

The CalAware Guide to Journalism Law in California

Introduction

By Terry Francke

This guide is intended as a general orientation and quick reference on the law affecting how journalists do their jobs in California. It is kept current by updates—new court decisions, statutes, Attorney General opinions or other developments as they occur throughout the year—posted on the website of Californians Aware, <http://www.calaware.org>. It is also supplemented by any information I can provide those who call (916.487.7000) or message me at terry@calaware.org.

Organization

The chapter sequence first presents the laws most frequently consulted by reporters—the California Public Records Act and the Ralph M. Brown Act. As noted within, while the guide covers most of the issues most journalists are likely to encounter concerning those statutes, the full laws and how they have been interpreted by the courts and the Attorney General get thorough treatment in *The CalAware Guide to Open Meetings in California*, available at https://www.calaware.org/estore/product_detail.php?product_id=37 or by mail or phone order to Californians Aware, and *The CalAware Guide to Public Information and Privacy*, to be published in early 2007. Appendices A and B provide the full texts, current as of September 2006, of these two statutes.

A third chapter concerns a state constitutional amendment, added by Proposition 59 of 2004, that makes public access to meetings of government bodies and the records of public officials and agencies a fundamental right of all citizens. More pointedly, it mandates that laws providing access to public meetings and records be interpreted broadly, and that limitations on those laws be interpreted narrowly. In other words, provisions allowing secrecy are not to be stretched beyond their precisely intended limits.

Chapter 4 covers the legal issues that arise in covering civil and criminal court proceedings—access to hearings and trials and information about them.

Chapter 5 deals with the news gathering phase: journalistic accreditation and press passes and the rights and risks of entering private and public property, acquiring private records, covering accidents and gathering other medical patient information under HIPAA, interviewing willing and unwilling sources, the use of cameras and tape recorders, and the confidential source relationship and obligations.

Chapter 6 moves on to the publication or broadcast phase and deals with efforts to prevent a news organization from reporting or to compel it to publish certain information; and law enforcement searches, the issuance of subpoenas and the use of civil discovery to force the release of unpublished information, including confidential source identities.

Chapter 7 uses a checklist to present the basic issues to consider in writing and editing to minimize exposure to liability for libel, slander and invasion of privacy.

Chapter 8 covers distinctive laws protecting journalists at California's high schools, colleges and universities from censorship or punishment for doing their jobs. It also covers laws providing access to college campus police crime logs.

Special Features

The guide uses a question and answer format to personalize the presentation for the reader. In various locations, a **NEWS NOTES** sidebar highlights opportunities to take advantage of the law for more attentive reporting, and the California bear and federal eagle are used to highlight issues on which there are clearly separate policies on a given issue.

The final pages of the book consist of perforated tear-out slips that can be used to

- protest closure of court proceedings,
- state one's rights of access to school grounds,
- challenge apparent violations of the Brown Act,
- caution law enforcement officers about to search for unpublished journalistic materials, or
- request documents under the California Public Records Act.

Citations to Case Law

Most case citations are to decisions of the California Court of Appeal (___ Cal.App.2d, 3d or 4th ___) or Supreme Court (___ Cal. 3d or 4th ___), or of the U.S. Court of Appeals for the Ninth Circuit (___ F.2d or 3d ___), which sets precedent for federal district (trial) courts in California if there is no U.S. Supreme Court (___ U.S. ___) case on the issue. Cases from other jurisdictions are also cited where California and Ninth Circuit decisions offer few or no precedents.

Finding Case Law, Statutes and AG Opinions Online

FindLaw.com provides those interested—not just lawyers—with a free Internet database of the full texts of all California and federal appellate and supreme court case opinions. Registration is http://login.findlaw.com/scripts/new_register?dest='http://my.findlaw.com/0'&goback=1. California statutes can likewise be looked up and downloaded free at—without registration—at http://info.sen.ca.gov/cgi-bin/pagequery?type=sen_calaw&site=sen&title=California+Law&sb=y. California Attorney General Opinions since 1986 are at <http://caag.state.ca.us/opinions/index.htm>

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CHAPTER 5 JOURNALISM LAW 1: THE RIGHTS AND RISKS OF NEWS GATHERING

The Source of News Gathering Rights

- Does the First Amendment provide me with any unique rights as a journalist?
- Where do rights of special press access come from?

