



# WISCONSIN LAWYERS' GUIDE TO THE NEWS MEDIA

Published by the  
Media-Law Relations Committee  
State Bar of Wisconsin



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**Wisconsin Constitution: Article I, Section 3**

Free speech; libel. Section 3. Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions or indictments for libel, the truth may be given in evidence, and if it shall appear to the jury that the matter charges as libelous be true, and was published with good motives and for justifiable ends, the party shall be acquitted and the jury shall have the right to determine the law and the fact.

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## Preface

For the bar and the news media to work together successfully, it is apparent each must better understand the practices and procedures of the other. In 1979 the Media-Law Relations Committee of the State Bar of Wisconsin completed *A Wisconsin News Reporters' Legal Handbook*, covering judicial procedures and legal terminology, for use by reporters, editors and journalism teachers and students. The publication was a step forward in educating reporters, editors and news directors in such fundamentals as court procedure, fair trial and free press principles and guidelines, and the Wisconsin rules governing electronic media and still photography coverage in courts. The handbook has been updated in 1987, 2003 and 2005.

Similarly, it is apparent to the committee that many in the legal profession do not fully understand the constitutional rights of the media and the way they function.

Many lawyers and judges still raise these basic questions:

- Why are reporters concerned with my client?
- Why are reporters always under deadline pressure?
- Why do they want to bring their television cameras into

the courtroom?

- When are news conferences a good idea?
- When does the paper go to press?

The Media-Law Relations Committee recognized that lawyers and judges have hundreds of similar questions about the news media. Understanding that not every question could be answered, the committee developed and now has revised this handbook to respond to some of these concerns.

*A Wisconsin Lawyer's Guide to the News Media* is designed as a reference manual for members of the bar, and the committee hopes it will find its way onto desks and into libraries of law firms and judicial offices throughout the state.

The committee wishes to thank the State Bar of Wisconsin for its support of this project. The project had its beginning under attorneys Jeffrey B. Bartell and James P. Brody and continued under the leadership of attorney Brady C. Williamson, chair of the State Bar Media-Law Relations Committee.

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Photos by Mark Hertzberg, courtesy of The Journal Times, Racine

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## Chapter 1

# The Law-Media Relationship

### How the News Media Perceives Lawyers

Legal issues and controversies, both criminal and civil, capture public interest and merit media attention. Consequently, journalists and lawyers have frequent contact. Depending on the circumstances of that contact, journalists' and lawyers' perceptions of one another probably run the gamut from "great" to "grim." Yet, to generalize about the relationship between journalists and lawyers is to ignore exceptions. In many cases, lawyers and journalists, over time, have built relationships based on trust, mutual respect and recognition of the different roles they play in a democratic society. However, these different roles often do create certain tensions that put lawyers and journalists into adversarial positions.

In the general perception of journalists, lawyers probably fall into four broad categories:

1. Most lawyers seldom have direct dealings with the media. Their cases, whether civil or criminal, often may not be what the media consider newsworthy. These lawyers can cause problems for themselves and for the media when thrust into the limelight by an unusual case. The attorney's lack of experience with journalists and subsequent effort to avoid them may be perceived as uncooperative or arrogant. When a reporter is assigned to cover a case and a lawyer refuses to provide reasonable and legally permissible information, the reporter feels an obligation to get that information in some other way.

2. There are those lawyers who have occasional or even frequent contact with the media and understand their needs. Without ignoring their professional responsibilities, these attorneys not only aid their clients but contribute to an informed public by helping to explain the legal system and its language and procedures. Not all journalists are knowledgeable and experienced in covering the courts and interpreting the law. Therefore, everyone benefits from whatever cooperation is possible.

3. There are attorneys who believe that the media have no right to any information from them. They believe their only responsibility is to the client and that the public interest is someone else's business. They do not respond to legitimate news media questions and believe the media are an intrusion in the legal system.

