the publication. An appellate court in Pennsylvania has said that, with time, a public record such as a conviction can fade into a private fact unless some compelling reason warrants maintaining public awareness of the record. The most compelling reason for publishing a 20- or 30-year-old record is the existence of a substantial connection between a person's past crimes, his or her current activity and the public interest. Thus, editors need to consider the relevance of such old information to their stories. Editors also should be careful when preparing "nostalgia" features, such as "25 Years Ago Today" columns or republication of old front pages.

B. False Light in the Public Eye

This form of invasion of privacy consists of publicity which places the plaintiff in a false light before the public in a manner that is "highly offensive." (It need not be truly defamatory, however). As a result, it is similar conceptually to defamation and very often accompanies defamation claims. Falsity is an element of any false light claim, and the actual malice standard (discussed previously) governs. Thus, for a claim of false light invasion of privacy, the plaintiff must show that a highly offensive false statement was publicized by the defendant with knowledge that it was false or at least with a high degree of awareness that it was false.

The action may arise by attributing to the plaintiff some opinion or utterance, or by the unauthorized use of his or her name on a petition, or the use of the plaintiff's picture to illustrate a book with which he or she has no formal connection. To be actionable, however, the false light must be highly objectionable to the ordinary person under the circumstances. For example, suppose an article states that a person supported candidate X, when in fact she supported candidate Y. Such a statement may place the plaintiff in a "false" light, but it is not actionable unless such a misattribution can be seen as outrageous.

In one case, the Supreme Court found an actionable invasion of privacy in a report which falsely implied that it was based upon an interview with plaintiff. This placed plaintiff in a false light because it lent credence to the report of the plaintiff's poor financial condition.

False light claims tend to arise where the facts published are literally true but are selectively disclosed in a manner creating a false impression. For example, one false light claim grew out of the publication by several newspapers of excerpts from the confidential transcript of proceedings before the Judicial Inquiry and Review Board. The Superior Court ruled that a cause of action could be sustained if the plaintiff could prove that the newspapers selectively printed excerpts from the testimony in a manner which created a false impression. In other words, despite the accuracy of the facts published (the excerpts were faithfully reproduced), presentation of the information in a manner which, because of deletions of relevant portions of the testimony, would render the publication susceptible to false inferences may be actionable.

C. Misappropriation

The third type of invasion of privacy is the misappropriation, for defendant's benefit or advantage, of the plaintiff's name or likeness without consent. Involved here is the plaintiff's name as a symbol of his identity; hence, it is only when the name or likeness is pirated for defendant's advantage that the intrusion occurs. This type of invasion of privacy has also been referred to as the "right of publicity" — the right of the individual to reap the reward of his own endeavors, and it has little to do with protecting feelings or reputation. For example, the Supreme Court decided it was a violation of the right of publicity for a television station to broadcast plaintiff's entire 15-second "Human Cannonball" act, which went to the very heart of plaintiff's ability to earn a living.

Use of a photograph to illustrate a newsworthy article does not constitute misappropriation, even though the publication seeks to make a profit. For example, a federal court has held that publication of a picture of the plaintiff at a Pittsburgh Steelers game with the zipper of his pants down was not an actionable appropriation of his name or likeness because plaintiff was photographed in a public place for a newsworthy article. However, use of a model's photograph on a book cover and to advertise the book may be actionable.

D. Intrusion

Because this "privacy" claim is a kind of newsgathering tort, it is discussed next.

E. Consent

Consent is a defense to invasion of privacy claims. To be defensible, consent must be obtained from someone who can validly give it. Mentally disabled persons and children may not be legally capable of offering valid consent. Similarly, although police or fire officials may consent to the media's presence inside private property, such as a crime or fire scene, their consent may not be sufficient to bind other individuals present at the scene. The law does not provide a defense if it can be found that the consent was obtained through mistake, misrepresentation or duress.

Courts have held that consent is a defense only to the particular conduct consented to, and not to other conduct. Thus, for example, the fact that a person consents to one publication of an article containing private facts about his or her life does not mean that the person has consented to the publication of other private facts. In other words, the person's consent must be broad enough to cover the full range of material that the reporter seeks to publish.

Oral consent is binding, but written consent is clearly preferable when it can be obtained. If a reporter conducting an interview obtains intimate details about a person's private life, the person's consent to publication can usually be implied from the fact that he or she was speaking to a reporter. If obtainable, however, written consent will avoid the possibility of a later claim that the person consenting did not realize the interviewer was a reporter, or that the information was for publication, etc.

VI. NEWSGATHERING LIABILITY

Increasingly, reporters have gotten themselves in legal trouble not because of what information they reported, but how they obtained the information they reported. Litigation over the techniques used to gather news stems largely from the United States Supreme Court's decision in Cohen v. Cowles Media Co. (1991), where the Court rejected a newspaper's First Amendment defense against liability for a tort committed to obtain a news story, holding that generally applicable laws do not offend the First Amendment when their enforcement against the press has incidental effects on its ability to gather and report the news. Subsequently, lawsuits increasingly seek to impose liability for a variety of torts, including trespass, fraud, intrusion, etc. Case law, however, is muddled as to the extent that such liability is consistent with the First Amendment. Nonetheless, reporters must take special care to ensure that the way in which they gather news does not run afoul of the law.

