COMPENDIUM OF JUDICIAL REFERENCES TO FIRST AMENDMENT INTERESTS IN NEWSGATHERING

Prepared for
DCS Newsgathering Committee,
LIBEL DEFENSE RESOURCE CENTER

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CONTENTS

****CAUTION****

The synopses in this compendium are intended solely to identify language concerning the First Amendment status of newsgathering activity, and do not summarize the full issues or facts presented in the cases cited. REFER TO THE FULL DECISION BEFORE RELYING ON A CASE, as the holding may be unhelpful in various respects. As a quick reference, the following protocol is used to flag potential issues:

* *An italicized case description indicates that the court did not decide in favor of the media party.*

** ***A bold and italicized case description indicates that the court held only partially in favor of the media party.***

A. Newsgathering Tort & Miscellaneous Cases

UNITED STATES SUPREME COURT

***Bartnicki v. Vopper* 532 U.S. 514, 29 Media L. Rep. 1737 (2000).**

The U.S. Supreme Court held that a radio commentator was not liable under state and federal wiretapping statutes for broadcasting recordings of illegally intercepted cellular telephone conversations obtained from a third party.

"Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully. 'It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." Id. at fn. 19, citing Branzburg, 408 U.S. at 691.

Cohen v. Cowles Media Co.*, *501 U.S. 663, 18 Media L. Rep. 2273 (1991).

A confidential source sued newspaper publisher for breach of contract and misrepresentation after newspaper revealed his identity, thereby causing him to lose his job. The Supreme Court held that the First Amendment did not bar plaintiff's claim, but remanded the case for further consideration, including whether any state law might shield the newspaper from liability.

"[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired." Id. at 669.

Zemel v. Rusk*, *381 U.S. 1, 1 Media L. Rep. 2299 (1965).

The Supreme Court affirmed that the Secretary of State is authorized and constitutionally permitted to refuse to validate passports of United States citizens for travel to Cuba.

"The right to speak and publish does not carry with it the unrestrained right to gather information." Id. at 17.

CIRCUIT COURTS

D.C. CIRCUIT

Sherrill v. Knight, 569 F.2d 124, 3 Media L. Rep. 1514 (D.C. Cir. 1977).

A journalist filed a complaint when he was denied a White House press pass by order of the Secret Service, without being given a reason. The court held that First Amendment considerations required the Service to provide those denied a press pass with notice of the factual bases for denial, an opportunity to rebut, and a decision in writing.

"[T]he protection afforded newsgathering under the first amendment guarantee of freedom of the press . . . requires that this access not be denied arbitrarily or for less than compelling reasons . . . . Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information." Id. at 129-130 (citations omitted).

2nd CIRCUIT

***Galella v. Onassis**, 487 F.2d 986, 1 Media L. Rep. 2425 (2d Cir. 1973).*

A "paparazzi" photographer who had persistently and aggressively pursued President John F. Kennedy's widow sued after he was arrested and detained by her secret service agents. The court granted defendants' motion for summary judgement

"Galella does not seriously dispute the court's finding of tortious conduct. Rather, he sets up the First Amendment as a wall of immunity protecting newsmen from any liability for their conduct while gathering news. There is no such First Amendment right. Crimes and torts committed in news gathering are not protected. There is no threat to a free press in requiring its agents to act within the law." Id. at 995 (citations omitted).

4th CIRCUIT

Food Lion Inc. v. Capital Cities/ABC Inc., 1999 WL 957738 (4th Cir. 1999).

Suit for fraud, trespass, and breach of duty to an employer was filed after two ABC reporters obtained employment at a grocery store for the purpose of an undercover investigation for the television program, Prime Time Live.

The court found that the fraud caused by falsely getting jobs did not cause damages but that hidden cameras did constitute a breach of duty of loyalty and that therefore trespass was committed. The court awarded nominal damages for trespass and breach of duty of loyalty, but did not allow damages resulting from broadcast of the news program. The court held that a plaintiff may not "recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by Hustler [Magazine Inc. v. Falwell]." Id. at 522.

"Neither tort [duty of loyalty or trespass] targets or singles out the press . . . . Nor do we believe that applying these laws against the media will have more than an 'incidental effect' on newsgathering. We are convinced that the media can do its important job without resort to the commission of run-of-the-mill torts." Id. at 521 (citations omitted).

5th CIRCUIT

U.S. v. Brown, 250 F.3d 907, 29 Media L. Rep. 1779 (5th Cir. 2001).

In a highly publicized criminal trial, media outlets challenged both the trial judge's pre-trial order barring them from compromising the anonymity of the jury, and the judge's subsequent post-verdict denial of their request for access to the jurors' identifying information. The court held the order to maintain jury anonymity to be an unconstitutional prior restraint and overbroad, in that it prevented the journalists' attempts at independent newsgathering. However, the court found the

post-verdict denial of access to be constitutional and reasonable, as "protecting jurors from post-trial harassment and invasions of privacy is a legitimate concern." Id. at 921.

"While the media are entitled to receive, investigate and report on all public proceedings involved in a trial, the right to gather news, much like other first amendment rights, is not absolute." Id. at 914.

Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 24 Media L. Rep. 1513 (5th Cir. 1996).

News agencies appealed an order prohibiting the school board, its attorneys and employees from publicly discussing its school desegregation plan. The court held that the order was an unconstitutional prior restraint on the news agencies' protected right to gather news and receive speech.

"The First Amendment provides at least some protection for the news agencies' efforts to gather the news." Id. at 926.

"[A]n inhibition of press news-gathering rights must be necessitated by a compelling governmental interest, and narrowly tailored to serve that interest." Id. at 928-929 (citations omitted).

In re Express-News Corp., 695 F.2d 807, 9 Media L. Rep. 1001 (5th Cir. 1982).

A publisher and reporter filed a motion to vacate local court rules prohibiting discharged jurors from speaking about any case in connection with the preparation of a news story. The Fifth Circuit found the rule unconstitutional.

"[A] court rule cannot . . . restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice." Id. at 810.

"A court may not impose a restraint that sweeps so broadly and then require those who speak freely to justify special treatment by carrying the burden of showing good cause. The first amendment right to gather news is 'good cause' enough. If that right is to be restricted, the government must carry the burden of demonstrating the need for curtailment." Id. at 810.

"The first amendment's broad shield for freedom of speech and the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say." Id. at 808.

6th CIRCUIT

Boddie v. American Broad. Cos., 881 F.2d 267, 271, 16 Media L. Rep. 2038 (6th Cir. 1989).

In an exposé of judicial corruption in Ohio, a news program revealed portions of an interview with plaintiff, a woman who claimed to have had sex with a judge to avoid a sentence. In violation of a promise made by journalists to the woman, the interview was recorded. Plaintiff sued in part under the federal wiretapping statute, which prohibits intercepting communications for "injurious" purposes. The court held that the statute was unconstitutional because the term "injurious" is "vague and overbroad" and fails "to give potential speakers adequate notice of its scope." Moreover, the court held that "[s]ince the wiretapping statute has a potentially inhibiting effect on the press' constitutionally protected reportorial functions, the vagueness test applies with particular force." Id. at 271-272.

"[N]ewsgathering does 'qualify for First Amendment protection.'" Id., citing Branzburg, 408 U.S. at 681.

CBS v. Young, 522 F.2d 234, 1 Media L. Rep. 1024 (6th Cir. 1975).

During a civil action concerning the May 4, 1970 shootings at Kent State University, a district court judge ordered that all parties and counsel refrain from discussing the case with the media. Holding that the ruling imposed an unconstitutional prior restraint, the Sixth Circuit ordered the judge to vacate the order.

"'Without some protection for seeking out the news, freedom of the press could be eviscerated.' News Gathering thus qualifies for First Amendment protection." Id. at 238, citing Branzburg, 408 U.S. at 665.

"[A]s authorities demonstrate, any restrictive order involving a prior restraint upon First Amendment freedoms is presumptively void and may be upheld only on the basis of a clear showing that an exercise of First Amendment rights will interfere with the rights of the parties to a fair trial." Id. at 241.

7th CIRCUIT

Desnick v. American Broad. Cos., Inc., 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995).

In exchange for cooperation, a producer for Prime Time Live promised plaintiff, the owner of a chain of ophthalmic clinics, that a television news story on large cataract practices would be "fair and balanced" and would not involve ambush interviews or undercover surveillance. Id. at 1347-48. When the resulting piece ended up to be accusatory and involved "test" patients wired with hidden cameras, plaintiff sued, alleging trespass, privacy, violations of the wiretap statute, and fraud. The court rejected each claim as insufficient.

"Today's 'tabloid' style investigative television reportage . . . in an increasingly competitive television market constitutes—although it is shrill, one-sided, and offensive, and sometimes defamatory—an important part of that market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort . . . and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast. If . . . no established rights are invaded in the process of creating [a news story] . . . then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly." Id. at 1355 (citations omitted).

FMC Corp. v. Capital Cities/ABC Inc., 915 F.2d 300, 18 Media L. Rep 1195 (7th Cir. 1990).

ABC broadcast a story on plaintiff, a U.S. Defense Department contractor, regarding pricing and contracting policies. The story referred to documents in ABC's possession that plaintiff claims were stolen. ABC refused to reveal the documents, copies of the documents, or their source. While the Seventh Circuit held that ABC must return originals in its possession, it expressly permitted ABC to retain any copies "so that its First Amendment investigative activities will not be chilled or discouraged. . . . ABC is free to retain copies . . . (and to disseminate any information contained in them) in the name of the First Amendment." Id. at 303-305.

9th CIRCUIT

Deteresa v. American Broad. Cos., 121 F.3d 460, 25 Media L. Rep. 2038 (9th Cir. 1997).

A flight attendant who discussed with an ABC producer information relevant to the O.J. Simpson trial brought suit against ABC and the producer for surreptitiously taping the conversation and then airing it against her wishes. The court rejected Plaintiffs' claims of invasion of privacy, fraud, unfair business practices, and violations under the federal wiretapping and eavesdropping statutes.

Daily Herald Co. v. Munro, 838 F.2d 380, 14 Media L. Rep. 2332 (9th Cir. 1988).

A newspaper brought suit against Washington's Secretary of State, claiming that a statute prohibiting exit-polling within 300 fee of polls on election days violates First Amendment protections. The Ninth Circuit held the statute unconstitutional on its face, because it was not narrowly tailored to accomplish a compelling government interest.

"The media plaintiffs' exit polling constitutes speech protected by the First Amendment, not only in that the information disseminated based on the polls is speech, but also in that the process of obtaining the information requires a discussion between pollster and voter. . . . '[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 388 (citations omitted).

Daily Herald Co. v. Munro, 758 F.2d 350, 11 Media L. Rep. 1033 (9th Cir. 1985).

News organizations challenged the constitutionality of a Washington statute prohibiting exit-polling on the day of any election within 300 feet of a polling place. The Ninth Circuit reversed the lower court's granting of summary judgment for defendants, finding that the government had failed to meet the constitutionally required showing that the statute was supported by a compelling state interest or was the least restriction means available of furthering that interest. The court remanded the case for a further factual showing.

"[I]t is settled law that newsgathering, as well as news reporting, is protected by the First Amendment." Id. at 358.

United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978).

A district court order forbade any person, including the media, from contacting jurors after the return of their verdict. The court issued a writ of mandamus, voiding the court order.

"The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment. . . . [D]epriving the media of the opportunity to ask jurors if they wish to be

interviewed[] was clearly erroneous as a matter of law." Id. at 1362, citing Branzburg, 408 U.S. at 665.

***Dietmann v. Time, Inc.**, 449 F.2d 245, 1 Media L. Rep. 2417 (9th Cir. 1971).*

To investigate a story based on plaintiff, a man allegedly practicing medicine without a license, reporters for Life Magazine visited plaintiff's home under the false pretences of seeking medical advice, and taped the appointment with a hidden microphone and radio. The court affirmed plaintiff's invasion of privacy claim, holding that clandestine recording constituted invasion of privacy, notwithstanding defendants' status as reporters. Moreover, the court held that "[n]o interest of the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication." Id. at 250.