4. Finally, other attorneys may try to make the media unwilling, and sometimes unwitting, allies for whatever serves their own interests. Such attorneys are knowledgeable about what captures media attention and can "manipulate" journalists skillfully. Reporters who recognize the manipulation are in an uncomfortable position. They can follow a good, though self-serving lead, or they can reject it and risk losing a good story.

This type of attorney is an exception, but there are enough of them to make other lawyers uneasy and responsible reporters suspicious.

### **The Ideal Relationship**

Lawyers should be more aware than most people of the importance of freedom of the press in a democratic system of government. Most lawyers are exposed, through constitutional law courses, to the legal significance of the rights of the news media. The lawyer must acknowledge and, consistent with ethical client representation, support the news gatherer's efforts to obtain news, while the journalist must keep in mind that the lawyer's first responsibility, with few exceptions, is to the client.

The best relationship between an attorney and a reporter is one in which each respects the obligations and professionalism of the other. Clearly, this requires that each pursues professional responsibility with dedication to justice, each adheres to high ethical standards and, to the extent allowed by their roles and clients, each bears in mind the common purpose of the public interest.

Perhaps, then, the ideal relationship between lawyer and reporter is one in which a lawyer makes a good faith effort to provide the reporter with the desired information unless disclosure will harm the client or otherwise breach his or her code of professional responsibility. An unwavering posture of "no comment" will rarely serve the best interests of the client, and often it will prevent the news media from informing the public.

### **Reporters' Responsibilities for Fairness and Balance**

Reporters and editors have a responsibility to give readers and viewers accurate, balanced and unbiased information. They believe it is their obligation to provide the facts and let the public draw the conclusions. Responsible reporters seek the views of all sides and present issues fairly and in perspective.

In reporting civil or criminal matters, reporters should take special care not to sway public opinion by failing their obligation to achieve balance. The assumption, of course, is that all relevant facts are available to the news media. If this is not so, and the reporter fails to present both sides, the one who refused to provide information has no legitimate complaint about lack of balance.

Reporters are trained to question their informational sources. An old newsroom adage goes, "If your mother tells you she loves you, check it out." Were they to accept every bit of information presented to them, the media would offer the public a dearth of fact and a wealth of fiction. It is a reporter's job to challenge, to pursue and confirm facts, and to dig beneath and beyond the obvious and superficial.

### **Lawyers as Sources: The Need for Cooperation**

Responsible journalists seek out lawyers for information and explanation. If lawyers are unwilling sources, the media cannot fairly be blamed for the results. A tight-lipped bar and an ill-informed press leave the public in a “catch 22” when approaching or observing the courtroom.

There is much information a lawyer properly can provide. (See Chapter 3.) For example, a lawyer should be willing to explain legal procedure, statutes and appellate and trial court decisions and, without elaboration, to provide information in the public record. Additionally, a lawyer properly can answer many of the reporter’s who, what, where, when and why questions and need not respond with silence.

Conversely, the journalist should become knowledgeable about ethical prohibitions that might prevent the lawyer from answering every question. (See Chapter 4.) The lawyer, of course, should be willing to furnish information about ethical constraints. Further, since an important function of the legal profession is to educate people to recognize legal problems, lawyers should be receptive to invitations to write for the press and participate in television and radio forums. Without cooperation, the public is the loser.





## Chapter 2

# Media Operations Primer

### The Print Media

A daily newspaper, in many respects, is a 24-hour operation. The creation of each day's newspaper often begins early in the morning and stretches late into the night, or over a multi-day period. As more and more newspapers devote resources to their Web sites, constant updates of breaking news and other information are becoming the norm.

Each day's paper is a completely new product. Major changes also are made from edition to edition, with the content of different editions usually targeted to specific geographic areas. In some cases, the planned content of a front page can change several times during the day, depending upon breaking news. Headlines understandably are a common source of complaint from attorneys and judges. Headlines are written by a 'page editor' or 'copy editor' who is twice removed from the actual story, and not by the reporter. He or she writes the headline based on his or her understanding of the story, within the constraints of the exact column space allotted for the story. It is a challenge to accurately sum up complex stories in a short headline.