A. INTRUSION

This form of invasion of privacy occurs where there is some sort of "highly offensive" intrusion on the plaintiff's physical solitude or seclusion. This cause of action occurs not by publication (which may or may not have occurred), but by the actual intrusion, as by invading a plaintiff's home or eavesdropping upon private conversations, in the course of the newsgathering process. On a public street, however, the plaintiff has no legal right to be alone; and it is generally no invasion of privacy to follow her about (although Pennsylvania does make it a criminal offense to follow another for the purpose of harassment). Similarly, it generally is no invasion of privacy to take a photograph in a public place, for this amounts to no more than recording what the general public could have seen. There is no intrusion unless the plaintiff has a reasonable expectation of privacy wherever he or she is.

One federal court in Pennsylvania held that use of high-power microphones and videocameras from public streets and waterways may constitute intrusion. In that case, reporters for Inside Edition engaged in extensive efforts to interview and photograph a U.S. Healthcare executive for a story about the high salaries paid to the HMO's executives. The court focused on the fact that a jury may have concluded that the reporters engaged in the activity not for the "legitimate purpose" of gathering and broadcasting the news, but to try to "obtain entertaining background for their T.V. expose." The case settled before the appeal was argued.

Another court has considered the issue of what rights a news team has at the scene of an accident. While the presence of the news team and their filming of events at the scene of the accident did not constitute an intrusion because the victims did not have reasonable expectation of privacy there, the filming of events in the rescue helicopter may have violated the victims' privacy rights even if the media had permission from the helicopter company to film inside. In addition, one of the rescue workers wore a

microphone at the request of the reporters, and the court concluded that recording the victims' conversations with the rescue workers may also have violated their privacy rights. In discussing this developing area, courts focus on what privacy the individual can reasonably expect under the circumstances. At one extreme, patients in a hospital room probably have a reasonable expectation of being free from media cameras and microphones. At the other extreme, there is probably no such expectation of privacy while attending a football game or even just walking down the street.

Publication of material which, by law, is supposed to be confidential can constitute intrusion if the material was obtained by "use of subterfuge . . . which goes beyond the acceptable bounds of news gathering techniques." Thus, revelation of the contents of confidential grand jury, juvenile or other judicial proceedings may give rise to an action for intrusion if the transcript was obtained "by subterfuge." If the material was stolen, publication may be actionable; if it was "leaked" by a source with no subterfuge or other illegal act by the press, it would appear that the publication is protected.

The use of undercover media investigations in recent years has produced conflicting law about the availability of this tort for intrusions into other areas, such as the workplace. For example, in one case, a reporter obtained access to a pap smear lab by falsely representing herself as a cytotechnologist who was interested in starting her own lab. The reporter, accompanied by a man with a hidden camera, was escorted to a conference room, but did not obtain general access to the laboratory. The court concluded that there is a diminished expectation of privacy in the workplace and that the plaintiff could be successful only if the intrusions yielded information of a highly intimate nature, which they did not. The court noted that the recording took place in a location that was at least partially open to the public and was accessible to employees and that the discussion was limited to general practices at the lab. By contrast, another court held that an intrusion claim could proceed where a reporter obtained employment at a telepsychic company and secretly taped the other employees with a "hat cam." Even though the recorded conversations could be overheard by other employees, the court held that employees in a workplace to which the general public does not generally have access may enjoy an expectation of privacy even if other employees may overhear their conversations, particularly against "electronic intrusion by a stranger."

The limits of this tort, therefore, are not clear, particularly when it comes to undercover investigations, and the Pennsylvania courts have not yet considered this issue. Whether an intrusion claim will arise out of newsgathering may well depend on the extent to which a reporter gains access to spaces not normally accessible to members of the general public.

B. TRESPASS/ENTRY INTO PRIVATE PROPERTY

Reporters and photographers should exercise great caution before entering private property to gather or photograph news. Trespass is defined as entering into another's land or property without consent. Reporters and their employers have been subjected to trespass actions for entering private property, such as the scene of a fire or other emergency. For example. it was held that representatives of the media may be prosecuted criminally for following demonstrators into a restricted area at a nuclear power plant. The fact that the reporters were pursuing a story did not justify violation of the criminal code.

As with invasion of privacy claims, consent is a defense to a trespass claim. For example, in one case, a tenant permitted a film crew to enter to film an alleged slum. Even though the landlord had given instructions to preclude the media from entering, the court held that the tenant's consent to enter was sufficient to preclude a trespass action. The courts have split, however, over whether consent is sufficient if the reporters secure consent through misrepresentation or concealed intentions or identities, as in undercover media investigations. The Pennsylvania courts have not addressed this issue in a written opinion, so caution is necessary in this area.