"The defendant claims that the First Amendment immunizes it from liability for invading plaintiff's den with a hidden camera and its concealed electronic instruments because its employees were gathering news and it instrumentalities 'are indispensable tools of investigative reporting.' We agree that newsgathering is an integral part of news dissemination. We strongly disagree, however, that the hidden mechanical contrivances are 'indispensable tools' of newsgathering." Id. at 249.

10th CIRCUIT

Journal Publ'g Co. v. Mechem, 801 F.2d 1233, 13 Media L. Rep. 1391 (10th Cir. 1986).

A publishing company sought to overturn a judge's post-trial order prohibiting press interviews with certain jurors. The court issued the writ, holding that the order was unconstitutionally overbroad.

"News gathering is an activity protected by the First Amendment. . . . [A]ny inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint." Id. at 1236 (citations omitted).

DISTRICT COURTS

ARIZONA

Medical Lab Management Consultants v. American Broad. Cos., Inc., 30 F. Supp. 2d 1182, 27 Media L. Rep. 1545 (D. Ariz. 1998).

A Prime Time Live reporter posed as a cytotechnologist in order to gain access to a pap-smear clinic with hidden cameras for use in a television exposé. The owner sued on numerous grounds.

The court rejected intrusion claims, holding that the requisite offensiveness standard was not met, because "the intrusion [was] by a member of the print and broadcast press in pursuit of news material. . . . [T]he constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of the news, an interest that may—as a matter of tort law—justify an intrusion that would otherwise be considered offensive. . . . [W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 1190 (citations omitted).

CALIFORNIA

New Kids on the Block v. News America Publ'g, 745 F. Supp. 1540, 5 Media L. Rep. 1156 (C.D. Ca. 1990).

The pop music group New Kids on the Block sued magazine publishers for alleged trademark infringement and misappropriation, based on defendant publishers' use of a 900 number to conduct pay-per-call polls to collect the public opinion on who was the most popular band member. The court granted summary judgment, holding that the First Amendment provided immunity to publishers, because their activities were protected forms of newsgathering, and because defendant did not falsely mislead the public into thinking the New Kids on the Block endorsed these polls.

"The risk that some people might think that the New Kids implicitly endorsed or sponsored the Star Magazine's and USA Today's 900 number services is outweighed by the danger of restricting news gathering and dissemination." Id. at 1545.

CONNECTICUT

Connecticut Magazine v. Moraghan, 676 F. Supp. 38, 14 Media L. Rep. 2127 (D. Conn. 1987).

A magazine sought a preliminary injunction against enforcement of a gag order in a state murder trial. The court granted the injunction, holding that the order was unconstitutionally overbroad and not narrowly tailored.

"'[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 40, citing Branzburg, 408 U.S. at 681.

"The right to gather news falls within the protections of the first amendment." Id. at 42.

D.C.

Steele v. Isikoff, 130 F. Supp.2d 23, 28 Media L. Rep. 2630 (D.D.C. 2000).

A source quoted by name in a news magazine article sued the magazine and reporter on several grounds (other than defamation) for the reporter's breach in agreeing to maintain confidentiality. The court dismissed each of plaintiff's claims, holding that her non-publication claims were not actionable, and that her claims for damages based on reputational harm were barred under the First Amendment, because she was unable to meet the constitutional requirements of a defamation claim.

"First Amendment protections, iron-clad and far-reaching though they may be, do not allow the media to break the law in its efforts to gather the news. . . . [In Cohen,] plaintiff's promissory estoppel claim was . . . inoffensive to the First Amendment because the doctrine of promissory estoppel does not 'target or single out the press.'" Id. at 29, citing Cohen, 501 U.S. at 669.

FLORIDA

CBS Inc. v. Smith, 681 F. Supp. 794, 14 Media L. Rep. 1251 (S.D. Fla. 1988).

A statute that forbade news organizations from interviewing voters and conducting exit polls in the immediate vicinity of polling places was held to be fatally overbroad and thus violative of the First Amendment.

"It is . . . clear that the conduct of exit polling and journalistic interviews are protected by the First Amendment guarantees of free speech and free press." Id. at 802.

"The gathering of news of political consequence is a necessary corollary to the freedom to report about politics and government. . . . Simply put, newsgathering is a basic right protected by the First Amendment; 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 802-803 (citations omitted).

GEORGIA

Nat'l Broad. Co., Inc. v. Cleland, 697 F. Supp. 1204, 15 Media L. Rep. 2265 (N.D. Ga. 1988).

Plaintiffs, media organizations, challenged a state statute forbidding exit interviews within 250 feet of polling places. The court held that the statute was overly broad and not narrowly tailored, that the state's interest was not sufficiently legitimate, and that the statute infringed upon the First Amendment right to gather news.

"Moreover, the Supreme Court has indicated that outside the limited context of prisoner interviews, the State's ability to interfere with newsgathering is severely limited." Id. at 1214, citing Richmond Newspapers, 448 U.S. at 555.

KANSAS

***Koch v. Koch Indus., Inc.**, 6 F. Supp. 2d 1185 (D. Kan. 1998).*

The media sought to intervene in a civil action to challenge a gag order. The court denied the motion, holding that the government had shown a compelling interest and that the media lacked standing.

However, the court recognized that "[n]ews gathering is an activity protected by the First Amendment," and "carefully balanced the parties' and public's interest in a fair trial against the competing interest in freedom of speech" in reaching its decision. Id. 1188-89.

MARYLAND

***United States v. Matthews**, 11 F. Supp. 2d 656 (D. Mar. 1998).*

Defendant reporter was indicted for sending and receiving child pornography in preparation for a news story. While recognizing that protection for newsgathering exists, the court denied his motion to dismiss, holding that "a press pass is not a license to break the law." Id. at 664.

"Because the right to a free press would be worthless without some protection for the press's ability to seek out the news, the Supreme Court has recognized that the First Amendment also protects news gathering activities. . . . Supreme Court precedent demonstrates that the Court must balance the competing interests involved in this particular case." Id. at 662, citing Branzburg, 408 U.S. at 681.

MASSACHUSETTS

United States v. Doherty, 675 F. Supp 719, 14 Media L. Rep. 1406 (D. Mass 1987).

Newspapers sought access to the names and addresses of jurors after they had reached a decision in a criminal trial. The court reconciled the competing interests in constitutionally protected newsgathering rights and privacy by holding that such information would be available to the press only once seven days had passed since the verdict.

"[T]he Supreme Court recognized that news gathering qualifies for First Amendment protection." Id. at 721.

NEW HAMPSHIRE

Connell v. Hudson, 733 F. Supp. 465, 17 Media L. Rep. 1803 (D.N.H. 1990).

A photo-journalist sued a town for violating his First Amendment rights when police officers ordered him away from the scene of an accident and threatened arrest if he persisted in taking photographs. Finding that "[n]ewsgathering is protected by the First Amendment," id. at 468, the court held that this right outweighed the victim's privacy interests or the government's interests in the investigation, awarding plaintiff nominal damages and attorneys' fees.

NEW YORK

United States v. Simon, 664 F. Supp. 780, 14 Media. L. Rep. 1321 (S.D.N.Y. 1987).

Newspapers challenged court gag order, forbidding criminal defendants, attorneys, and prosecutor from communicating with the press in political corruption case. The court held that the newspapers had standing to sue based on the constitutional protection for newsgathering, but that the possibility of an unfair trial justified the order, at least until the conclusion of the case.

"The Court has no difficulty with the notion that the right to gather news is encompassed within the protections afforded under the First Amendment." Id. at 786.

NORTH CAROLINA

Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F. Supp. 1211 (M.D.N.C. 1996).

Suit for fraud, trespass, and breach of duty to an employer was filed after two ABC reporters obtained employment at a grocery store for the purpose of an undercover investigation for the television program, Prime Time Live. This decision involved defendants' objections to a court order compelling discovery of hidden camera investigations not involving plaintiff. The court held that the journalist's privilege did not protect defendants from disclosure because plaintiffs demonstrated a compelling need for the information, that it was relevant, and that it could not be obtained by alternate means.

"Despite the ultimate answer to the question before it, the [Supreme] Court also stated '[n]or is it suggested that news gathering does not qualify for First Amendment protection; for without some protection for seeking out the news, freedom of the press could be eviscerated.' It is this statement and others like it that have led to the development of a journalist's privilege." Id. at 1213, citing Branzburg, 408 U.S. at 681 (citations omitted).

PENNSYLVANIA

***Wolfson v. Lewis**, 924 F. Supp. 1413, 24 Media L. Rep. 1609 (E.D. Pa. 1996).*

The family of a health insurance executive sought preliminary injunction to enjoin Inside Edition television reporters from surveilling their home and otherwise harassing them. Given the journalists' extreme behavior, the family was able to show a likelihood of success on the merits of their invasion of privacy claim, and the injunction was granted.

"At the core of the First Amendment is the right to publish or broadcast the news without prior restraint. . . . Implicit in the right to publish the news is the right to gather the news. 'Without some protection for seeking the news, freedom of the press could be eviscerated.' . . . There is an 'undoubted right to gather news "from any source by means within the law"'. . . . Because a 'free press cannot be made to rely solely upon the sufferance of government to supply it with information,' the First Amendment protects the right of journalists to lawfully obtain information using 'routine newspaper reporting techniques.'" Id. at 1417 (citations omitted).

TEXAS

***Risenhoover v. England**, 936 F. Supp. 392, 24 Media L. Rep. 1705 (W.D. Tex. 1996).*

The government sued media publishers and television stations for negligently disclosing that the police were staging a raid on the Davidian compound in Waco Texas by dispatching reporters to the scene. The court noted that "[f]reedom of the press involves not only the ability to publish the news, but the ability to gather it," id. at 403, but that this right is not absolute. The court denied summary judgment as to the negligence claims, holding that whether the media defendants had contributed to agents' injuries was a fact question.

VIRGINIA

Health Sys. Agency of Northern Virginia v. Virginia State Bd. of Medicine, 424 F. Supp. 267, 2 Media L. Rep, 1107 (E.D. Va. 1976).

Plaintiffs wanted to create a directory of physician services and fees in their community, and sought to enjoin defendants from enforcing a state statute which explicitly prohibited physician advertising services and fees to the general public. The court held that the directory fell under the First Amendment understanding of the term "press," and that the statute was an impediment on plaintiffs' First Amendment newsgathering rights to collect, publish and receive information.

"Because the press includes the directory, the Agency's standing is premised on the first amendment right to gather and publish news." Id. at 272.

STATE COURTS

CALIFORNIA

Shulman v. Group W. Prod., Inc., 955 P.2d 469, 26 Media L. Rep. 1737 (Cal. 1998).

Accident victims sued news media, alleging torts of publication of private facts and intrusion. The court held that the victims had no right to privacy at accident scene, but that they did have such a right when dealing with medical personnel.

While the court recognized that newsgathering is constitutionally protected, it qualified this by holding that it does not receive the same level of protection as publication. The court held that newsworthiness does not necessarily bar liability for newsgathering (where it otherwise would for publication). Id. at 496.

Aisenson v. American Broad. Co., Inc., 220 Cal. App. 3d 146, 17 Media L. Rep. 1881 (Cal. Ct. App. 1990).

A judge sued a television station in defamation and privacy for showing up at his driveway with cameras and then airing a story related to the judge's low ranking in a performance survey among local attorneys. The court affirmed defendants' motion for summary judgment.

In rejecting the intrusion claim, the court found that "[p]ublic officials and public figures are thus subject to news coverage, including being photographed, so long as the interference is no greater than that necessary to protect the overriding public interest. In this instance, there is no evidence to support a finding that ABC's method of newsgathering exceeded the public's interest in seeing a current videotape picture of an elected official." Id. at 162 (citations omitted).