A newspaper's editorial department usually is led by the editor or executive editor, who is responsible for the paper's news content, coverage and editorial policy. This person rarely is involved with day-to-day news coverage except on smaller papers. The managing editor reports to the editor and deals more directly with content, but in a supervisory capacity. Since the editor and managing editor are in charge of the operations, they are the logical persons to contact in case of a dispute or concerns about accuracy and fairness. The city, metropolitan or news editor reports to them.

To help the lawyer better understand the complexities of producing a daily newspaper, this section will summarize part of the typical 24-hour period at a morning newspaper. (The processes are similar at an afternoon newspaper, but a shorter time span is involved because of production deadlines for afternoon distribution.)

Most newsroom activity begins before 8 a.m. (before 5 a.m. at some evening papers) with the arrival of the person responsible for making assignments, coordinating coverage and supervising the local reporting staff during the day. While this person's title may vary, she or he usually functions at the city desk, metropolitan desk or news desk. This editor "opens the shop," picking up where the late-night crew ended, planning news coverage and getting the first shift of reporters started on the day's assignments. This is the heart of the local news operation.

On an afternoon paper, most reporters work day shifts; on a morning paper, many work at night. This permits coverage of news and events occurring until 10 or 11 p.m. and even later if the event is of major importance. The day-shift reporters on a morning newspaper are primarily those who cover government activities, including the courts. After these reporters check with the day city or assignment editor, they report to their "beats" or "runs." The court reporter will cover trials and hearings at the courthouse and check on filings of lawsuits and other legal proceedings.

Some beat reporters work from pressrooms in government buildings and stay in touch with the city desk by phone. Sometimes they use a portable computer terminal that connects them with the newsroom. They also may return to the newsroom at the end of the day to write some of the stories.

Some reporters assigned to cover a court or legal story do not have any significant familiarity with the law and court procedure. While some newspapers have reporters assigned fulltime to a court 'beat,' at other newspapers the courts might be covered by somebody with multiple responsibilities. And, when a good court beat reporter is on vacation, his or her backup may be somebody with less experience. Sometimes when a court story breaks on deadline, the city editor has no choice but to give the assignment to the nearest available reporter. Less experienced reporters may be more likely to use information that comes to them, rather than dig for information. That can result in one side of the story being more prominently presented. Competition can drive some media outlets to rush a story into print or on air sooner than might have otherwise happened. Reporters and supervising editors loathe telling their managing or executive editor why the competition beat them to the punch.



The city, metropolitan or news editor and assistants will read and edit these local news stories. Copy editors check for grammar and style and write headlines. The news editor places the stories in the news pages.

Deadlines rule the news business and, in a way, the deadline process works backward. If the goal is to have the morning newspaper at each reader's doorstep by 6:30 a.m., distribution times will vary with distance from the printing plant. Therefore, press times are staggered. The less delivery time involved, the later that edition of the paper can go to press. Obviously, the latest editions carry the latest news. However, for the state's largest daily newspapers, edition content also varies geographically. The earlier (state or suburban) editions contain more news originating from more remote areas, while the later (city) editions contain more local news. Typically, the presses might start running at midnight for a city edition on a morning paper, or around noon or early afternoon for an evening paper.

As distribution time determines press time, so press time determines news deadlines. Before the press can start, stories must be written and edited, pages designed, headlines written, type set, photos developed and production completed. From reporter to press, the process can take several hours.

In special circumstances, such as election nights and major late-breaking stories, deadlines may be delayed to get important news into the paper. In many Wisconsin communities, the local weekly newspaper is the primary source for local news and information. While many of the same descriptions of news operations apply, more often these newsrooms are more thinly staffed. Reporters can be less experienced – but also expert multi-taskers, moving from news reporting to photography to high school sports writing, even to occasional paper delivery.

Deadline cycles for weeklies typically focus on the midweek period. Reporters and editors are busiest on Tuesdays and Wednesdays, less stressed on Fridays.