Undercover employment presents another potential problem. In one national case which received a significant amount of attention, ABC reporters secured employment at a Food Lion grocery store as part of an undercover investigation into allegedly unsavory meat handling practices. The reporters did not reveal their ABC affiliation in applying for the Food Lion positions. A jury found the reporters liable for trespass, and the court of appeals affirmed the verdict. The court concluded that the reporters had trespassed by breaching their duty of loyalty to Food Lion — a duty that all employees owe to their employers — when they pursued their investigation for ABC. Although the verdict was affirmed, the damage award was reduced to one dollar. Thus, while the conduct is actionable, damages are very difficult to prove. While this may give the media some comfort, such a claim may well get to a jury and subject the publisher to potential liability and substantial legal fees.

C. CONVERSION

Conversion is defined as: "[A]n intentional exercise of dominion or control over chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value." A court applying Pennsylvania law has suggested that a reporter, who claimed that a confidential source showed her a police report from which she took notes, might have been liable for the tort of conversion if she possessed the report, however briefly.

D. FRAUD AND MISREPRESENTATION

Plaintiffs have pursued fraud actions against media defendants who have allegedly obtained information for publication

through the use of false pretenses. For example, in one case mentioned above, the plaintiff complained that a reporter committed fraud when she obtained access to a pap smear lab by falsely representing herself as a cytotechnologist who was interested in starting her own lab. To recover for fraud, a plaintiff must show (1) a material representation; (2) that is made falsely; (3) with knowledge of its falsity or recklessness as to whether it is true or false; (4) and with the intent of misleading another into relying on the representation. Thus, a plaintiff must also show that he or she justifiably relied on the representation and that he or she suffered injury as a result of reliance on the representation.

As with the other theories of recovery for newsgathering, court cases are inconsistent and fail to give much guidance. The focus has frequently been whether the plaintiff can show injury as a result of reliance on the misrepresentation. Many courts, but not all, have held that plaintiffs cannot recover for damages suffered as a result of the publication of the information, even if the information was gathered by fraudulent means. In other words, damages in such cases are limited to the damages suffered as a result of the misrepresentation, rather than the damages flowing from publication of the article or broadcast. This issue, however, has also not been decided by the Pennsylvania courts.

E. TAPING OF CONVERSATIONS

Pennsylvania has an "eavesdropping" statute, 18 Pa.C.S. § 5701, making it a criminal offense to intercept a wire or oral communication. It is a criminal act to record a telephone or face-to-face conversation without permission of all parties to the communication. In addition to criminal penalties, a private cause of action is available to any person whose oral or wire communication is improperly intercepted. Thus, to tape record a conversation, the consent of all parties to the conversation must be obtained.

The same statute provides for criminal and civil penalties for the disclosure or use of any unlawfully intercepted communication. In Bartnicki v. Vopper, however, the United States Supreme Court, in a case involving both the federal and Pennsylvania eavesdropping acts, has held that those acts may not be applied where the information concerns an issue of "public importance" and the media did not participate in or encourage the interception. In that case, a cellular phone conversation regarding a local Teachers' Union contract negotiations was recorded and a copy left in the mailbox of one defendant. That defendant gave copies to two radio stations, who were also sued. Because the radio stations neither participated in nor encouraged the interception, they could not constitutionally be held liable.

In another case, where a transcript of an intercepted conversation was inadvertently filed with the court and was obtained by the media, the Pennsylvania Supreme Court found that no action could be brought against the newspapers, primarily because at the time the newspaper obtained its copy, the transcript was a matter of public record, having been filed with a court without any notation that its control was restricted. In other cases, however, given the Pennsylvania constitution's recognition of an individual's right to privacy, it is open to question how cases with dif-

ferent facts might come out. If the reporter has reason to know that such a record is sealed, the reporter may be held liable for publishing information contained in the record.

There is an open issue as to whether the Pennsylvania wiretapping act applies to interstate, as opposed to intrastate calls. Federal law does not prohibit the recording of a telephone conversation by one of the parties to the conversation, so long as the recording is not made for the purpose of committing any criminal or tortious act. One trial court has held that the secret tape recording of a telephone call in Ohio with residents of Pennsylvania did not violate Pennsylvania's Act, and that the recording was admissible in Pennsylvania courts.

F. ELECTRONIC COMMUNICATIONS (E.G., EMAILS)

Both federal and Pennsylvania law prohibit unauthorized interception of or access to electronic communications. "Electronic communication" is broadly defined and probably includes email, faxes, beepers, pagers, secure websites, and certain television signals (like scrambled pay television programming). Federal law also provides protection for electronic communications while in "electronic storage" — defined as intermediate or backup storage incidental to the transmission of any electronic communication. A federal court in Pennsylvania recently decided that "electronic storage" does not include post-transmission storage of electronic communications.