***Miller v. Nat'l Broad. Co.**, 187 Cal. App. 3d 1463 (Cal. Ct. App. 1987).*

The wife and daughter of a man who suffered a heart attack sued NBC for alleged trespass, invasion of privacy and intentional infliction of emotional distress caused by an NBC camera crew's non-consensual entry into the family's apartment to film paramedics administering life-saving techniques and NBC's broadcast of the footage. The court held that, while "[n]ewsgathering, as well as news dissemination, may be within the protective ambit of the First Amendment," this right was outweighed by the family's right to privacy. Id. at 1492.

Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509, 12 Media L. Rep. 2009 (Cal. Ct. App. 1986).

Plaintiff brought intrusion privacy suit against defendant newspaper for publishing the confidential fact that a committee found that he was not qualified for judicial appointment. Finding that a journalistic privilege protects "ordinary newsgathering techniques" from any tort, the court affirmed defendants' motion to dismiss.

"[T]he First Amendment protects the ordinary news-gathering techniques of reporters and those techniques cannot be stripped of their constitutional shield by calling them tortious." Id. at 512-13.

"[T]he news gathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves 'routine . . . reporting techniques' . . . [which] include asking persons questions, including those [persons] with confidential or restricted information." Id. at 519, quoting Smith, 443 U.S. at 103.

"[T]he constitutional protection accorded normal newsgathering activities does not depend upon the characterization of the cause of action . . . ." Id. at 520.

COLORADO

Allen v. Combined Communications, 7 Media L. Rep. 2417 (Colo. Dist. Ct. 1981).

A livery stable sued a news reporter and his publisher on several grounds, including trespass, for methods in covering a news story. The court granted plaintiffs leave to amend their complaint, holding that in order to sustain the trespass claim, they must plead that the reporter intentionally committed trespass, or that Plaintiff suffered damages.

"First Amendment considerations should be applied to issues of newsgathering. The public has a First Amendment right to receive information . . . and implied in that right is surely some right to acquire it. The right of the press in this regard is at least coextensive with the right of the public. The role of the news media as primary purveyor of news of general interest to society suggests to some a special right to acquire the news beyond that of the general public." Id. at 2420 (citations omitted).

FLORIDA

Seminole Tribe of Florida v. Times Publ'g Co., 780 So.2d 310 (Fla. Dist. Ct. App. 2001).

Casino owners sued reporters and their newspaper for tortious interference after reporters solicited the casino employees and agents to reveal confidential and proprietary information. The court, acknowledging the "social interest in protecting routine news gathering techniques," held that the reporters' actions were lawful.

"[N]ews gathering [is] an activity of constitutional significance. As the Supreme Court has written, 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 316, citing Branzburg, 408 U.S. at 681.

"While the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through 'routine reporting techniques.'" Id. at 317-318, (citations omitted).

***Shevin v. Sunbeam Television Corp.**, 351 So.2d 723, 3 Media L. Rep. 1312 (Fla. 1977).*

Media outlets challenged a statute prohibiting the taping of wire or oral communications without the consent of all parties. The court held that individuals' right to privacy in this case outweighed any claims by the media that surreptitious tapings and other such interceptions were necessary for newsgathering.

"'[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'. . . News gathering is an integral part of news dissemination." Id. at 725-726, (citation omitted).

ILLINOIS

Cassidy v. American Broad. Cos., 377 N.E.2d 126, 3 Media L. Rep. 2449 (Ill. App. Ct. 1978).

A hidden camera crew filmed plaintiff, an undercover cop, arrest a woman for solicitation. Plaintiff sued for eavesdropping and invasion of privacy. The court affirmed defendant's motion for summary judgment.

"[N]o right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties." Id. at 132.

INDIANA

Indiana v. Heltzel, 552 N.E.2d 31, 17 Media L. Rep. 1677 (Ind. 1990).

Newspaper reporters were accused of attempting to induce former grand jurors to reveal secret grand jury evidence, deliberation, and votes. Despite the fact that the reporters' alleged acts were unlawful and therefore not protected by the First Amendment, the court held that the reporters' actions were not serious enough to warrant the criminal contempt charges.

"The reporters correctly assert that decisions of the United States Supreme Court have extended . . . First Amendment protection to news gathering activities of the press. The High Court noted in Branzburg that without some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 34 (citations omitted).

LOUISIANA

***Keller v. Aymond**, 722 So. 2d 1224 (La. Ct. App. 1998).*

A newspaper was sued for publishing excerpts from an illegally-obtained wiretap. While recognizing that "the right of the press to gather news and information is protected by the First Amendment," the Louisiana Court of Appeal reversed and remanded the lower court's holding of summary judgment for the newspaper, finding that the newspaper was not entitled to this protection because its acts were in violation of state law.

MARYLAND

Hearst Corp. v. Maryland, 447 A.2d 1264, 8 Media L. Rep. 2088 (Md. 1982).

The court recognized a newspaper's standing, right to intervene, and right to appeal in companion criminal cases for the purpose of opposing a gag order requested by the accused. "'Without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 1267, citing Branzburg, 408 U.S. at 681.

NEW JERSEY

***New Jersey v. Lashinsky**, 404 A.2d 1121, 5 Media L. Rep. 1418 (N.J. Sup. Ct. 1979).*

A photojournalist convicted of disorderly conduct for refusing to leave an accident scene sought to overturn his conviction on the basis that he was privileged as a photojournalist. While recognizing that "the right of the press to gather news is entitled to special constitutional protection," the court held that the gravity of the accident and the photojournalist's behavior constituted disorderly conduct. Id. at 1127.

"Restrictions which fail to give proper weight to the importance of the news and those who gather it and which are not necessary to accommodate any other legitimate governmental concerns would have no justification." Id. at 1128.

NEW YORK

In re Nat'l Broad. Co., 116 A.D.2d 287, 12 Media L. Rep. 2025 (N.Y. App. Div. 1986).

NBC sought to prohibit a judicial ruling in a criminal case banning counsel from communicating with the press. The court held first that "[i]n view of this infringement on its constitutionally guaranteed right to gather news, NBC clearly has standing," and then prohibited the order, because the court did not demonstrate that the news coverage would have endangered the proceedings or that less restrictive means would have been ineffective. Id. at 289.

OHIO

Cincinnati Post v. Court of Common Pleas of Hamilton County, 570 N.E.2d 1101, 18 Media L. Rep. 2170 (Ohio 1991).

The court granted a newspaper's writ of mandamus, holding that a post-trial gag order preventing anyone (including the press) from communicating with jurors was unconstitutional.

"[N]ews gathering is protected by the First Amendment." Id. at 1102.

OKLAHOMA

Stahl v. Oklahoma, *665 P.2d 839, 9 Media L. Rep. 1945 (Okla. Crim. App. 1983).*

Members of the press covered a protest at the grounds of a future nuclear power plant, and in the process were arrested for trespass. The court affirmed their conviction.

"The First Amendment does not shield newspersons from liability for torts and crimes committed in the course of news-gathering. . . . Further, the First Amendment does not guarantee the press a constitutional right of special access not available to the public generally." Id. at 842.

SOUTH DAKOTA

Sioux Falls Argus Leader v. Miller, *610 N.W.2d 76, 28 Media L. Rep. 1833 (S.D. 2000).*

Media outlets sought a writ of prohibition, alleging that a gag order in connection with a felony child abuse prosecution was unconstitutional. The court held that, while the media outlet had the standing and the right to challenge the order, the gag order was reasonable and not violative of First Amendment guarantees of a free press.

"The United States Supreme Court has previously determined that the First Amendment protects the right to receive information and ideas . . . . '[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 80 (citations omitted).

B. Access Cases

UNITED STATES SUPREME COURT

Richmond Newspapers v. Virginia, 448 U.S. 555, 6 Media L. Rep. 1833 (1980).

Recognizing for the first time an enforceable First Amendment right of access to judicial proceedings, the Supreme Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Id. at 581. In reaching this conclusion, the Court observed, "It is not crucial whether we describe this right to attend criminal trials, to hear, see and communicate observations concerning them, as a right of access or a 'right to gather information,' for we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 576 (citations omitted).

"While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . .'" Id. at 573, citing Nebraska Press Ass'n v. Stuart, 427 U.S. at 587.

***Houchins v. KQED, Inc.**, 438 U.S. 1, 3 Media L. Rep. 2521 (1978).*

A broadcasting company was denied access to a jail cell where a prisoner had allegedly committed suicide. The Court held that the First Amendment does not guarantee the press a "special right" of access to government information or to county jails, greater than the rights of the general public.

However, the Court confirmed that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" Id. at 11, citing Branzburg, 408 U.S. at 681-682.

***Pell v. Procunier**, 417 U.S. 817, 1 Media L. Rep. 2379 (1974).*

Prison inmates and journalists challenged the constitutionality of a prison regulation that allowed reporters to interview inmates, but did not allow reporters to choose whom to interview and forbade prisoners to initiate interviews. While recognizing that newsgathering is "not without its First Amendment protections," the Supreme Court held that the regulation was not unconstitutional. Id. at 833, (citations omitted).

"[A] journalist is free to seek out sources of information not available to the general public, . . . [and] is entitled to some constitutional protection of the confidentiality of such sources." Id. at 834.

***Saxbe v. Washington Post Co.**, 417 U.S. 843, 1 Media L. Rep. 2314 (1974).*

In a case challenging a federal regulation against press interviews with prisoners, the Supreme Court found no First Amendment violation so long as the press was granted access to the same information available to the general public and information on prison conditions was otherwise available.

"[In Branzburg] we recognized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful. . . . [A] fair reading of the majority's analysis in Branzburg makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated." Id. at 859-60.

"For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news, the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government." Id. at 863 (Powell, J., dissenting).

CIRCUIT COURTS

D.C. CIRCUIT

Sherrill v. Knight, 569 F.2d 124, 3 Media L. Rep. 1514 (D.C. Cir. 1977).

A journalist filed a complaint when he was denied a White House press pass by order of the Secret Service, without being given a reason. The court held that First Amendment considerations required the Service to provide those denied a press pass with notice of the factual bases for denial, an opportunity to rebut, and a decision in writing.

"[T]he protection afforded newsgathering under the first amendment guarantee of freedom of the press . . . requires that this access not be denied arbitrarily or for less than compelling reasons . . . . Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information." Id. at 129-130 (citations omitted).

3rd CIRCUIT

United States v. Criden, 675 F.2d 550, 8 Media L. Rep. 1297 (3d Cir. 1982).

Philadelphia Newspapers sought immediate access to a pretrial in camera hearing transcript. The Third Circuit held that the press, as well as the public, have a First Amendment right of access to pretrial suppression, due process, and entrapment hearings.

"An indispensable condition of meaningful communication is the right to gather information." Id. at 556 (citation omitted).

United States v. Cianfrani, 573 F.2d 835, 3 Media L. Rep. 1961 (3d Cir. 1978).

A court order denied public access to a criminal pretrial suppression hearing. The Third Circuit remanded the decision, holding that the order was overly broad. The court stated, however, that certain limits on pretrial hearings would not offend the First Amendment.

"'The right to speak and publish does not carry with it the unrestrained right to gather information.' Nor does the first amendment 'guarantee the press a constitutional right of special access to information not available to the public generally . . . [d]espite the fact that newsgathering may be hampered.'" Id. at 861 (citations omitted).

5th CIRCUIT

U.S. v. Brown, 250 F.3d 907, 29 Media L. Rep. 1779 (5th Cir. 2001).

In a highly publicized criminal trial, media outlets challenged both the trial judge's pre-trial order barring them from compromising the anonymity of the jury, and the judge's subsequent post-verdict denial of their request for access to the jurors' identifying information. The court held the order to maintain jury anonymity to be an unconstitutional prior restraint and overbroad, in that it prevented the journalists' attempts at independent newsgathering. However, the court found the post-verdict denial of access to be constitutional and reasonable, as "protecting jurors from post-trial harassment and invasions of privacy is a legitimate concern." Id. at 921.