Press Passes and Discriminatory Access

- Do I have a legal right to a press pass?
- What kind of conditions may the government place on press pass eligibility?
- If my application for a press pass is denied, am I entitled to know why?
- Are there reasons that do not justify denying a pass?
- Can a government official deny me access as punishment for bad press, or play favorites in giving others access to records, but not me?

Access to Private and Public Property

- Do I have a First Amendment or other legal right freely to enter private property?
- What if a tenant invites me to his or her home or business rental?
- In covering a breaking story, do I have the right to accompany police, firefighters or other public safety personnel onto private property?
- Does my company run a risk of legal liability in creating a coverage agreement with law enforcement raiders?
- What's the difference between intrusion and trespass liability?
- Do I risk legal liability in posing as someone else in order to get access to private areas?
- What are my rights to gather news on business premises?
- What are my rights to gather news on government property?
- Do I have any First Amendment rights to enter jails or prisons?
- What are my rights to witness executions?
- What are my rights to attend parole hearings?
- What are my rights of access to accident, disaster and riot scenes?
- Can I be kept out of yellow tape zones for my own safety?
- What if any basis do officials have for limiting my access to yellow tape zones?
- Is federal regulation of certain disaster scenes more restrictive? 62
- What are my rights of access to public school grounds?
- Am I as a journalist an "outsider" compelled to register for school access?
- What are my rights of access to arts, sports or entertainment events in public facilities?

Private Records and the Risks of Acquiring Them

- Do I risk legal liability for receiving leaked private records?
- What if it was unlawful for the source to leak the information?
- What if I am given information I don't realize is "stolen"?
- Must I return unlawfully leaked records to the owner?
- Are records left out for trash collection accessible without liability for conversion or theft?

Learning about Accident Victims and Hospital Patients

- Does California law allow public access to medical information?
- What are the HIPAA restrictions and how do they affect California law?
- Is California law adjusting to HIPAA?
- Do the HIPAA restrictions apply to public safety and emergency personnel or others not medical

providers?

- What guidelines have professional health provider organizations established to interpret HIPAA's privacy provisions?

Recording Others' Speech without Their Knowledge

- What risks would I run in the surreptitious recording of conversations?
- What are my rights of access to accident, disaster and riot scenes?
- Can I be kept out of yellow tape zones for my own safety?
- What if any basis do officials have for limiting my access to yellow tape zones?
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Recording Others' Speech without Their Knowledge

- What risks would I run in the surreptitious recording of conversations?
- What is the specific restriction posed by Penal Code §632?
- Why does secret taping also risk liability for the tort of intrusion?
- Is secretly taping someone in his or her home an intrusion?
- Is secretly taping someone on his or her doorstep an intrusion?
- What liability would I risk in taping a business presentation made in a public setting?
- What liability would I risk in taping my own office consultation—as a purported "patient"—with a medical professional?
- What liability would I risk in taping a real patient's interaction with a medical professional?
- What liability would I risk in taping a conversation with a fellow employee in the workplace?
- Wouldn't a tape be useful to prove what someone said if I were sued for defamation?

Eavesdropping, Wiretapping, Hacking

- What would I risk in using technology to monitor or capture others' conversations or messages?

Receipt and Publishing of Intercepted Conversations

- What would I risk in publishing the contents of communications that I receive from others, knowing or suspecting they unlawfully intercepted them?

Photography and the Unwilling Subject

- What is the basic legal principle protecting photojournalism?
- Where would a court draw the line against extreme photo stalking?
- What legal exposure might result from my use of long- distance photo (or audio) technology?
- What legal exposure might result from overly aggressive photo approaches?
- Can police, security guards or others seize my camera or film as evidence?

Interviewing the Willing and Unwilling

- Can I be punished for asking "the wrong question"?
- Can the government order citizens not to speak to me?

Interviewing Public Officials and Personnel

- May government officials be gagged?
- May public employees' speech be regulated?
- May the government restrain public employees' speech?
- May the government punish public employees' speech?
- Has the Pickering standard served to protect public employees who blow the whistle to the press?
- Wouldn't a government employee be more protected by reporting a problem internally—up the chain of command—than by whistleblowing to the press?