The following chart will help to explain the types of activities that are unlawful, as well as the applicable penalties for violations:

Provision	Prohibited Conduct	Federal Penalty	State Penalty
Wiretap Provision	Intercepting, trying to intercept, or procuring anyone else to intercept or try to intercept any electronic communication	A fine, up to five years imprisonment, and potential for civil damages	Up to seven years imprisonment and possible civil liability
Stored Communications Provision	Intentionally accessing any electronic communication while it is in electronic storage such that one obtains, alters, or prevents authorized access to the electronic communication	A first offense may result in a fine and up to one year imprisonment, as well as the potential for civil damages	A first violation may carry with it a fine of up to $250,000 and imprisonment for up to one year, as well as possible civil liability

In a recent case involving the federal and Pennsylvania wiretap laws, the United States Supreme Court held that these laws could not be applied against media defendants where the defendants played no part in the illegal interception and the subject matter of the intercepted cellular telephone conversation was of public importance. In Barnicki v. Vopper neither the media defendants nor their source engaged in the illegal interception of a cellular telephone call — they merely disclosed the contents of the intercepted call. While approving of the general rule that laws of general applicability can constitutionally be applied to the press, the Bartnicki Court believed that under the circumstances of this case the First Amendment freedoms at stake outweighed the state interest in protecting the privacy of individuals.

While Bartnicki makes clear that prohibitions on disclosing intercepted communications by media defendants may not withstand constitutional scrutiny, there is little doubt that press cannot in the name of newsgathering intercept or procure others to intercept electronic communications like e-mail messages or facsimiles.

G. "RIDE-ALONGS"

The United States Supreme Court recently decided that it is unconstitutional for police officers to take reporters along with them in the execution of search and arrest warrants. In that case, five police officers, with a newspaper reporter and photographer, forcibly entered a private home before 7:00 a.m., unaware that it was the home of the parents of the suspect for whom they had an arrest warrant. The Court held that the presence of the media was improper under the Fourth Amendment protection against searches and seizures.

Left undecided by the Court was whether the media may also be held liable for the Fourth Amendment violation. Several courts have held that members of the media are "joint actors" with the police officers who executed the warrants and therefore also liable for the constitutional violation. Either way, the day of media ridealongs has likely come to an end.

H. BREACH OF CONTRACT AND PROMISSORY ESTOPPEL

In 1991, the United States Supreme Court in Cohen v. Cowles Media Co. held that the First Amendment does not bar a promissory estoppel cause of action against reporters when they break a promise made to a source. In Cohen, Dan Cohen approached reporters at two Minnesota newspapers with information unfavorable to a candidate for Minnesota Lieutenant Governor. Cohen made it clear that he would only provide the documents relating to the candidate if he was given a promise of confidentiality. The reporters agreed. Later, the editorial staffs of both newspapers decided to publish Cohen's name as part of the story about the Lieutenant Governor candidate. The Supreme Court held in Cohen that the First Amendment would not serve to shield the press from a generally applicable state law requiring that those who make promises keep them.

Although no Pennsylvania court has addressed this specific issue, Pennsylvania courts generally recognize the doctrine of promissory estoppel and would likely follow the Supreme Court's decision in Cohen. Therefore, for legal as well as ethical reasons, reporters should be aware of their obligation to keep the promises that they make.

In other jurisdictions, courts have looked favorably upon promissory estoppel claims in the following situations:

- A woman who had undergone plastic surgery agreed to be interviewed for a television program on plastic surgery, provided that her identity would be obscured. The television station agreed to electronically obscure her face and voice. During the broadcast the woman's voice was not disguised and her face was not properly obscured After the broadcast, the woman was called by several friends and ridiculed by her ex-husband.
- A woman agreed to be interviewed by a magazine writer for an article relating to therapist-patient sexual abuse on the condition that she not be identified in the article. The magazine then published the article which contained identifying facts about the woman that the magazine had obtained independently.

At least one court, however, has held that vague promises to portray a person or organization in a "positive" light may lack the specificity to be actionable under state law. Courts seem to recognize that investigative reporters' promises to wear "kid gloves" is nothing more than an old trick of the trade that a person of average sophistication should be aware of.

I. TORTIOUS INTERFERENCE WITH CONTRACT

Tortious interference with contract (or tortious interference with prospective economic advantage) is unlawful interference that causes harm to a plaintiff's contractual relationship (or anticipated contractual relationship). Plaintiffs have begun to bring these cases when they claim some form of business-related injury from unfavorable publicity about them. For example, claims have been brought against the media for encouraging a corporate employee, bound by his contract with the employer not to reveal information learned during the course of employment, to reveal the information to the press. No courts in Pennsylvania have yet considered such "whistle blower" claims. To the extent plaintiffs in these cases are claiming harm from publication, courts in other jurisdictions have generally required plaintiffs to satisfy the same standards as they must in defamation cases, e.g., showing falsity and actual malice in certain cases.

J. CRIMINAL CONDUCT

Prosecution of reporters for criminal conduct has become more common. For example, in the Chiquita case, which has received significant attention, a reporter pleaded guilty to a criminal vio-

lation of the federal eavesdropping statute for unlawfully accessing Chiquita's voicemail system.

Recently two reporters were found guilty of conspiracy to remove fabric samples from a seat cushion from the reconstructed cabin of TWA Flight 800. The co-conspirator was a former TWA pilot who was part of the investigating NTSB team. The defendants argued that by requesting the samples, the reporters' conduct was no different than that of the journalist who asks public officials about confidential information. The government successfully convinced the court that participation in the removal of physical evidence of a crime was distinguishable from obtaining unauthorized access to confidential information.