"While the media are entitled to receive, investigate and report on all public proceedings involved in a trial, the right to gather news, much like other first amendment rights, is not absolute." Id. at 914.

Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 24 Media L. Rep. 1513 (5th Cir. 1996).

News agencies appealed an order prohibiting the school board, its attorneys and employees from publicly discussing its school desegregation plan. The court held that the order was an unconstitutional prior restraint on the news agencies' protected right to gather news and receive speech.

"The First Amendment provides at least some protection for the news agencies' efforts to gather the news." Id. at 926.

"[A]n inhibition of press news-gathering rights must be necessitated by a compelling governmental interest, and narrowly tailored to serve that interest." Id. at 928-929 (citations omitted).

In re Express-News Corp., 695 F.2d 807, 9 Media L. Rep. 1001 (5th Cir. 1982).

A publisher and reporter filed a motion to vacate local court rules prohibiting discharged jurors from speaking about any case in connection with the preparation of a news story. The Fifth Circuit held that the rule was unconstitutional.

"[A] court rule cannot . . . restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice." Id. at 810.

"A court may not impose a restraint that sweeps so broadly and then require those who speak freely to justify special treatment by carrying the burden of showing good cause. The first amendment right to gather news is 'good cause' enough. If that right is to be restricted, the government must carry the burden of demonstrating the need for curtailment." Id. at 810.

"The first amendment's broad shield for freedom of speech and the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information were denied access to it, for freedom to speak is of little value if there is nothing to say." Id. at 808.

***United States v. Gurney**, 558 F.2d 1202, 3 Media L. Rep. 1081 (5th Cir. 1977).*

Newspapers and reporters challenged district court orders limiting their access to certain trial documents. The court denied access to those records not available to the general public, holding that the "First Amendment right to gather news has been defined in terms of information available to the public generally," and that "[any] burdens [to newsgathering] . . . are incidental in view of the strong government interests" in efficient trials and in defendants' Sixth Amendment rights. Id. at 1208.

"The Supreme Court has recognized that newsgathering warrants some degree of First Amendment protection." Id. at 1208.

***Garrett v. Estelle**, 556 F.2d 1274, 2 Media L. Rep. 2265 (5th Cir. 1977).*

A news reporter sought access to attend and film a criminal execution. While recognizing that "[n]ews gathering is protected by the First Amendment," id. at 1277, the court denied the petition on the grounds that the general public were denied access as well.

6th CIRCUIT

Nat'l Broad. Co., Inc. v. Presser, 828 F.2d 340, 14 Media L. Rep. 1417 (6th Cir. 1987).

The court recognized a qualified First Amendment right of public access to documents and records that pertain to criminal proceedings:

"We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press would be eviscerated.'" Id. at 343, citing Branzburg, 408 U.S. at 861.

9th CIRCUIT

***California First Amendment Coalition v. Calderon**, 150 F.3d 976, 26 Media L. Rep. 2009 (9th Cir. 1998).*

A press coalition challenged the exclusion of witnesses from certain phases of executions by lethal injection. The court found that "[t]he right of the press to gather news and information is protected by the First Amendment," id. at 981, and therefore held that the coalition had standing to sue. However, the court held that the prison procedure did not violate the First Amendment, because the government had satisfactorily demonstrated that it "directly related to prison security, staff security, and the orderly operation of the institutional procedure." Id. at 982.

***Seattle-Tacoma Newspaper Guild v. Local #82, of American Newspaper Guild**, 480 F.2d 1062 (9th Cir. 1973).*

Two journalists were denied interviews with the leaders of a prison strike. The court balanced the journalists' newsgathering rights against the governmental interests at stake, and held that the ban was reasonable in light of security threats and the fact that the media otherwise had extensive access to prisons and their personnel.

"Decisions recognizing 'the paramount public interest in a free flow of information to the people concerning public officials, their servants,' are equally applicable in the realm of prison administration." Id. at 1066 (citations omitted).

10th CIRCUIT

***Smith v. Plati**, 258 F.3d 1167, 29 Media L. Rep. 2305 (10th Cir. 2001).*

The operator of an internet website devoted to University of Colorado sports was denied access to interviews, and sued the assistant athletic director on several grounds, including denial of the First Amendment right to gather news. The 10th Circuit held that the university had not denied plaintiffs'

First Amendment rights, because the press has no special access to information not available to the general public.

"In Branzburg, the Supreme Court remarked that 'without some protection for seeking out the news, freedom of the press could be eviscerated,' and 'newsgathering is not without its First Amendment protections.' These statements are prefatory dicta and do not create a right of access." Id. at 1178 (citation omitted).

Journal Publ'g Co. v. Mechem, 801 F.2d 1233, 13 Media L. Rep. 1391 (10th Cir. 1986).

A publishing company sought to overturn a judge's post-trial order prohibiting press interviews with certain jurors. The court issues the writ, holding that the order was unconstitutionally overbroad.

"News gathering is an activity protected by the First Amendment. . . . [A]ny inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint." Id. at 1236 (citations omitted).

DISTRICT COURTS

CONNECTICUT

***Tsokalas v. Purtill**, 756 F. Supp. 89, 18 Media L. Rep. 1737 (D. Conn. 1991).*

A newspaper and sketch artist sought a preliminary injunction against a state court order prohibiting publication of sketches made during a trial. The court upheld the restriction as a reasonable time, place, manner regulation.

"It is axiomatic that the First Amendment protects the right of press to attend trial proceedings . . . '[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 93, (citation omitted).

FLORIDA

United States v. Miller, 579 F. Supp. 862, 10 Media L. Rep. 1321 (S.D.Fla.1984).

Media members sought access to audio and video tapes used in a criminal bail hearing and in a government drug agent's related affidavit. The court held that the tapes of the bail hearing were public judicial records and therefore accessible to the press. However, the court found that the media's qualified right to gather news was outweighed by the government's right to fully present evidence at trial, and therefore denied access to the affidavit tapes.

"'[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated' . . . Access claims, whether based on common law or the First Amendment, can best be adjudicated on a case-by-case basis. Per se rules denying access are overbroad." Id. at 866 (citations omitted).

GEORGIA

Cable News Network v. American Broad. Cos., Inc., 518 F. Supp. 1238, 7 Media L. Rep. 2053 (N.D. Ga. 1981).

Media companies sought to temporarily restrain the President and principal deputy press secretary from excluding press from "limited coverage" White House events. The court held that although there are legitimate governmental interests represented by this policy of exclusion, they are far outweighed by the First Amendment right of the free speech which "carries with it some freedom to listen." Id. at 1242, citing Richmond Newspapers, 448 U.S. 555, 576.

"[N]ews gathering qualifies for some First Amendment protection" Id. at 1243 (citations omitted).

HAWAII

Borreca v. Fasi, 369 F. Supp. 906, 1 Media L. Rep. 2410 (D. Haw. 1974).

A journalist sought to enjoin a mayor and his assistant from denying him access to general news conferences held in the mayor's office. The court granted the injunction, stating that there was no compelling governmental interest justifying the mayor's infringement on the journalist's First Amendment rights.

"First Amendment freedom of the press includes a limited right of reasonable access to news." Id. at 908 (citations omitted).

INDIANA

***Entertainment Network Inc. v. Lappin**, 134 F. Supp. 2d 1002, 29 Media L. Rep. 1769 (S.D. Ind. 2001).*

Plaintiff internet service sued government officials for declaratory and injunctive relief so that they would be permitted to air and charge viewers to watch a live internet broadcast of Timothy McVeigh's federal execution for bombing a federal building. Plaintiff also challenged the constitutionality of a prison regulation banning recording devices from executions.

The court qualified its recognition that "the right of the press to gather news and information is protected by the First Amendment," by noting that "the First Amendment does not require unfettered access to government information." Id. at 1009, 1016. The court further held that the regulations were reasonably related to protecting legitimate prison institutional interests.

MASSACHUSETTS

United States v. Doherty, 675 F. Supp 719, 14 Media L. Rep. 1406 (D. Mass 1987).

Newspapers sought access to the names and addresses of jurors after they had reached a decision in a criminal trial. The court reconciled the competing interests in constitutionally protected newsgathering rights and privacy by holding that such information would be available to the press only once seven days had passed since the verdict.

"[T]he Supreme Court recognized that news gathering qualifies for First Amendment protection." Id. at 721.

McMillan v. Carlson, 369 F. Supp. 1182 (D. Mass. 1973).

Plaintiff author writing a biography on Martin Luther King, Jr.'s assassin was prevented from interviewing the subject's incarcerated brother, and sought to enjoin the Federal Bureau of Prisons from barring all personal interviews. The court held that this universal ban on all personal inmate

interviews with authors was an unnecessary restriction of free speech under the First Amendment, regardless of the fact that lettered correspondence was allowed.

"[N]ewsgathering is viewed as being within the ambit of the First Amendment protection as a corollary of the right to publish." Id. at 1186.

MISSOURI

Bauer v. Kincaid, 759 F. Supp. 575 (W.D. Mo. 1991).

Plaintiff, editor-in-chief of his university's student newspaper, sued to enjoin the university from preventing disclosure of criminal investigation and incident reports maintained by campus police. The court held that these records were subject to disclosure under the First Amendment.

"'Nor is it suggested that news gathering does not qualify for First Amendment protection.' State courts have applied this principle, in the area of crime reports gathered by police departments, generally holding that at least some reports are constitutionally required to be available to the public, despite competing interests such as a suspect's right to privacy." Id. at 594 (citations omitted).

NEW YORK

***Hone v. Cortland City School District**, 985 F. Supp. 262, 26 Media L. Rep. 1105 (N.D.N.Y. 1997).*

A newspaper sports reporter was barred from a local high school after he made repeated unwelcome social advances towards local girls' high school soccer coaches. While recognizing that qualified protection for newsgathering exists, the court denied each of plaintiffs' various claims, holding that "a school has the authority to protect its employees from unwanted and bothersome contact on school property." Id. at 269.

"Of course, implicit in the right to publish the news is the right to gather the news. . . . There is an undoubted right to gather news from any source by means within the law." Id. at 269 (citations omitted).

Cianci v. New Times Publ'g Co., 88 F.R.D. 562, 6 Media L. Rep. 2502 (S.D.N.Y. 1980).

Plaintiff, Mayor of Providence, Rhode Island, sued defendants, a defunct publishing company, for an allegedly libelous article discussing accusations by a woman that plaintiff had raped her. After defendants noticed the deposition of plaintiff, he moved for a protective order preventing improper publication or misuse of his deposition testimony or any related documents. The court held that defendants had a constitutionally protected right to access the deposition and answers, as they were part of the public court record.

"The Supreme Court has recognized that newsgathering by the press warrants some measure of First Amendment protection. 'Without some protection for seeking out the news, freedom of press could be eviscerated.'" Id. at 564, citing Branzburg, 408 U.S. 665, 681.

RHODE ISLAND

D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 13 Media L. Rep. 1769 (D.R.I. 1986).*

A photo-journalist sued a city civic center for prohibiting him from taking photographs during rock concerts. The court enforced the rule, because it had a legitimate purpose, was rationally related to this purpose, and was narrowly tailored.

"The Supreme Court has recognized that the concept of a free and unfettered media necessarily implies the existence of safeguards to insure access, for 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 1542, citing Branzburg, 408 U.S. at 681.

TEXAS

Houston Chronicle Publ'g Co. v. Kleindienst, 364 F. Supp. 719 (S.D. Tex. 1973).

Various government bodies prevented a newspaper publisher from interviewing two federal prison inmates. The court held that the plaintiff publisher had a newsgathering right protected by the First Amendment that was not outweighed by any governmental interest.