Interviewing Participants in Judicial Proceedings

- Why do courts try to control the speech of those involved in trials and other judicial proceedings?
- May grand jurors and grand jury witnesses speak to me?
- What about gag orders on speech by trial participants?
- What keeps gag orders from cutting off all trial-related information outside the courtroom?
- Can the press be barred from paying sources for crime-related information?

Gag Orders to Protect Privacy or Reputation

- Are gag orders permitted in civil cases to protect privacy?
- Does it make a difference if the private information was obtained only through court-ordered discovery?
- Are gag orders permitted in civil cases to protect business interests?
- Can a court order a person to stop making statements that have already been ruled false and defamatory?

Attorneys' Professional Ethical Constraints

- Is the gag order the only barrier to comments by trial attorneys?

Interviewing Jurors

- Am I permitted to contact jurors while they are sitting in a case?
- Can the judge order me not to speak to jurors after trial?
- What are the rules on access to federal jurors?
- When may juries be kept anonymous?
- May the Legislature outlaw paying the jurors (after trial) for press interviews?

Interviewing Jail and Prison Inmates

- What rules govern access to California prison inmates?
- Could these policies change anytime soon?

Interviewing Pupils and Children

- Can public school staff prevent me from interviewing pupils without parental consent?
- Are there risks in interviewing smaller children without parental consent?

Grilling the Unwilling

- Are ambush interviews inherently subject to liability?

Pledging Confidentiality

- What happens if I don't live up to my promise to keep a source's identity confidential?
- What happens if I inadvertently expose a confidential source?

SAMPLE PAGES (Approx. 2/3 actual size)

ceedings are as open as civilian criminal hearings and trials. The court concluded that the party seeking closure must spell out an overriding public interest likely to be threatened by open proceedings, that any consequent closure order must be narrowly drawn to protect that interest without creating needless secrecy, and that closure is available as a last resort only if other measures to protect the interest would be inadequate or impracticable. *U.S. v. Anderson*, 46 M.J. 728, 731 (Army Ct. Crim. App. 1997). Prior cases to same effect include *U.S. v. Story*, 35 M.J. 677 (A.C.M.R. 1992); *U.S. v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987); *U.S. v. Hershey*, 20 M.J. 433 (C.M.A. 1985); *U.S. v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

Civil Proceedings

Is there a presumption of open civil proceedings in California?



Yes. California proceedings in superior court are governed by the state Supreme Court's decision in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.4th 1178, 1217 (1999), which holds that courts should consider closing civil case courtrooms "only in the rarest of circumstances," and then only when several conditions are met.

First, a trial court must provide notice to the public of the contemplated closure . . . when a motion to close a proceeding is made in open court (or, for example, at a closed bench conference held during open court proceedings), adequate notice of the contemplated closure is provided if the trial judge thereafter announces in open court that he or she plans to hold (or to consider holding) that proceeding in closed session. When a motion seeking closure is made in a written filing, adequate notice is provided by publicly docketing the motion reasonably in advance of a determination thereon. . . . Second, *before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv)

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there is no less restrictive means of achieving the overriding interest.

(Emphasis added.) In a few instances, statutes limit public attendance at certain civil proceedings either subject to the court's discretion or by flat prohibition. Discretionary access includes proceedings in family law—all matters dealing with marriage and domestic disputes such as annulment, separation, conciliation, community property, and child custody, support and visitation. Family Code §214. Public access is prohibited to proceedings in conservatorship—unless a party insists on open hearings (Welfare and Institutions Code §5118); and hearings on mental fitness to carry a concealed weapon—upon motion of the person in question. Welfare and Institutions Code §8103.

Are federal civil proceedings presumed open as well?