While the community weekly – or small daily – newspaper may seem outwardly small and less significant than a regional daily newspaper or broadcast outlet, its reach and influence on local citizens should not be underestimated. The community newspaper can be heavily relied upon by citizens for the delivery of essential local information, from city council or school board decisions to high school football results or community calendars – or an arrest or the filing of lawsuit.

Lawyers need to be aware of these constraints in releasing news. Check with your local editors to learn their deadlines.

Deadlines are relentless and predictable. Space, though, is a daily variable based on the number and location of ads, press considerations, special sections and other factors. The “news hole” – the amount of space available for general news – may change even between editions. There always are many more stories than available space. This means that reporters must be selective in what they include. They try to reflect the crux of the news situation in as few words as possible. Editors may shorten the story further,

and then it may lose in competition with other stories for the limited space and not even appear in print or be dropped from the paper from one edition to the next.

In determining which stories will be printed, the editors use such criteria as news value, timeliness, importance to readers, human interest and the overall “mix” of that day’s news content.

Competition is important in the news business. No product is more perishable than news. Once it is reported, it no longer is news. Reporters and editors keep close watch on what other newspapers, radio and television stations are reporting. In highly competitive media markets, a “scoop” by one news media outlet can change how a story is reported – if it’s reported – by another.

Professional pride is involved, too. Most reporters and editors feel a deep sense of commitment to their craft and responsibility to their readers. Today’s reporters generally are well educated. They have a strong sense of ethics and are dedicated to accuracy and fair play. They know that their futures depend on the credibility of their newspapers.

Responsible journalists distinguish between news stories and editorials. Clearly labeled as such, editorials are written to persuade the public toward a point of view; news stories are not. Some newspapers also run opinion columns on non-editorial pages, but those columns usually are distinguished from regular news stories. Reporters covering the news try to present all sides of a story, which becomes difficult if one party in a controversy is not willing to be interviewed.

## **The Electronic Media**

Radio and television news – electronic journalism – has become the journalism of immediacy. Technology has made it possible for radio and television stations to report live from the scene of the news event. Deadlines are important for these journalists as well and may affect coverage of legal matters.

Television newsrooms generally are staffed or reporters/photographers are on call around the clock. Lawyers should realize that, in television news, pictures taken at the time of the event are extremely important because the event cannot be re-created. However, only rarely can a television news program be filled with spot news. Many other stories need to be developed to produce a complete newscast. Legal coverage can fall into either category. While pictures are important, rarely is a newsworthy story omitted from a telecast because of a lack of pictures; however, its on-air time and play during the broadcast frequently will be limited by a lack of “visuals.”

Television stations usually do not have as many reporters as newspapers, but their reporters cover many of the same beats. In the course of a day, the television news reporter often is called upon to cover stories outside his or her beat. When this happens, the reporter researches the subject to gain a better understanding. Here, in their areas of expertise, lawyers can be

most helpful to such reporters. Often those reporters, moving from story to story and event to event, have only minutes to conduct that research on a “breaking” story.

Live broadcasting poses special problems. Generally, the reporter is operating under time constraints and may appear to be rushing the newsmaker’s interview or may need to cut off the interview abruptly. With live broadcasts, events sometimes take place outside the broadcaster’s control. If the newsmaker makes mistakes during a live broadcast, there may be no chance for immediate correction. The reporter and newsmaker can minimize the chance for mistakes by taking a little time before the broadcast to go over the ground rules.

Time and timeliness affect television news stories. While a television newscast usually is 30 minutes long, sports, weather and commercials consume nearly at least half of that time. There are many factors that influence the amount of time producers will allot to a story. On a light news day, stories can be allotted more time. On heavy news days, stories are shortened or eliminated.

A story of an event occurring in the morning probably has been broadcast on radio throughout the day and usually will appear in the evening newspaper. Such a story might not be given much time on the evening newscast. A story of an event that occurred late in the afternoon might get more time.