"We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out news, freedom of the press could be eviscerated." Id. at 725, citing Branzburg, 408 U.S. 665.

STATE COURTS

ARIZONA

KPNX Broad. Co. v. Superior Court, 678 P.2d 431, 10 Media L. Rep. 1289 (Ariz. 1984).

In a criminal case, a TV station, reporter, and sketch artist sought to vacate a judicial order requiring judicial pre-approval of sketches and a gag order limiting trial participants' contact with the media. The court held that the order regarding the sketches was unacceptable prior restraint, but that the gag order was proper, in light of the government and defendant's interest in a fair trial.

"We do not suggest 'that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 441, citing Branzburg, 408 U.S. at 681.

FLORIDA

Palm Beach Newspapers, Inc. v. Burk*, 504 So.2d 378, 13 Media L. Rep. 2087 (Fla. 1987).*

Media outlets sought access to pretrial discovery depositions and copies of unfiled depositions in an attempted murder case. The court ruled that the media have no First Amendment right to access these materials in criminal cases. Nevertheless, the court recognized that "'without the freedom to attend [criminal] trials . . . important aspects of freedom of speech and 'of the press could be eviscerated.'" Id. at 380 (citation omitted).

MASSACHUSETTS

***Ottoway Newspapers, Inc. v. Appeals Court**, 362 N.E.2d 1189 (Mass. 1977).*

A newspaper demanded disclosure of papers impounded in the course of litigation between a bank and the state banking commissioner. The court ruled that the papers in question were properly and reasonably impounded, "in aid of a clear legislative design." Id. at 1195-1196. However, in its ruling the court explicitly recognized that "the State must afford some protection for seeking out the news." Id. at 1195 (citations omitted).

NEW JERSEY

In re VV Publ'g Corp., 552 A.2d 661 (N.J. Super. Ct. App. Div. 1989).

The Village Voice sought to unseal transcripts of an open child abuse trial. The Voice had not attended the trial, wishing to base its research on the complete transcripts instead. The court determined that the Voice had a right to either receive a version of the trial transcripts that had been redacted to protect the identities of the children involved, or else receive an unredacted version of the transcripts, the identifying details of which the paper must guarantee not to reveal. "Without the freedom to attend criminal trials important aspects of freedom of speech and of the press could be eviscerated." Id. at 663 (citations omitted).

NEW YORK

Herald Co., Inc. v. Bd. of Parole of New York, 499 N.Y.S.2d 301 (N.Y. Sup. Ct. 1985).

Members of the news media challenged a Board of Parole policy that denied access to parole revocation hearings. The court ordered that such hearings remain open, "in the absence of compelling reasons justifying closure." Id. at 310.

"[W]e note the vital role which the press plays in our democratic process of self-government, for the press can gather and disseminate information which the average citizen, left to his own devices, would never acquire." Id. at 302 fn.2 (citations omitted).

"'[W]ithout the freedom to attend [criminal] trials . . . important aspects of freedom of speech and "of the press could be eviscerated." Branzburg, 408 U.S. at 681 (citations omitted).' The Chief Justice emphasized that the unarticulated right to attend criminal trials is implicit in the enumerated guarantees of free speech and free press." Id. at 304, citing Richmond, 448 U.S. at 581.

NORTH DAKOTA

***Dickinson Newspapers, Inc. v. Jorgensen**, 338 N.W.2d 72, 9 Media L. Rep. 2063 (N.D. 1983).*

Journalists petitioned to open a preliminary hearing the county court judge had closed to the public. The court found that the defendant's right to a fair trial and the fact that the general public is denied from such hearings overrode the news media's right of access in this instance.

However, the court recognized that "'[w]ithout some protection for seeking out the news, freedom of the press would be eviscerated.' . . . We realize the important role the news media has in the administration of justice. It not only makes public the events of the courts, its rulings and decisions, but also serves as a catalyst for openness and, as such, promotes fairness and trust." Id. at 77-78, citing Branzburg, 408 U.S. at 681.

OHIO

In re D.R., 624 N.E.2d 1120 (Ohio 1993).

A juvenile charged in a criminal case moved to exclude the press and the public from preliminary and amenability hearings. The court ruled that certain juvenile court hearings are neither presumptively open nor presumptively closed. In this instance, the court found that the public and the press had a right to access the preliminary and amenability proceedings.

"Without the freedom to attend [criminal] trials… important aspects of freedom of speech and 'of the press could be eviscerated.'" Id. at 1123 (citations omitted).

Ohio ex rel. The Repository, Div. of Thompson Newspapers v. Unger, 504 N.E.2d 37, 13 Media L. Rep. 2119 (Ohio 1986).

A newspaper filed writs of prohibition and mandamus following the closure to the public of two separate murder cases. The court found that the paper had been unconstitutionally barred from the trial proceedings, as there was no evidence that either trial judge had determined that closure was essential, or as narrowly-drawn as possible, or that no other alternatives to total closure had been considered.

"Without the freedom to attend [criminal] trials… important aspects of freedom of speech and 'of the press could be eviscerated.'" Id. at 40 (citations omitted).

"Freedom of the press includes the right to 'gather, write, and publish the news.'" Id. at 40, citing State, ex rel. Dayton Newspapers v. Phillips, 46 Ohio St. 2d at 467.

Dayton Newspapers, Inc. v. Phillips, 351 N.E.2d 127, 1 Media L. Rep. 1237 (Ohio 1976).

In response to a motion made by a defendant in a sensationalized kidnapping and murder case, a court barred the public from the proceedings and barred the press from reporting on the case. The Ohio Supreme Court held the ruling unconstitutional. The court granted standing to media petitioners and granted their writ of mandamus, holding that their "ability to gather the news concerning the trial [was] directly impaired or curtailed. The protected right to publish the news would be of little value in the absence of sources from which to obtain it." Id. at 129-30.

OKLAHOMA

Lyles v. Oklahoma, 330 P.2d 734 (Okla. Crim. App. 1958).

The court held that the trial court did not abuse its discretion in allowing television cameras in the court room during a criminal trial.

"No one will deny the long established right of the press in the United States to gather and disseminate news and information concerning every phase of human activity, together with the incidents pertaining thereto. This right makes the press the most potent servant of the people in protecting all rights against acts of tyranny, fraud, and corruption, as well as a most prolific medium of information and education. We are of the opinion that freedom of speech and press is not a discriminate right but the equal right of newsgathering and disseminating agencies, subject to the restrictions against abuse, and injurious use to individuals or public rights and welfare." Id. at 739.

PENNSYLVANIA

Pennsylvania v. Buehl, 462 A.2d 1316, 9 Media L. Rep. 1896 (Pa. Super. Ct. 1983).

A newspaper publisher appealed an order denying access to a pretrial hearing and denying request of a transcript of that hearing. The court held that a trial court must give notice to the public before closing any pretrial hearing, and that if a representative of the public (such as a member of the press) opposes that closure, his opposition will be heard by the trial court. Furthermore, before ordering closure, the trial court must consider alternatives to that closure; and if closure is still deemed necessary, the trial court must state on the record why any alternatives to closure were rejected. In deciding thus, the court held that the public and the media's right of access to pretrial criminal proceedings was as great as its right to criminal trial proceedings.

"Without the freedom to attend [criminal] trials… important aspects of freedom of speech and 'of the press could be eviscerated.'" Id. at 1320 (citations omitted).

***McLaughlin v. Philadelphia Newspapers, Inc.**, 348 A.2d 376 (Pa. 1975).*

A newspaper sought records pertaining to a prior confidential disciplinary hearing of a recently appointed district attorney. Recognizing that newsgathering is protected activity, the court held that the "freedom of the press is not violated" by denying the newspaper access to records that are denied to the general public.

"[T]he press, of necessity, has a limited constitutional right to gather the news." Id. at 379.

***McMullan v. Wohlgemuth**, 308 A.2d 888, 1 Media L. Rep. 2333 (Pa. 1973).*

Media outlets sought access to the state's welfare rolls. The court held that the media is not entitled to information not otherwise available to the public.

"[I]t is perhaps logical to assume that such a right to gather news 'of some dimensions must exist' if the First Amendment is to have realistic vitality. . . . 'A corollary of the right to publish must be the right to gather news. . . . News must not unnecessarily be cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.' . . . [W]e agree that such a right, emanating from the First Amendment, does exist." Id. at 896 (citations omitted).

TEXAS

***Houston Chronicle Publ'g Co. v. Crapitto**, 907 S.W.2d 99 (Tex. Ct. App. 1995).*

Members of the media challenged a judicial order excluding the press from trial proceedings. The court held that the trial judge had abused her discretion by excluding the media from the proceedings, as there was nothing on the record indicating such an exclusion was vital or necessary, or that alternatives to exclusion had been considered.

"The First Amendment, in conjunction with the Fourteenth, prohibits the government from 'abridging the freedom of speech, or of the press'… These freedoms are expressly guaranteed and share a common purpose of assuring freedom of communication… The Court concluded that the right of access to criminal trials may be seen as assured by the 'amalgam of the First Amendment guarantees of speech and press.'" Id. at 103 (citations omitted).

***Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. 1975).**

A publishing company challenged the city of Houston's refusal to allow it access to various law enforcement records. The court held that the press and the public had right of access to many types of police records. However, Texas law prohibited the publisher access to unredacted offense reports, personal histories, and arrest records that were either directly related to the investigation of a crime or destined for internal use.

"'We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of press could be eviscerated.'" Id. at 185-186, citing Branzburg, 408 U.S. at 681.

WASHINGTON

***Halquist v. Dep't of Corrections*, 783 P.2d 1065, 17 Media L. Rep. 1250 (Wash. 1989).**

A journalist opposed a prison policy allowing the press access to executions, but banning use of video. The court upheld the policy because the general public are also not allowed to use video, and also because the journalist's right is qualified, therefore not requiring the state to show a compelling reason to enforce the statute.

"News gathering is protected by the First Amendment." Id. at 1067.

***Seattle Times Co. v. Eberharter*, 713 P.2d 710, 12 Media L. Rep. 1794 (Wash. 1986) (en banc).**

A newspaper petitioned for a writ of mandamus to inspect a search warrant affidavit sealed by the trial court. The court found that the First Amendment did not require public access to search warrant affidavits in an unfiled criminal case. Because the circumstances involved a high-profile serial-killer investigation, the trial judge's decision was deemed reasonable. Nevertheless, the noted that "the Supreme Court has recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 712, citing Branzburg, 408 U.S. at 681.

"[I]n Justice Brennan's view, the structural role of the First Amendment would be emasculated without some protection for news gathering so that the informed debate vital to self-government can occur." Id. at 713, citing Richmond, 448 U.S. at 588 (Brennan, J., concurring).

WYOMING

Sheridan Newspapers, Inc. v. City of Sheridan, 66 P.2d 785 (Wyo. 1983).

A newspaper publisher sought access to certain categories of records maintained by the city's police department. Under state law, the police chief, as custodian of the records, may legitimately deny access to materials compiled for investigatory or prosecution purposes. The court held that the custodian could not deny public access to the records on a categorical basis, but must consider each request case-by-case and provide reasons for any denial.

'"The press has a preferred position in our constitutional scheme . . . to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people. . . . '[N]ews gathering is not without its First Amendment protections . . . for, without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 794 (citations omitted).

C. Privilege Cases

UNITED STATES SUPREME COURT

***Branzburg v. Hayes**, 408 U.S. 665, 1 Media L. Rep. 2617 (1972).*

Requiring journalists to appear and testify before federal and state grand juries, the Court observed: "[It is not] suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 681. Nonetheless, the First Amendment interests were found to be outweighed by law enforcement interests in the grand jury context: "[W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result." Id. at 690.

CIRCUIT COURTS

D.C. CIRCUIT

Zerilli v. Smith, 656 F.2d 705, 7 Media L. Rep. 1121 (D.C. Cir. 1981).