At all events, it is clear that the First Amendment will not shield reporters from otherwise criminal activity, even if carried out in the course of gathering the news.

APPENDIX A

I. THE FEDERAL AND PENNSYLVANIA STATE COURT SYSTEMS

To understand many of the topics that will be discussed in this booklet, it helps to have at least a rudimentary understanding of the federal and state court systems and how they work. What follows is a brief summary of the federal and state systems:

A. Federal Courts

The United States Supreme Court is the highest court in the land. The nine Justices of the Supreme Court decide issues of federal constitutional and statutory law that arise from the lower federal courts and the various state courts. On these issues, their word is final.

The United States Circuit Courts of Appeals hear appeals from the federal trial courts and, in some instances, appeals from decisions and results of the rule-making processes of federal agencies. The Third Circuit Court of Appeals hears appeals from federal trial courts in Pennsylvania, New Jersey, and Delaware.

The Federal District Courts are the main federal trial courts. These courts have only limited jurisdiction, which means that they may take only cases involving questions of federal law and certain state law cases involving parties from different states. The district courts are assisted in their work by Federal Magistrate Judges, who among other things, rule on search and arrest warrants, conduct hearings and trials, and perform other tasks assigned to them by the trial judges.

Finally, the federal courts include courts of special jurisdiction, such as the Tax, Bankruptcy and Patent Courts, the Court of International Trade, the Judicial Panel on Multidistrict Litigation, and other courts with limited jurisdiction over a specific subject area.

B. Pennsylvania Courts

Pennsylvania's highest court is its Supreme Court, whose decisions on issues of state law are final. The Supreme Court takes some appeals directly from the state trial courts, but most cases before the court consist of appeals from the two Pennsylvania appellate courts. Decisions of the Pennsylvania Supreme Court may be overruled on issues of federal constitutional and statutory law by the United States Supreme Court.

There are two appellate courts in Pennsylvania. One is the Pennsylvania Superior Court, which hears appeals from virtually all civil trials where the Commonwealth is not a defendant, and all criminal appeals. The second appellate court is the Commonwealth Court, which generally hears appeals in civil actions against the state, appeals challenging the decisions of state agencies, and in other cases (like election cases) where the decisions of municipalities are challenged.

The main trial courts in Pennsylvania are the various county Courts of Common Pleas. These are courts of almost unlimited jurisdiction, hearing everything from criminal trials to trials aris-

ing from auto accidents or commercial disputes. District Justice Courts preside over smaller commercial, tort and other matters (including misdemeanor charges and traffic offenses in some localities). Similar matters are heard by the Municipal and Traffic Courts in Philadelphia, and by City Magistrates in Pittsburgh.

II. POWERS OF DISTRICT JUSTICES

District Justices, formerly called Justices of the Peace, preside over the following types of actions:

1. Criminal charges involving misdemeanors of the third degree. These are cases where the maximum penalty is a term of imprisonment of not more than one year. District Justices may preside over these actions if:
   (a) The misdemeanor is not the result of a reduced charge;
   (b) Personal injury or property damage is less than $500; and
   (c) The defendant pleads guilty.
2. Criminal charges involving summary offenses. These are cases where the maximum penalty is a term of imprisonment of not more than ninety days, other than offenses within the jurisdiction of an established Traffic Court.
3. Criminal offenses relating to driving under the influence of alcohol or a controlled substance if:
   (a) It is a first offense;
   (b) No personal injury, other than to the defendant or his immediate family, resulted;
   (c) Property damage, other than to the defendant's property, is $500 or less; and
   (d) The defendant pleads guilty.
4. Civil cases where the amount demanded does not exceed $4,000.
5. Actions arising under the Landlord and Tenant Act.

In addition, District Justices preside at arraignments, fix and accept bail, issue warrants, and perform all duties of a committing magistrate in criminal cases.

The District Justice sits as a recognized court, and all records of proceedings before the Justice are open to the public.

III. COPYRIGHT PROTECTION

Original works of authorship are automatically protected by copyright. Copyright is owned by the author or, if the work was prepared for the author's employer, by the author's employer. All transfers of copyright must be in writing.

The copyright owner has the exclusive right to make and distribute copies of the copyrighted work. However, copyright protects only the author's expression of ideas, not the ideas themselves.

Copyright notice is not necessary in order to obtain copyright protection. However, many people have the mistaken impression that copying is permissible if no copyright notice appears in a publication. Therefore, it is wise to include a copyright notice (usually in the masthead), which should read as follows:

(c) [year of publication] [name of copyright owner]

The word "Copyright" can be substituted for the (c) symbol if the symbol is not available.

Copyright registration is also not necessary in order to obtain copyright protection. However, registration is mandatory before a lawsuit for infringement can be filed. In addition, registration can give the copyright owner greater leverage in seeking damages from infringers. If the copyright owner has obtained copyright registration within three months after publication, a court may grant the copyright owner "statutory damages" of up to $20,000 (or up to $100,000 if infringement was willful) even though the actual damages may be much lower.