Television reporters face constant deadlines, some several hours before the scheduled newscast. After the reporter has written the story, the script must be read and approved by a producer; then it must be edited and matched to the videotape provided by the photographers. Editing can take from a few minutes on a short, simple story to several hours on a complicated one.

Radio reporters face many of the same problems. Since radio deals only with sound, careful choice of words to convey a clear and concise understanding of the news story is even more important.

Radio reporters make great use of the telephone to cover stories. A radio story, with a telephone interview, can be on the air in a matter of minutes. Television reporters use the telephone to gather information that may be written into their stories or to decide whether to ask for an on-camera interview. Lawyers should not hesitate to be interviewed on the phone.

Radio newscasts usually are shorter than television newscasts, and radio reporters must meet hourly deadlines since radio newscasts often are scheduled every hour and sometimes twice an hour. Sometimes a radio reporter has only a few minutes to cover the entire day's news. Because of these severe time limits, a radio news reporter sometimes can do little more than give headlines. This is difficult with legal coverage. But, because radio news is broadcast frequently throughout the day, some stories can be developed on successive newscasts with additional details included in later reports.

## Chapter 3

### Suggestions for Working with the News Media

Reporters use many sources when gathering news. The first and most obvious sources for legal reporters are court records, such as complaints. Law enforcement officers and attorneys are other good sources. In major cases, potential witnesses may be interviewed soon after the incident. Sometimes people offer tips, and reporters will follow such leads carefully. In short, reporters interview the people most likely to provide information. If a lawyer will not talk to the news media, reporters will seek information elsewhere. The following suggestions should make media contacts more effective and more pleasant.

#### When Lawyers Contact the Media

**News Releases** – The media are bombarded with news releases every day. Most are never printed or broadcast. Indeed, news releases often are viewed as self-serving. Reporters value those news releases that contain new information but often discard the ones that don't. Any news release may be rewritten to provide more background or to conform to the news medium's style.

Here are some news release guidelines:

- Do not spend three days writing, typing and mailing a news release on something that is news today. Local reporters probably would prefer to pick up a news release than to wait for the mail. Find out where the newsroom is in the courthouse or phone the local news media. E-mail is an excellent way of contacting reporters, but such communication should be limited. If reporters get a barrage of e-mails from you that are not useful, they may direct your messages to be automatically filtered out by their Spam filter.
- A news release should be accurate and complete, and include the name and telephone number of someone who will be available to provide more information. Be clear on what organization or individual is making the announcement, and be sure to be available to answer phone calls.
- If you are seeking coverage of something, a Bar event for example, explain why it would be of interest to the general public. Be sure to give enough advance notice (at least a week) for publication or announcement and contact the right person to announce such events.
- Pay attention to what your local newspaper prints. If a paper uses photographs of the Bar president handing an award to a local lawyer, by all means provide one. If you do not see such pictures in a larger paper, don't waste your time. Provide biographical information when appropriate.
- Informal reminders are helpful. If you know the arguments or

evidence in your case will be especially interesting, tell a reporter in advance. Don't call the reporter later and say "You should have been there." Remind a reporter that a decision is expected soon in that big case that has been pending for months.

**News Conferences** – News conferences, informal or formal, may be useful to convey the same information to many reporters at once. Informal news conferences may occur on the spur of the moment when several reporters gather around one or more lawyers to ask questions during or after a trial or other event. Formal news conferences are called by the source of the news – a lawyer, perhaps – who solicits news organizations to send reporters to a predetermined location.

The media appreciate advance notice of formal news conferences as well as some indication of the subject so that editors can evaluate the potential news value of the conference. A single-page written notice stating who, what, where, when, why and how of the event is helpful.

While assignment editors appreciate advance notice, the news media

also are equipped to respond on short notice to breaking news events such as the multimillion-dollar settlement of a major lawsuit. Remember, news is perishable and needs to be released in a timely manner. Don't sit on major news. If it's worth a news story, get it out immediately. That big lawsuit settlement, for example, is bigger news the day it occurs than it is later.