Plaintiffs claimed their constitutional and statutory rights were violated when transcripts of plaintiffs' telephone conversations were leaked to a local newspaper and used as the basis of a series of articles on organized crime. Plaintiffs moved to compel discovery to establish the source of the leaked information, and the reporter claimed a qualified privilege. The court found the reporter's First Amendment interest to outweigh the interest in compelled disclosure of sources, because plaintiffs had not established that they had exhausted alternative sources of information.

"[T]he press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. . . . [B]ecause news gathering is essential to a free press, it deserves some First Amendment protection." Id. at 122.

***Reporters Comm. for Freedom of the Press v. AT&T**, 593 F.2d 1030, 4 Media L. Rep. 1177 (D.C. Cir. 1978).*

Plaintiff newspaper publishers and press organization brought action against a telephone company, arguing that its practice of submitting journalists' long-distance billing records to law-enforcement officials without prior notice violates the First and Fourth Amendments. The court held that the First Amendment does not provide additional protections against good-faith criminal investigations beyond those provided by the Fifth and Fourth Amendments, and that giving the government access to evidence during good faith investigations does not abridge newsgathering rights.

However, the court recognized that newsgathering protections exist: "[T]he freedom to gather information guaranteed by the First Amendment is the freedom to gather subject to the general and incidental burdens that arise from good faith enforcement of otherwise valid criminal and civil laws that are not themselves solely directed at curtailing the free flow of information." Id. at 1051.

***Carey v. Hume**, 492 F.2d 631 (D.C. Cir. 1974).*

A union official sued journalist Britt Hume for libel and sought to discover the confidential sources used to prepare the story. Because the story was based only on confidential sources and that therefore there were no alternate means from which to obtain the information, the court ordered disclosure.

"The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Id. at 636.

1st CIRCUIT

***United States v. LaRouche Campaign**, 841 F.2d 1176, 15 Media L. Rep. 1502 (1st Cir. 1988).*

Defendants in a criminal action subpoenaed outtakes of a television network's interview with a key government witness. The First Circuit balanced the network's "very considerable," id. at 1182, First Amendment interests in newsgathering against the defendants' right to a fair trial and interests in the subpoenaed materials, and held that the outtakes would be viewed in camera.

"The [journalistic] interests named are 'the threat of administrative and judicial intrusion' into the newsgathering and editorial process; the disadvantage of a journalist appearing to be 'an investigative arm of the judicial system' or a research tool of government or of a private party; the disincentive to 'compile and preserve nonbroadcast material'; and the burden on journalists' time and resources in responding to subpoenas. There is some merit to these asserted First Amendment interests." Id. at 1182.

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 6 Media L. Rep. 2057 (1st Cir. 1980).

Plaintiff sued newspaper over an article alleging defects in its products, and moved to compel disclosure of the sources of the article. The First Circuit remanded the case, holding that the district court had improperly disregarded protections of newsgathering when balancing the interests at stake:

"[C]ourts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. In determining what, if any, limits should accordingly be placed upon the granting of such requests, courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information. . . . The Court's reference to a 'right to gather information' . . . seems inescapably to point to the kind of constitutionally sensitized balancing process stressed by Mr. Justice Powell in both Branzburg and Herbert." Id. at 595-596, fn. 13 (citations omitted).

2nd CIRCUIT

***United States v. Cutler**, 6 F.3d 67, 21 Media L. Rep. 2075 (2d Cir. 1993).*

A defense attorney in the trial of John Gotti was held in criminal contempt for violating a gag order by repeatedly commenting on the case to the press. During his subsequent prosecution, the attorney subpoenaed reporters and television stations, seeking the information gathered during his interviews. The court recognized that "newsgathering is not without its First Amendment protections," Id. at 72, but held that the attorney could discover certain testimony and unpublished notes of the reporters, in light of the fact that the information was not otherwise available.

"The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claims, and not obtainable from other available sources." Id. at 71 (citations omitted).

von Bulow by Auersperg v. von Bulow, *811 F.2d 136, 142, 13 Media L. Rep. 2041 (2d Cir. 1987).*

In connection with children's suit against Claus von Bulow for the murder of their mother, plaintiffs subpoenaed information obtained by defendant, an "intimate friend" of Claus von Bulow who had prepared a book manuscript based on the famous case. While the court held that a journalists' privilege exists, it found that defendant did not qualify as a journalist for the purpose of the privilege, because she did not demonstrate the "intent to disseminate [the information] to the public" when she first began to gather the information. Id. at 146.

"[T]he process of newsgathering is a protected right under the First Amendment, albeit a qualified one." Id. at 142.

United States v. Burke, 700 F.2d 70, 9 Media L. Rep. 1211 (2d Cir. 1983).

A defendant in a criminal racketeering case involving fixed college basketball games sought all documents used to prepare a Sports Illustrated article on the subject. The court recognized the reporter's and publisher's qualified privilege and denied access to the documents, because defendant could not make a "clear and specific showing" that the documents were "'highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.'" Id. at 77, citing In re Petroleum Prod. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982).

"We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering . . . the reporter's interest in confidentiality. . . . '[W]hat is required is a case by case evaluation and balancing of the legitimate competing interests of the newsman's claim to First Amendment protection from forced disclosure of his confidential sources, as against the defendant's claim to a fair trial.'" Id. at 77, citing United States v. Orsini, 424 F.Supp. 229, 232 (E.D.N.Y. 1976).

In re Petroleum Prod. Antitrust Litig., 680 F.2d 5, 8 Media L. Rep. 1525 (2d Cir. 1982).

Reporter appealed contempt conviction for refusing to disclose confidential sources used to prepare an article concerning ongoing petroleum antitrust litigation. The court vacated the conviction and remanded the case for further factual showing.

"The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources." Id. at 7.

Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972).

In a case involving a suit against Chicago real estate agents for "blockbusting," plaintiffs sought the source of information provided to a journalist, who, ten years prior, had written a related article. The court held that the reporter was protected from having to reveal his source.

"A representative democracy, such as ours, cannot exist unless there is a free press both willing and able to keep the public informed of all the news. The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information." Id. at 782 (citations omitted).

***Garland v. Torre**, 259 F.2d 545, 1 Media L. Rep. 2541 (2d Cir. 1958).*

In connection with a suit by Judy Garland against CBS for breach of contract and defamation, Garland sought the source of an allegedly libelous statement made to a newspaper reporter. The court found that the reporter had to reveal her source, as it went to the heart of Garland's claim.

"[W]e accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information entails an abridgment of press freedom by imposing some limitation upon the availability of the news." Id. at 548.

3rd CIRCUIT

***United States v. Cuthbertson**, 651 F.2d 189, 7 Media L. Rep. 1377 (3d Cir. 1981).*

In defending itself in a fraud suit, a fast-food chain issued a subpoena to CBS demanding reporters' notes, outtakes, and transcripts of interviews used to create a prior 60 Minutes television news story featuring the restaurants. The court held that CBS did not have to release the materials because the defendants failed to demonstrate that there was no other practical way to access the information.

"[C]ompelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. . . . [The] qualified privilege may be superseded by countervailing interests in particular cases, requiring district courts to balance the defendant's need for the material against the interests underlying the privilege." Id. at 191 (citations omitted).

United States v. Cuthbertson, 630 F.2d 139, 6 Media L. Rep. 1545 (3d Cir. 1980).

In defending itself in a fraud suit, a fast-food chain issued a subpoena to CBS demanding reporters' notes, outtakes, and transcripts of interviews used to create a prior 60 Minutes television news story featuring the restaurants. The court narrowed the scope of discoverable materials to specific interviews of witnesses that the government intended to call in the criminal proceeding, holding that defendants had demonstrated that was no other practical way to access the information.

"The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information that is the foundation for the privilege."

Riley v. City of Chester, 612 F.2d 708, 713 (3d Cir. 1979).

In connection with an injunction sought by a mayoral candidate against his opponent over alleged "surveillance," the Third Circuit held that the reporter who published the story disclosing the surveillance was protected by a reporters' privilege from having to divulge her sources.

"In Branzburg, the Court acknowledged the existence of First Amendment protection for newsgathering. The interrelationship between newsgathering, news dissemination, and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis." Id. at 714 (citations omitted).

8th CIRCUIT

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

The mayor of St. Louis sued Life Magazine for publishing a story implicating him in connections to organized crime, and sought to discover confidential sources used by the reporter. The court held that the sources were constitutionally protected.

"[T]o compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity." Id. at 993, fn. 10.

"[T]he free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality. Hence, . . . absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants." Id. at 992, fn. 9.

9th CIRCUIT

Shoen v. Shoen ("Shoen II"), 48 F.3d 412, 23 Media L. Rep. 1522 (9th Cir. 1995).

Plaintiffs in a defamation action concerning a notorious murder sought documents and testimony from the author of a book on the subject. The Ninth Circuit held that to overcome a journalist's privilege as to nonconfidential information, the litigant seeking the information must show the material is otherwise unavailable "despite exhaustion of all reasonable alternatives," is noncumulative, and is clearly relevant. In this case, the information was not discoverable, because plaintiffs could not establish its relevance.

"[W]e recognoze that routine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process. . . . The test we adopt must therefore ensure that compelled disclosure is the exception, not the rule." Id. at 415-16.

Shoen v. Shoen ("Shoen I"), 5 F.3d 1289, 21 Media L. Rep. 1961 (9th Cir. 1993).

Plaintiffs in a defamation action concerning a notorious murder sought documents and testimony from the author of a book on the subject. The Ninth Circuit remanded the case, holding that the author had standing to invoke the journalist's privilege, that the privilege applied even as to nonconfidential materials, and that plaintiffs had failed to provide a compelling reason for the information sought, in light of their failure to pursue other means for the information.

"'[T]he compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information that is the foundation for the privilege.' . . . [T]hese [] legitimate First Amendment interests [] must be balanced against the defendant's interests before disclosure may be ordered." Id. at 1294-95, (citations omitted).

***In Re Grand Jury Proceedings* (*Scarce v. United States*)** *5 F.3d 397, 21 Media L. Rep. 1972 (9th Cir. 1993).*

A graduate student was held in contempt for refusing to testify in front of a grand jury regarding confidential information that related to his scholarship. The Court of Appeals rejected the student's

claim to a "students' privilege," but recognized that "[n]ews gathering is not without its First Amendment protections." Id. at 400, citing Branzburg, 408 U.S. at 665.

***Farr v. Pitchess**, 522 F.2d 464, 1 Media L. Rep. 2557 (9th Cir. 1975).*

In violation of a court order prohibiting the release of proposed trial testimony in the Charles Manson murder cases, a party to the case released information to a reporter, who subsequently published a related news story. The reporter was held in contempt for refusing to disclose his source, and appealed his conviction. The Ninth Circuit affirmed the conviction, holding that the reporter's qualified privilege did not apply, because the right was outweighed by the due process right of the defendants.

"[T]he Supreme Court of the United States . . . appears to have fashioned at least a partial First Amendment shield available to newsmen who are subjected to various demands to divulge the source of confidentially secured information." Id. at 467.

10th CIRCUIT

***Silkwood v. Kerr-McGee Corp.**, 563 F.2d 433 (10th Cir. 1977).*

During the course of a lawsuit brought against a corporation for murder, the corporation sought discovery from a non-party witness who conducted interviews that he promised would remain confidential, while preparing a documentary film on the subject. Recognizing that that a journalists' privilege to protect a source and confidential information exists, the court nonetheless remanded the case, ordering the corporation to narrow its requests for information, and ordering the witness to reveal the nature of the confidential information, without revealing specific contents. Id. at 438.

"[A] privilege which protects information given in confidence to a reporter is important. . . . [W]ithout some protection for seeking out the news, freedom of the press could be eviscerated. . . . In holding that a reporter must respond to a subpoena, the Court is merely saying that he must appear and testify. He may, however, claim his privilege in relation to particular questions which probe his sources." Id. at 437 (citations omitted).