APPENDIX B

PENNSYLVANIA RIGHT TO KNOW ACT

Section 66.1. Definitions

In this act the following terms shall have the following meanings:

(1) "Agency." Any department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, or any State or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function.

(2) "Public Record." Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term "public records" shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants; it shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, excepting therefrom however the record of any conviction for any criminal act.

Section 66.2. Examination and inspection

Every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania.

Section 66.3. Extracts, copies, photographs or photostats

Any citizen of the Commonwealth of Pennsylvania shall have the right to take extracts or make copies of public records and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or his authorized deputy. The lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.

Section 66.4. Appeal from denial of right

Any citizen of the Commonwealth of Pennsylvania denied any right granted to him by section 2 or section 3 of this act, may appeal from such denial. If such court determines that such denial was not for just and proper cause under the terms of this act, it may enter such order for disclosure as it may deem proper.

APPENDIX C

PENNSYLVANIA SUNSHINE ACT

Section 701. Short title of chapter

This chapter shall be known and may be cited as the Sunshine Act.

Section 702. Legislative findings and declaration

(a) Findings.—The General Assembly finds that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.

(b) Declarations.—The General Assembly hereby declares it to be the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter.

Section 703. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Administrative action." The execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency. The term does not, however, include the deliberation of agency business.

"Agency." The body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the executive branch of the government of this Commonwealth, including the Governor's Cabinet when meeting on official policymaking business, any board, council, authority or commission of the Commonwealth or of any political subdivision of the Commonwealth or any State, municipal, township or school authority, school board, school governing body, commission, the boards of trustees of all State-aided colleges and universities, the councils of trustees of all State-owned colleges and universities, the boards of trustees of all State-related universities and all community colleges or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through the joint action of its members exercises governmental authority and takes official action. The term does not include a caucus or a meeting of an ethics committee created under rules of the Senate or House of Representatives.

"Agency business." The framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by

contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action.

"Caucus." A gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action in the General Assembly.

"Conference." Any training program or seminar, or any session arranged by State or Federal agencies for local agencies, organized and conducted for the sole purpose of providing information to agency members on matters directly related to their official responsibilities.

"Deliberation." The discussion of agency business held for the purpose of making a decision.

"Emergency meeting." A meeting called for the purpose of dealing with a real or potential emergency involving a clear and present danger to life or property.

"Executive session." A meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting.

"Litigation." Any pending, proposed or current action or matter subject to appeal before a court of law or administrative adjudicative body, the decision of which may be appealed to a court of law.

"Meeting." Any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.

"Official action."

(1) Recommendations made by an agency pursuant to statute, ordinance or executive order.

(2) The establishment of policy by an agency.

(3) The decisions on agency business made by an agency.

(4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

"Political subdivision." Any county, city, borough, incorporated town, township, school district, intermediate unit, vocational school district or county institution district.

"Public notice."

(1) For a meeting:

(i) Publication of notice of the place, date and time of a meeting in a newspaper of general circulation, as defined by 45 Pa.C.S. s 101 (relating to definitions), which is published and circulated in the political subdivision where the meeting will be held, or in a newspaper of general circulation which has a bona fide paid circulation in the political subdivision equal to or greater than any newspaper published in the political subdivision.

(ii) Posting a notice of the place, date and time of a meeting prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held.

(iii) Giving notice to parties under section 709(c) (relating to public notice).

(2) For a recessed or reconvened meeting:

(i) Posting a notice of the place, date and time of the meeting prominently at the principal office of the agency holding the meeting or at the public building in which the meeting is to be held.

(ii) Giving notice to parties under section 709(c).

"Special meeting." A meeting scheduled by an agency after the agency's regular schedule of meetings has been established.

Section 704. Open meetings

Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).

Section 705. Recording of votes

In all meetings of agencies, the vote of each member who actually votes on any resolution, rule, order, regulation, ordinance or the setting of official policy must be publicly cast and, in the case of roll call votes, recorded.

Section 706. Minutes of meetings, public records and recording of meetings

Written minutes shall be kept of all open meetings of agencies. The minutes shall include:

(1) The date, time and place of the meeting.

(2) The names of members present.

(3) The substance of all official actions and a record by individual member of the roll call votes taken.

(4) The names of all citizens who appeared officially and the subject of their testimony.

Section 707. Exceptions to open meetings

(a) Executive session.—An agency may hold an executive session under section 708 (relating to executive sessions).

(b) Conference.—An agency is authorized to participate in a conference which need not be open to the public. Deliberation of agency business may not occur at a conference.

(c) Certain working sessions.—Boards of auditors may conduct working sessions not open to the public for the purpose of examining, analyzing, discussing and deliberating the various accounts and records with respect to which such boards are responsible, so long as official action of a board with respect to such records and accounts is taken at a meeting open to the public and subject to the provisions of this chapter.