Remember, if you call a news conference; be sure to deliver some news. Neither reporters nor editors want to waste their time. When deciding to hold a news conference, keep in mind the local media deadlines. You need to be concerned about three types of media – radio, television and newspapers – and each has its own deadlines:

- **RADIO** – Radio stations are always on dead-



line, some around the clock; they often have a format that can be interrupted easily for news breaks. Most stations have regularly scheduled newscasts, some as frequently as every half hour or hour. Other stations concentrate on morning drive time, midday or evening news broadcasts.

- TELEVISION – Television stations also break in with major news at any time, but their format is such that they would be more reluctant to disrupt a network or important locally produced program. They also have morning, midday, evening and nightly newscasts. The 6:00 p.m. and 10:00 p.m. newscasts are considered prime time.

- NEWSPAPERS – There are, of course, both morning and evening newspapers. Your community may have one or the other, or both. If the latter is true, the timing of your news conference is going to favor one or the other.

Obviously, if your town has only an evening newspaper, time your press conference for the morning. To gain exposure in the morning paper, time the news conference for the afternoon. Radio and television probably will carry your news release on the next scheduled newscast, whatever the time of day. If you favor prime-time exposure on television, then the afternoon conference is more desirable.

Here are some news conference guidelines:

- Make a brief statement, have written copies if possible and be available for questions.

- Supply copies of letters, complaints and other documents that explain your message. Remember that a reporter needs a little time to digest and understand something you may have been studying for months. Reporters will receive your materials gladly, if with a wary eye.

- Don't mislead a reporter. Be careful about the facts. Don't be careless about giving information (dates, times, names) and then blame the reporter for inaccuracy. If you don't know, or aren't sure, say so.

- Explain things in clear language. Be specific. Include definitions when using legal terms. Distinguish, if necessary, between your interpretation of a law and established legal points. It may be helpful to remind the reporter of the opposition's point of view or to refer the reporter to opposing counsel.

- Answer the obvious questions. What do you want the court to do? What is the basis for your position?

- Explain court or legal procedures if reporters are unfamiliar with it.
- Point out obvious pitfalls: this case does not involve the same issue as another publicized case; your client is not the bank president even though his name is the same.

- Answer the reporter's questions, but put your responses in context. Give a brief history of the situation, but omit lengthy legal citations.

- Be clear when discussing what might happen; you might give an example that is not related to your case.

## When the Media Contact Lawyers

To talk to the media or not no longer is the question. Lawyers now realize the value in good press relationships; some even hire media advisors to tout their expertise and availability to address complicated areas of the law. The advisor's mission is to make the contact valuable for both the lawyer and the reporter.

With or without a media advisor, it helps not to panic when a reporter calls or tracks you down in the courthouse. If possible, ask for a mutually agreeable time, even within a few minutes, to give yourself a few moments to consider your responses before the interview and, during the interview, don't be afraid to pause before answering. You might consider using the approach some politicians try: saying what you want regardless of the precise question.

Avoid legalese unless you're willing to decipher in plain English. And, remember, reporters are more likely to use thoughtful, colorful quotes than boring prose, so take the time to embellish your interview with stories or examples.

Beyond those general comments, keep in mind several special areas of concern in responding to media questions:

**"I Cannot Comment."** Lawyers should avoid "I can't comment" responses to reporters. In many cases, it will be in the client's interest to have a lawyer give the media at least a brief explanation of his or her position. Silence will make it more difficult for the reporter to write a balanced story. If a thorough explanation is not advisable, it is best to say even the obvious, such as "My client is innocent until proven guilty" or "The whole story will come out in court."

If it is necessary to make literally no comment, there should be an appropriate explanation, such as the need to protect confidential lawyer-client communications or the privacy of certain individuals. If possible, a lawyer who refuses to comment should refer the reporter to someone who can comment. Finally, an offer to comment at some later time (the sooner the better) will be appreciated by the reporter and will leave the attorney the option of a "no comment" response later on. This may be appropriate when an attorney and the client have not yet reviewed the case or charge.