DISTRICT COURTS

ARKANSAS

***In re Grand Jury Subpoena American Broad. Cos., Inc.**, 947 F. Supp. 1314 (E.D. Ark. 1996).*

ABC moved to quash a grand jury subpoena from Independent Counsel seeking the transcript and video of an interview concerning the Whitewater scandal. The court acknowledged that "'[N]ewsgathering is not without its First Amendment protections,'" but denied the motion, because ABC did not allege, pursuant to Branzburg, that the subpoena was issued "in bad faith or as a means of press harassment, that the information sought by the subpoena has a remote and tenuous relationship to the subject of the investigation, or that the Independent Counsel does not have a legitimate need for the information." Id. at 1320, citing Branzburg, 408 U.S. at 681.

CALIFORNIA

***Dillon v. City and County of San Francisco**, 748 F. Supp 722, 18 Media L. Rep .1297 (N.D.Ca. 1990).*

Plaintiff in a police brutality action subpoenaed a television news cameraman to testify as to personal observations. While recognizing a qualified journalist's privilege, the court denied the motion to quash, holding that it was unaware of any "authority to support the proposition that such personal observations are privileged simply because the eyewitness is a journalist." Id. at 726.

"Justice White, in his plurality opinion for the Branzburg Court, observed that state legislatures were free to go beyond those protections provided newspapers by the first amendment and to fashion their own shield laws. It appears that both the legislature and the voters of California accepted this invitation." Id. at 725, fn. 3.

D.C.

United States v. Hubbard, 493 F. Supp. 202 (D.D.C. 1979).

A Washington Post reporter sought to quash defendants' subpoena of materials used in preparation for a book on the Church of Scientology. Recognizing the reporter's qualified privilege, the court quashed the subpoena because defendants could have sought the same information through alternative means.

"Newsgathering by the press is protected by a qualified First Amendment privilege." Id. at 204.

Zerilli v. Bell, 458 F. Supp. 26 (D.D.C. 1978).

Plaintiffs sought to compel a reporter to reveal the sources from the government that leaked excerpts from wiretap logs, that were published in the Detroit News. Balancing the constitutionally protected interests of the press against the interests of justice in the case, the court held that the sources were constitutionally protected.

"The compelled disclosure of journalist sources clearly impinges on the First amendment, as it undeniable jeopardizes a journalist's ability to obtain information on a confidential basis. It thus interferes with newsmen's right to gather and disseminate news and the public's right to receive news." Id. at 28 (citations omitted).

"Since the First amendment is a 'preferred' constitutional freedom, there must be a 'compelling' interest in order to permit a countervailing right to take precedence over the journalist's right to protect confidential sources or the editorial process." Id. at 28.

Democratic Nat'l Comm. v. McCord, 356 F. Supp. 1394, 1 Media L. Rep. 2680 (D.D.C. 1973).

Media outlets and reporters moved to quash subpoenas directed to information they possessed about the Watergate scandal. The court held that the reporters' qualified privilege protected the information, in light of the fact that movants had not shown that alternative sources of information had been exhausted, or that the information requested was material to the case.

"'[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 1398, citing Branzburg, 408 U.S. at 681.

"A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both." Id. at 1399 (citation omitted).

***United States v. Liddy**, 354 F. Supp. 208 (D.D.C. 1972).*

A newspaper moved to quash a subpoena requiring production of interview notes connected to the Watergate scandal. While recognizing a limited newsgathering privilege, the court denied the motion to quash.

"[I]t may be said that a right to gather news has been explicitly acknowledged." Id. at 214, citing Branzburg, 408 U.S. at 681.

FLORIDA

United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982).

A newspaper and reporter sought to quash a subpoena requiring the reporter to testify regarding work product. Subpoena quashed.

"The First Amendment to the Constitution of the United States requires that a reporter be immune from subpoenas in criminal cases regarding his or her work product unless the party seeking the reporter's testimony first makes a showing of sufficient interest and need to overcome the reporter's constitutional privilege, and then only under appropriate safeguards." Id. at 296.

Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975).

Plaintiff subpoenaed a reporter to testify and produce documents in a civil case. The court denied the motion.

"[T]he paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighs the subordinate interest served by the liberal discovery provisions embodied in the Federal Rules of civil procedure." Id. at 1300.

ILLINOIS

United States v. Lopes, 1987 WL 26051, 14 Media L. Rep. 2203 (N.D. Ill. 1987).

Defendant in a criminal suit sought NBC videotape outtakes from an interview between defendant and a local reporter. The court granted NBC's motion to quash the subpoena because defendant did not exhaust alternate sources and did not establish how the outtakes were material to her defense.

"Since Branzburg, federal courts have with near uniformity recognized a qualified privilege for the protection of reporters' notes and other source materials . . . . [A]t least in civil cases, it extends to all underlying unpublished material gathered in preparation for a news story or broadcast regardless of whether the source of the material is confidential." Id. at 1 (citations omitted).

"[T]he important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases, since reporters are to be encouraged to investigate and expose evidence of criminal wrongdoing." Id. at 1, citing United States v. Burke, 700 F.2d 70, 77 (3d Cir. 1983).

Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating, 455 F. Supp. 1197, 4 Media L. Rep. 1342 (N.D. Ill. 1978).

Defendant in an antitrust suit sought the sources for a newspaper article on the subject. The court quashed the subpoenas, holding that defendant had not shown that the information was material, crucial, and unavailable through other sources.

"[T]he news gathering process qualifies for First Amendment protection . . . . [T]he compelled disclosure of a news source or source material places a restraint on the news gathering process, implicates and involves an infringement on freedom of the press." Id. at 1202.

NEW JERSEY

United States v. Nat'l Talent Assoc., Inc., 1997 WL 829176, 25 Media L. Rep. 2550 (D.N.J. 1997).

During the government's investigation of NTA, it sought to compel NBC, a non-party, to produce "outtakes" from an investigative report it had aired on NTA's sales practices. The court held that the subpoena should be quashed, because the government showed no compelling reason why it could not pursue non-privileged sources for the same information.

"The Court must be mindful of 'the essential role played by the press in the dissemination of information and matters of interest and concern to the public,' and should not too hastily pierce the constitutionally based privilege accorded this process." Id. at *6 (citation omitted).

Damiano v. Sony Music Entertainment, Inc., 168 F.R.D. 485 (D.N.J. 1996).

A songwriter suing Bob Dylan and his recording company for copyright infringement sought documents and a recorded interview with Dylan from the Associated Press. The court granted motion for a protective order as to the interview tape.

"The court has explained the reporter's privilege as a natural extension from the principle that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 495, citing Branzburg, 408 U.S. at 681.

NEW YORK

United States v. Sanusi, 813 F. Supp. 149, 21 Media L. Rep. 2202 (E.D.N.Y. 1992).

A defendant in a credit card fraud case sought production of a videotape prepared by news network employees. While the court granted the subpoena in part, it also limited the subpoena, recognizing that a constitutionally protected newsgathering privilege requires a balancing of interests.

"The existence of a limited newsgathering privilege—applicable in both civil and criminal proceedings, and to nonconfidential sources—has been settled in the Second Circuit for many years." Id. at 153 (citations omitted).

United States v. Marcos, 1990 WL 74521, 17 Media L. Rep. 2005 (S.D.N.Y. 1990).

CBS sought to quash a subpoena from the government ordering disclosure of unbroadcast portions from a television interview with Imelda Marcos. The court quashed the subpoena because the government was unable to show that the broadcast excerpt was "necessary or critical to its case." Id. at *4.

"[E]ffective gathering of newsworthy information in great measure relies upon the reporter's ability to secure the trust of news sources. Many doors will be closed to reporters who are viewed as investigative resources of litigants. The hindrance of free flow of information which accompanies this perception is inimical to the First Amendment." Id. at 2.

United States v. Karen Bags, Inc., 600 F. Supp. 667 (S.D.N.Y. 1985).

A defendant in a criminal contempt action tried to compel 60 Minutes to release outtakes of an interview with a trial witness. The court held that there was no compelling evidentiary need to justify discovery into the editorial process of a third-party media outlet.

"The resulting possibility of a chill on a news broadcaster's willingness to interview trial witnesses or otherwise report and editorialize on completed court proceedings vital to the public interest, in the analytical fashion by the reporter's duty to the public, presents an impermissible risk to First Amendment freedoms." Id. at 670.

United States v. Orsini, 424 F. Supp. 229, 2 Media L. Rep. 1446 (E.D.N.Y. 1976).

A criminal defendant subpoenaed sources used by a Newsweek reporter in preparation for a related article that he argued would show he was deprived of due process when apprehended. The court quashed the subpoena, holding that the information sought was "wholly irrelevant and immaterial" to defendant's case. Id. at 232.

"[W]hat is required is a case by case evaluation and balancing of the legitimate competing interests of the newsman's claim to First Amendment protection from forced disclosure of his confidential sources, as against the defendant's claim to a fair trial which is guaranteed by the Sixth Amendment." Id. at 232.

Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975).

A plaintiff in a products liability suit against a drug manufacturer sought to compel the publisher of a medical newsletter containing a related article to disclose the name of the author and provide related information. The court denied disclosure because plaintiff had not shown that the information contained in the newsletter was otherwise unavailable, and because requiring disclosure of the writer's identity would chill the newsletter's future ability to get information from physicians who would prefer to remain anonymous.

"[T]he language of the [Branzburg] decision reflects a concern for unfettered newsgathering as a function of the First Amendment." Id. at 83, (citation omitted).

PENNSYLVANIA

***Doe v. Kohn Nast & Graf, P.C.**, 853 F. Supp. 147, 22 Media L. Rep. 1817 (E.D.Pa. 1994).*

Defendant law firm accused of violating the Americans with Disabilities Act by firing an attorney for being HIV positive sought to compel NBC to produce outtakes from videotaped interviews with plaintiff for impeachment purposes. The court, based on what it considered to be a highly fact specific balancing of interests, held that the outtakes were discoverable, because they were relevant as evidence and otherwise unavailable.

"[T]he First Amendment to the Constitution affords some protection for the process of news gathering. . . . The Court of Appeals of this Circuit has recognized a qualified privilege for journalists to protect confidential sources and other information." Id. *at 148 (*citation omitted*).*

In re Scott Paper Co. Securities Litig., 145 F.R.D. 366, 20 Media L. Rep. 2164, 20 Media L. Rep. 2230 (E.D. Pa.1993).

Plaintiffs in a securities fraud action sought to discover information from a nonparty company that rates and publishes information on the creditworthiness of public corporations. The court held that the nonparty could claim a qualified newsgathering privilege and refuse to testify, noting that, "the Court of Appeals of this circuit has recognized a qualified privilege for journalists to protect confidential sources in order to preserve the journalist's ability to obtain information." Id. at 368, citing Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir.1979). The court also noted that the privilege had been expanded to "protect a reporter's notes, and other unpublished information, finding that compelled disclosure of such material would impede the news gathering and editorial processes, and threaten the 'free flow of information which is the foundation for the privilege.'" Id. at 368 (citation omitted).

Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 18 Media L. Rep. 2369 (E.D. Pa. 1990).

Plaintiff police office sought an order compelling defendant newspaper to reveal the source of a confidential police report involving a domestic abuse complaint from plaintiff's wife, that the newspaper used as the basis for a published article. Holding that, "First Amendment rights are fundamental . . . . In contrast, the [Supreme] Court has embraced privacy rights more tentatively," the court determined that the newspaper's interests outweighed the plaintiffs' privacy interests in this instance. Id. at 1532.

"Journalists are undeniably protected, to some degree, when they seek information. . . . reporters are entitled to some protection for 'routine newspaper reporting techniques.'" Id. at 1525.

TEXAS

Mise v. McGraw-Hill, 82 F.R.D. 475, 5 Media L. Rep. 1156 (S.D. Tex. 1979).