Section 708. Executive sessions

(a) Purpose.—An agency may hold an executive session for one or more of the following reasons:

(1) To discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining of any specific prospective

public officer or employee or current public officer or employee employed or appointed by the agency, or former public officer or employee, provided, however, that the individual employees or appointees whose rights could be adversely affected may request, in writing, that the matter or matters be discussed at an open meeting. The agency's decision to discuss such matters in executive session shall not serve to adversely affect the due process rights granted by law, including those granted by Title 2 (relating to administrative law and procedure). The provisions of this paragraph shall not apply to any meeting involving the appointment or selection of any person to fill a vacancy in any elected office.

(2) To hold information, strategy and negotiation sessions related to the negotiation or arbitration of a collective bargaining agreement or, in the absence of a collective bargaining unit, related to labor relations and arbitration.

(3) To consider the purchase or lease of real property up to the time an option to purchase or lease the real property is obtained or up to the time an agreement to purchase or lease such property is obtained if the agreement is obtained directly without an option.

(4) To consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.

(5) To review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and quasi-judicial deliberations.

(6) For duly constituted committees of a board or council of trustees of a State-owned, State-aided or State-related college or university or community college or of the Board of Governors of the State System of Higher Education to discuss matters of academic admission or standings.

(b) Procedure.—The executive session may be held during an open meeting or at the conclusion of an open meeting or may be announced for a future time. The reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session. If the executive session is not announced for a future specific time, members of the agency shall be notified 24 hours in advance of the time of the convening of the meeting specifying the date, time, location and purpose of the executive session.

(c) Limitation.—Official action on discussions held pursuant to subsection (a) shall be taken at an open meeting. Nothing in this section or section 707 (relating to exceptions to open meetings) shall be construed to require that any meeting be closed to the public, nor shall any executive session be used as a subterfuge to defeat the purposes of section 704 (relating to open meetings).

Section 709. Public notice

(a) Meetings.—An agency shall give public notice of its first regular meeting of each calendar or fiscal year not less than three days in advance of the meeting and shall give public notice of the schedule of its remaining regular meetings. An agency shall give public notice of each special meeting or each rescheduled regular or special meeting at least 24 hours in advance of the time of the convening of the meeting specified in the notice. Public notice is not required in the case of an emergency meeting or a conference. Professional licensing boards within the Bureau of Professional and Occupational Affairs of the Department of State of the Commonwealth shall include in the public notice each matter involving a proposal to revoke, suspend or restrict a license.

(b) Notice.—With respect to any provision of this chapter that requires public notice to be given by a certain date, the agency, to satisfy its legal obligation, must give the notice in time to allow it to be published or circulated within the political subdivision where the principal office of the agency is located or the meeting will occur before the date of the specified meeting.

(c) Copies.—In addition to the public notice required by this section, the agency holding a meeting shall supply, upon request, copies of the public notice thereof to any newspaper of general circulation in the political subdivision in which the meeting will be held, to any radio or television station which regularly broadcasts into the political subdivision and to any interested parties if the newspaper, station or party provides the agency with a stamped, self-addressed envelope prior to the meeting.

(d) Meetings of General Assembly in Capitol Complex.—Notwithstanding any provision of this section to the contrary, in case of sessions of the General Assembly, all meetings of legislative committees held within the Capitol Complex where bills are considered, including conference committees, all legislative hearings held within the Capitol Complex where testimony is taken and all meetings of legislative commissions held within the Capitol Complex, the requirement for public notice thereof shall be complied with if, not later than the preceding day:

(1) The supervisor of the newsroom of the State Capitol Building in Harrisburg is supplied for distribution to the members of the Pennsylvania Legislative Correspondents Association with a minimum of 30 copies of the notice of the date, time and place of each session, meeting or hearing.

(2) There is a posting of the copy of the notice at public places within the Main Capitol Building designated by the Secretary of the Senate and the Chief Clerk of the House of Representatives.

(e) Announcement.—Notwithstanding any provision of this chapter to the contrary, committees may be called into session in accordance with the provisions of the Rules of the Senate or the House of Representatives and an announcement by the presiding officer of the Senate or the House of Representatives. The announcement shall be made in open session of the Senate or the House of Representatives.

Section 710. Rules and regulations for conduct of meetings

Nothing in this chapter shall prohibit the agency from adopting by official action the rules and regulations necessary for the conduct of its meetings and the maintenance of order. The rules and regulations shall not be made to violate the intent of this chapter.

Section 710.1. Public participation

(a) General rule.—Except as provided in subsection (d), the board or council of a political subdivision or of an authority created by a political subdivision shall provide a reasonable opportunity at each advertised regular meeting and advertised special meeting for residents of the political subdivision or of the authority created by a political subdivision or for taxpayers of the political subdivision or of the authority created by a political subdivision or for both to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action. The board or council has the option to accept all public comment at the beginning of the meeting. If the board or council determines that there is not sufficient time at a meeting for residents of the political subdivision or of the authority created by a political subdivision or for taxpayers of the political subdivision or of the authority created by a political subdivision or for both to comment, the board or council may defer the comment period to the next regular meeting or to a special meeting occurring in advance of the next regular meeting.