In addition, the "I can't comment" response may be modified by explaining to the reporter what is happening in court. For example, the lawyer may explain proceedings that already have transpired or are yet to come, or what is likely to be accomplished on a given day in court. Such an account of the status of proceedings in no way compromises a client's confidences and helps meet the responsibility of all members of the bar to educate the public about the legal system.

**On-the-record v. background; not-for-attribution.** Avoid attempts to speak "off the record." A reporter's role in speaking to an attorney is not to collect gossip or information that the reporter cannot share with others. The reporter is interested in developing a story that can be published or broadcast.

Conceivably, an off the record communication may be appropriate when a reporter simply is interested in finding out, for example, whether an important witness is to be called on a particular day. If the attorney knows the reporter well enough and if such information will help the reporter plan his or her day, such off the record information is appropriate and may be very helpful. Given the difficult schedules of reporters trying to cover many events on a given day, this would show consideration to the reporter while helping the public learn the most significant aspects of a case.

Attorneys also should avoid “not for attribution” responses. This is similar to an off the record response and most reporters simply will not use the information. If they cannot verify information from two identifiable sources, it will not be printed. “Not for attribution” is the media’s equivalent of not allowing hearsay testimony.

A reporter cannot ethically reveal the source of a not-for-attribution remark. On the other hand, information attributed only to unnamed sources may weaken the credibility and quality of the news report. Always remember that nothing is ever fully off the record. A reporter may use the information you provide if he or she can obtain it from another source.

The best approach is to clarify the ground rules in advance and be sure the reporter agrees. Never make a remark and then later seek to declare that it was either off the record or not for attribution. Such agreements must be mutual, involving both lawyer and reporter. They cannot be unilateral declarations. A reporter cannot agree to grant favors that contradict his or her obligation to seek and publish as much information as possible. The best approach is to establish a professional, but cordial relationship.

**Requests to review a story before publication.** Generally speaking, a



reporter will not allow a news source to read a story before it is printed or broadcast. The best way to ensure an accurate report is to be accurate in your answers while, at the same time, being cautious not to reveal legitimate confidences. Be sure the reporter understands what you are saying about a matter because the reporter may be unfamiliar with the topic and, unintentionally, may report your views incorrectly. By being available for follow-up questions, misunderstandings can be limited without the necessity of asking to review the story before publication. Offer to confirm quotes before publication or broadcast, or tape the conversation after telling the reporter you intend to do so.

### **Misunderstandings and Disputes**

- Call the managing editor or news director *immediately* about an obvious error. It may be possible to correct it between editions or later in the same broadcast. If not corrected, an error is likely to be repeated. Don't tell a reporter three weeks later that he or she has been making the same error in every story.
- Be clear about whether you think a story is in error or whether you just didn't like it. Be clear about what you want: a correction, another story from your point of view, a clarification.
- If there is an error, ask that the archive copy of the story be corrected as well.
- Don't complain about stories if you have refused to comment or provide information.
- Remember that reporters usually don't write editorials and that editorials are opinions. Don't be afraid to ask to respond to an editorial with which you disagree.
- Keep in mind other ways of responding. Letters to the editor and guest editorials are good ways of conveying your message. Studies show that the public is attentive to both.
- Distance yourself from the story when you think about complaining. Do not consider a difference of opinion about a story that you are part of, as a factual error.

### **The Wisconsin Court System Web Site**

The state court system provides useful information for lawyers. The courts' Web site, at [www.wicourts.gov](http://www.wicourts.gov), provides links to court forms, opinions of the Supreme Court and Court of Appeals, court calendars, directories, press releases, and much more. The page within the courts' Web site that receives the most hits (about two million per day) is the Wisconsin Circuit Court Access (WCCA) page, <http://wcca.wicourts.gov/index.xsl>, a gateway to circuit court case information.