Plaintiff in a defamation action against a magazine publisher moved to compel defendant to disclose the identity of a confidential source used in preparation of the article. The court held that "the news-gathering process, including confidentiality of news sources, enjoys First Amendment protection in a civil suit to the extent that the court must balance competing interests in light of the circumstances of a particular case in determining whether compulsory disclosure is justified. . . . Even those courts which have ordered disclosure of a confidential source have done so after carefully balancing these equally compelling and competing interests." Id. at 475-76 (citations omitted).

STATE COURTS

CALIFORNIA

Dalitz v. Penthouse Int'l, Ltd.*, 168 Cal. App. 3d 468, 11 Media L. Rep. 2153 (Cal. Ct. App. 1985).*

In a libel action against a publisher, the publisher cross-claimed for libel, and the court dismissed the cross-claim as sanction for failure of the publisher's reporters to disclose confidential sources. The court held that sanctions were proper, as the publisher was using the privilege as "a sword rather than a shield." Id. *at 480.*

"[T]he [Supreme] Court recognizes at least some degree of constitutional protection for newsgatherers' confidences. . . . '[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 476-77 (citation omitted).

FLORIDA

***Florida v. Davis**, 720 So. 2d 220, 26 Media L. Rep. 2457 (Fla. 1998).*

Defendant convicted of aggravated assault with a motor vehicle moved to compel discovery from a newspaper, which had interviewed the alleged victim in a related story. While recognizing that a qualified reporter's privilege protects both confidential and nonconfidential information gathered, the Supreme Court of Florida held that the lower court erred in finding that a qualified reporter's privilege existed in the present case, because the defendant's interest in a fair trial outweighed the reporter's interest in the privilege.

"[T]he First Amendment [] extend[s] to news gathering activities…" Id. at 223 (citation omitted).

***CBS, Inc. v. Jackson**, 578 So. 2d 698, 18 Media L. Rep. 2110 (Fla. 1991).*

Defendant in a drug prosecution sought to discover from CBS untelevised video footage of his arrest and time spent in police custody, because the deposition of the arresting officer did not contain a conclusive retelling of the arrest. The court held that Branzburg recognized newsgathering protection and a qualified reporters' privilege under the First Amendment, however, it found that CBS was not entitled to this protection because the information requested was not otherwise available and the request did not implicate any sources of the information. Id. at 699-700.

***Miami Herald Publ'g Co. v. Morejon**, 561 So. 2d 577, 17 Media L. Rep. 1920 (Fla. 1990).*

A reporter challenged a subpoena issued in connection with his having personally witnessed defendant's arrest for trafficking cocaine. After balancing newsgathering rights with defendant's Sixth Amendment rights, the court denied the reporter's motion to quash the subpoena, holding that, "[w]hile we are mindful of the importance of a vigorous and aggressive press, we fail to see how compelling a reporter to testify concerning his eyewitness observations of a relevant event in a criminal proceeding in any way 'chills' or impinges on the newsgathering process." Id. at 580-81.

***Carroll Contracting, Inc. v. Edwards**, 528 So. 2d 951, 15 Media L. Rep. 2121 (Fla. Dist. Ct. App. 1988).*

Defendant accused of causing an automobile accident sought photographs of the accident site from a newspaper photojournalist. Although the court acknowledged that "news gathering does qualify for some First Amendment protection," it found that the defendant showed sufficient necessity to overcome the qualified privilege. Id. at 953.

***Miami Herald Publ'g Co. v. Morejon**, 529 So.2d 1204, 15 Media L. Rep. 1834 (Fla. Dist. Ct. App. 1988).*

A reporter challenged a subpoena issued in connection with his having personally witnessed defendant's arrest for trafficking cocaine. The court held that because no confidential source was at issue, the reporter's qualified privilege was not available.

"[T]he underlying rationale for recognizing . . . a qualified privilege is that 'news gathering [is] an essential precondition to [the] dissemination of news,' and that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 1206 (citations omitted).

Tribune Co. v. L.R. Huffstetler, 489 So.2d 722, 12 Media L. Rep. 2288 (Fla. 1986).

A reporter was held in contempt for refusing to reveal the source of an article concerning a suit filed with the ethics commission against two county commissioners. The court held that the reporter was protected by a qualified privilege, despite a statute prohibiting the disclosure of information related to such hearings, because "the societal interests underpinning most criminal statutes are not present in the instant statute." Id. at 724.

"[T]he application of the reporter's privilege in a given case involves striking a proper balance between constitutional and societal interests." Id. at 723.

Gadsden County Times, Inc. v. Horne, 426 So. 2d 1234, 9 Media L. Rep. 1290 (Fla. Dist. Ct. App. 1983).

The court held that a discovery order requiring a reporter to disclose a confidential source of an allegedly defamatory article was improper, as the order failed to demonstrate a compelling need for the information.

"[Defendants] argue that use of confidential sources is central to the news gathering and reporting process and that forced disclosure of such sources will substantially impair the effectiveness of reporters in the future. . . . We agree. . . . [W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 1236 (citations omitted).

Morgan v. State of Florida, 337 So. 2d 951, 1 Media L. Rep. 2589 (Fla. 1976).

A newspaper reporter was convicted for contempt for her refusal to disclose the source of her copy of a grand jury indictment summary. The court did not require her to reveal the source of the summary, because there was no showing that the person implicated in the indictment would be harmed or prejudiced.

"[I]mportant public interests, as well as private interests, may be served by publication of information the press receives from confidential informants. The United States Supreme Court has now sanctioned the view that the First Amendment affords some protection for seeking out the news." Id. at 953.

***In re Tierney**, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976).*

A news reporter was held in contempt for her refusal to answer grand jury questions regarding how she obtained leaked grand jury testimony. The court recognized that "newsgathering is not without its First Amendment protections," but held that Branzburg established that news reporters are not entitled to evade grand jury proceedings based on a qualified privilege. Id. at 44 (citations omitted).

MASSACHUSETTS

***In re Roche**, 411 N.E.2d 466, 6 Media L. Rep. 2121 (Mass. 1980).*

A television reporter was held in contempt for refusing to reveal confidential sources of information at a deposition. The court upheld the conviction, holding that the interests of justice outweighed the

reporter's constitutionally protected right to gather news, and that in light of the information already disclosed by the reporter, any harm to his First Amendment rights would be "negligible." Id. at 635.

"Some protection for [] information gathering must exist if the First Amendment is to serve adequately its central purpose of facilitating intelligent decisions by a self-governing people. . . . Furthermore, we have no doubt that in certain circumstances the extension of a pledge of confidentiality may significantly aid in the process of gathering information." Id. at 632 (citations omitted).

MICHIGAN

***Marketos v. American Employers Ins. Co**., 460 N.W.2d 272, 18 Media L. Rep. 1177 (Mich. Ct. App. 1990).*

A newspaper moved to quash a subpoena served by an insurance company that sought production of unpublished photos of a fire, taken by a newspaper photographer. The court held that no privilege existed for unpublished nonconfidential materials collected during the newsgathering process. Still, the court stated that a qualified privilege does exist for some confidential materials, in conformity with the First Amendment, the state constitution, and Michigan's press shield law.

NEW JERSEY

Dairy Stores, Inc. v. Sentinel Publ'g Co., Inc., 465 A.2d 953 (N.J. Super. Ct. Law Div. 1983).

A bottled-water company unsuccessfully sued a reporter, her newspaper, and source, for defamation over an article accusing the company of falsely claiming that its product was pure spring water. The court held that the source of a reporter's information is protected by the same "actual malice" standard as the media defendant; otherwise, potential sources of information might be frightened into staying silent, thereby hobbling the newsgathering process.

"[N]ewsgathering by the press enjoys First Amendment protection." Id. at 962.

Maressa v. New Jersey Monthly, 445 A.2d 376, 8 Media L. Rep. 1473 (N.J. Sup. Ct. 1982).

In a defamation suit based on an allegedly libelous magazine article, a senator sought more specific interrogatory answers from defendant reporters that would reveal confidential information and sources. The court held that newsgathering is constitutionally protected, and that New Jersey's shield law conferred an absolute newsperson's privilege to conceal confidential sources in a civil action, assuming no other constitutional rights are at stake.

"Unlike most other privileges, however, a newsperson's privilege has a constitutional foundation. . . . [T]he United States Supreme Court has unanimously recognized that a reporter's gathering of information receives some First Amendment protection." Id. at 380.

***In re Farber**, 394 A.2d 330, 4 Media L. Rep. 1360 (N.J. 1978).*

The New York Times and its reporter were held in contempt for refusing to comply with subpoenas issued during a murder trial that would require revealing confidential information and sources. In affirming the convictions, the court held that in light of the Supreme Court's refusal in Branzburg to allow a reporter to avoid testifying before the grand jury, a reporter must likewise appear at a criminal trial "on behalf of a defendant who is enforcing his Sixth Amendment rights." Id. at 268-69.

"[T]hose who gather and disseminate news are not without First Amendment protections. . . . They include, among others . . . to seek out news in any legal manner and to refrain from revealing its sources except upon legitimate demand." Id. at 267 (citations omitted).

NEW YORK

***In re Sullivan**, 635 N.Y.S.2d 437 (N.Y. Sup. Ct. 1995).*

A criminal defendant sought to compel disclosure of information from a journalist who had witnessed the defendant's interrogation. The journalist was found to have a qualified, not absolute, privilege regarding the information in question, as it was not confidential in nature. The defendant was able to prove that the information requested was highly material and relevant, critical to his claim or defense, and unavailable from any other source, so the journalist was compelled to comply with the subpoena.

Nevertheless, the court recognized that "[f]reedom of the press is one of the foundations upon which our form of government is based. . . . [T]he threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information." Id. at 439 (citations omitted).

"The newsgathering privilege reflects the vital and constitutionally protected functioning of an independent and vigorous press. Most importantly, 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Id. at 440, citing Branzburg, 408 U.S. at 681.

OKLAHOMA:

Taylor v. Miskovsky, 640 P.2d 959, 7 Media L. Rep. 2408 (Okl. Sup. Ct. 1981).

A reporter appealed a contempt conviction based on his refusal to answer questions in a deposition related to a senatorial candidate's defamation allegations against the reporter's employer, a publishing company. The court found that the reporter was protected from revealing his sources by a qualified privilege under the First Amendment and state statutes, because the senatorial candidate could not demonstrate that the information sought was relevant to a significant issue in his case.

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"[W]e find that the legislature was within First Amendment limits in its framing of the newsman's privilege statute." Id. at 962.

TEXAS

Dallas Morning News Co. v. Garcia, 822 S.W.2d 675, 19 Media L. Rep. 2033 (Tex. App. 1991).

A newspaper publisher sought to rescind an order compelling it to disclose confidential sources used to write allegedly libelous news articles about plaintiffs' involvement in illegal drug trafficking. The court held that the publisher was protected by a newsgatherer's qualified privilege.

"The [Branzburg] court, however, explicitly recognized that news gathering is not without first amendment protection." Id. at 678, citing Branzburg, 408 U.S. at 707.

"Given the overriding importance to our society of a free press, we feel it is important to emphasize that our decision today is based on both the First Amendment of the federal constitution and on article I, section 8 or our own constitution." Id. at 678 (citations omitted).

WASHINGTON

Senear v. Daily Journal American, 618 P.2d 536, 6 Media L. Rep. 2070 (Wash. Ct. App. 1980).

A newspaper defendant in a libel case appealed an order to disclose confidential sources used to write the article at issue. The court held that a qualified privilege protects newsgatherers at the discovery stage of civil cases.

"To say that there is no absolute privilege is not to say there is no privilege or that no heightened standard of necessity and relevance must be met prior to disclosure of a newsperson's confidential sources. . . . [N]ews gathering is not without its First Amendment protections." Id. at 539, 542 (citations omitted).