(b) Limitation on judicial relief.—If a board or council of a political subdivision or an authority created by a political subdivision has complied with the provisions of subsection (a), the judicial relief under section 713 (relating to business transacted at unauthorized meeting void) shall not be available on a specific action solely on the basis of lack of comment on that action.

(c) Objection.—Any person has the right to raise an objection at any time to a perceived violation of this chapter at any meeting of a board or council of a political subdivision or an authority created by a political subdivision.

(d) Exception.—The board or council of a political subdivision or of an authority created by a political subdivision which had, before January 1, 1993, established a practice or policy of holding special meetings solely for the purpose of public comment in advance of advertised regular meetings shall be exempt from the provisions of subsection (a).

Section 711. Use of equipment during meetings

(a) Recording devices.—Except as provided in subsection (b), a person attending a meeting of an agency shall have the right to use recording devices to record all the proceedings. Nothing in this section shall prohibit the agency from adopting and enforcing reasonable rules for their use under section 710 (relating to rules and regulations for conduct of meetings).

(b) Rules of the Senate and House of Representatives.—The Senate and House of Representatives may adopt rules governing

the recording or broadcast of their sessions and meetings and hearings of committees.

Section 712. General Assembly meetings covered

Notwithstanding any other provision, for the purpose of this chapter, meetings of the General Assembly which are covered are as follows: all meetings of committees where bills are considered, all hearings where testimony is taken and all sessions of the Senate and the House of Representatives. Not included in the intent of this chapter are caucuses or meetings of any ethics committee created pursuant to the Rules of the Senate or the House of Representatives.

Section 713. Business transacted at unauthorized meeting void

A legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this [FN1] chapter was violated, provided that, in the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting. The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached. Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid. Should the court determine that the meeting met the requirements of this chapter, all official action taken at the meeting shall be fully effective.

Section 714. Penalty

Any member of any agency who participates in a meeting with the intent and purpose by that member of violating this chapter commits a summary offense and shall, upon conviction, be sentenced to pay a fine not exceeding $100 plus costs of prosecution.

Section 714.1. Attorney fees

If the court determines that an agency willfully or with wanton disregard violated a provision of this chapter, in whole or in part, the court shall award the prevailing party reasonable attorney fees and costs of litigation or an appropriate portion of the fees and costs. If the court finds that the legal challenge was of a frivolous nature or was brought with no substantial justification, the court shall award the prevailing party reasonable attorney fees and costs of litigation or an appropriate portion of the fees and costs.

Section 715. Jurisdiction and venue of judicial proceedings

The Commonwealth Court shall have original jurisdiction of actions involving State agencies and the courts of common pleas shall have original jurisdiction of actions involving other agencies to render declaratory judgments or to enforce this chapter by injunction or other remedy deemed appropriate by the court. The

action may be brought by any person where the agency whose act is complained of is located or where the act complained of occurred.

Section 716. Confidentiality

All acts and parts of acts are repealed insofar as they are inconsistent with this chapter, excepting those statutes which specifically provide for the confidentiality of information. Those deliberations or official actions which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matter related to the investigation of possib le or certain violations of the law and quasi-judicial deliberations, shall not fall within the scope of this chapter.

APPENDIX D

PENNSYLVANIA SHIELD LAW

Section 5942.

Confidential communications to news reporters

(a) General rule.—No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

(b) Exception.—The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

APPENDIX E

For subpoenas seeking a reporter's testimony, the U.S. Justice Department Guidelines require the following:

1. "In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation - particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information."
2. "In civil cases, there should be reasonable grounds, based on non-media sources, to believe that the information sought is essential to a successful completion of the litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, or speculative information."
3. "The government should have unsuccessfully attempted to obtain the information from alternative non-media sources."
4. "The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as related to the accuracy of the published information."
5. "Subpoena requests for information which is publicly disclosed should also be treated carefully to avoid claims of harassment."
6. "Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents."

For a subpoena for a reporter's telephone toll records, the Guidelines are as follows:

1. "There should be reasonable ground to believe that a crime has been committed and that the information sought is essential to the successful investigation of that crime. The subpoena should be as narrowly drawn as possible; it should be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period. In addition, prior to seeking the Attorney General's authorization, the government should have pursued all reasonable alternative investigation steps...."
2. "When there have been negotiations with a member of the news media whose telephone toll records are to be subpoenaed, the member shall be given reasonable and timely notice of the determination of the Attorney General to authorize the subpoena and that the government intends to issue it."

3. If telephone records of a member of the news media have been subpoenaed without the requisite notice, notice shall be given "as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation. In any event, such notification shall occur within 45 days of any return made pursuant to the subpoena, except that the responsible Assistant Attorney General may authorize delay of notification for no more than an additional 45 days."
4. "Any information obtained as a result of a subpoena issued for telephone toll records shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes."

Finally, the Guidelines state that no member of the media may be questioned, arrested, or be the subject of a grand jury presentment for an offense alleged to be committed in the course of, or arising out of, news-gathering activities without the express approval of the Attorney General. If an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization shall be communicated immediately to the Attorney General and to the Director of Public Affairs.