Yes. So far nothing has changed since the *NBC Subsidiary* court (above) observed,

... every lower court opinion of which we are aware that has addressed the issue of First Amendment access to civil trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials. (*Publicker Industries, Inc. v. Cohen* (1984) 733 F.2d 1059 [public has First Amendment right of access to civil proceedings concerning motion for preliminary injunction in securities litigation; closure is not warranted merely to protect disclosure of poor corporate management]; see also *Westmoreland v. Columbia Broadcasting System, Inc.* (1984) 752 F.2d 16 [public and press have First Amendment right to attend, but not to televise, civil trial]; *In re Iowa Freedom of Information Council* (8th Cir. 1984) 724 F.2d 658 [First Amendment right of access applies to civil proceedings for contempt, but portions of proceeding involving trade secrets properly were closed]; *Newman v. Graddick* (11th Cir. 1983) 696 F.2d 796 [First Amendment right of access applies to hearings in class actions concerning prison overcrowding] ...)

What is "private judging," and is the public excluded?

In California, civil parties may try all or part of a lawsuit outside the courthouse and before someone who is not an

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active superior court judge. Despite the term “private judging,” however, these proceedings are legally (if not practically) as accessible to the public under the California Rules of Court as any others. The three types of proceeding are:

- A *stipulated trial by temporary judge*, which occurs when the parties agree to have a whole case tried before a retired judge whom they pay.
- A *reference by agreement* is usually used to decide a limited issue of fact or law that is very complicated or time-consuming or calls on special expertise. The “referee” reports his or her decision or findings of fact to the judge trying the whole case.

In either of these first two approaches, the proceedings are open and those who register as interested in the proceedings may be entitled to special notice indeed. Rules of Court 244 and 244.1 state with respect to these proceedings:

- (c) [Use of Court Facilities and Court Personnel] A party who has elected to use the services of a privately compensated (temporary judge or referee) . . . is deemed to have elected to proceed outside the courthouse; therefore, court facilities and court personnel shall not be used, except upon a finding by the presiding judge that the use would further the interests of justice. For all matters pending before privately compensated (temporary judges or referees), the clerk shall post a notice indicating the case name and number as well as the telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse.
- (d) [Order for Appropriate Hearing Site] The presiding judge or supervising judge, on request of any person or on the judge’s own motion, may order that a case before a privately compensated (temporary judge or referee) must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings. The request shall be by letter with reasons stated and shall be accompanied by a declaration that a copy of the request was mailed to each party, to the (temporary judge or referee), and to the clerk for placement in the file. The order may require that notice of trial or of other proceedings be given to the requesting party directly. An order for an appropriate hearing site shall not be grounds for withdrawal of a stipulation.
- (e) [Motion to Withdraw Stipulation or to Seal Records: Complaint for Intervention] “””” A motion to seal records in a case before a privately compensated (temporary judge or referee) shall be served and filed and shall be heard by the presiding judge or a judge designated by the presiding

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judge. The moving party shall mail or deliver a copy of the motion to the referee and to any person or organization who has requested that the case take place at an appropriate hearing site.



NEWS NOTE: "Private Judge" proceedings are often, if not always, used to avoid awkward press coverage. Accordingly, privately judged cases may well be among those most interesting to cover and even among those of most interest to the public. Coverage begins with consulting the clerk's list of privately judged cases, and using the phone numbers to learn what they concern or at least where they are being conducted. It is unlikely that anyone will be more helpful than the law requires, at least until they get used to press coverage.

- **Reference by Order:** Factual or legal issues may also be handed to a referee for resolution on the trial judge's initiative or either party's motion. The proceedings can be held in either a courtroom or on private premises, but if the latter, pursuant to Rule of Court 244.2, "the private facility shall be open to the public upon request of any person."

Juvenile Proceedings

Is there any difference in California juvenile court proceedings that makes a difference in public access?

Yes. Access rights will vary considerably depending on whether the matter in juvenile court comes under its delinquency or dependency jurisdiction.

What access is provided to juvenile delinquency proceedings?

The delinquency jurisdiction of the juvenile court deals with misconduct by a minor that would be a crime if committed by an adult. As noted below concerning dependency hearings, journalists may attend and report on any juvenile court proceeding if they are prepared to assure the court they will not identify the minor(s) involved. *Brian W. v. Superior Court*, 20 Cal.3d 618 (1978).

The general public, by contrast, is generally excluded. But Welfare and Institutions Code §676 provides that despite the general exclusion, they as well as journalists must be admitted to juvenile court hearings in which minors are charged with:

- murder
- arson or burglary of an inhabited building

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