Lawyers should be aware that WCCA is a favorite tool of the news media, for it provides instant access to information that used to be available only at the courthouse. The information is uploaded multiple times

each day from court clerks' offices around the state. However, it is only as accurate as the information that is keyed in, so media are encouraged to double-check the information they find on WCCA by telephoning the clerk's office or pulling the file and reviewing it.

Lawyers should also be aware that while WCCA also serves as an invaluable tool for the media, it also has become the most controversial piece of the court system Web site for it has made open records easily and instantaneously accessible. Keep in mind that when speaking to the media, oftentimes reporters are likely to have already accessed WCCA information prior to contacting a responding attorney and may already know about the case and the client (or parties). This easy access has sparked both a steady stream of accolades and complaints. Those who have complained about the system have raised concerns about the potential harm that can result when, for example, information on a criminal charge that was later dropped remains on the system.

Whether the courts should change what they present on WCCA or how the information is presented will be the subject of discussion by a committee that the director of state courts appointed in the summer of 2005. The [committee](#) is comprised of privacy advocates, media representatives, lawyers, judges, clerks of court and others. It will review the policy that guides the presentation of court information on WCCA and determine whether change is needed.



## Chapter 4

### Ethics and Guidelines

#### Wisconsin Fair Trial/Free Press Principles and Guidelines

In the wake of national debate in the 1960s, a committee was formed under the aegis of the Wisconsin Attorney General to draft some guidelines designed to reconcile the fundamental constitutional precepts of freedom of the press (as protected in the First Amendment of the U.S. Constitution and Article I of the Wisconsin Constitution) and the right of a criminal defendant to a fair trial (guaranteed in the Sixth Amendment of the U.S. Constitution and Article I of the Wisconsin Constitution). This joint committee published its “Statement of Principles” in early 1969 for the guidance of those involved in the criminal and juvenile justice systems in Wisconsin – participants, observers and reporters. Although the guidelines appear to have served well, disputes arose and legal developments left them somewhat dated.

The American Bar Association’s adoption in 1977 of “Recommended Court Procedures to Accommodate Rights of Fair Trial and Free Press” and the U.S. Supreme Court’s decision in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1977), led the Wisconsin Journalists/Lawyers Joint Interests Committee, formed as a subcommittee of the State Bar of Wisconsin Communications Committee, to review and update the 1969 “Statement of Principles” in the hope that these voluntary professional standards would avoid the need for “gag orders” in Wisconsin judicial proceedings. The committee appointed a special task force of persons with direct and working knowledge of the problems, equally representative of media personnel and participants in the legal system.

In 1979, the principles and guidelines on fair trial and free press were offered to members of the bar, judiciary, law enforcement agencies and news media as a voluntary standard of professional conduct the committee believed would protect the constitutional liberties involved and promote harmony among the professions. Guidelines relating to lawyers were patterned closely on then current lawyers’ canons of ethics. In 1990, the Media-Law Relations Committee of the State Bar reviewed and slightly revised these principles and guidelines, which are reproduced in the following paragraphs.

#### Purpose

The right to a fair and prompt trial and the right of freedom of the press are fundamental liberties guaranteed by the United States and Wisconsin Constitutions. These basic rights must be rigidly preserved and responsibly practiced according to highest professional standards.

Courts, in cooperation with the bar and with law enforcement agencies, are responsible for dispensing justice with respect to the parties before them. Nearly always, that responsibility is entirely consistent with the media's responsibility to apprise the public regarding the proceedings. However, it is important that the judiciary, bar, media and law enforcement agencies appreciate that in performing their respective duties they can jeopardize one or another of the constitutional precepts of fair trial and free press.

To promote reconciliation of the constitutional guarantees of freedom of the press and the right to a fair, impartial trial, the Media-Law Relations Committee of the State Bar of Wisconsin submits and recommends the following principles and guidelines to all members of the judiciary, bar, news media and law enforcement agencies in Wisconsin.

The committee further recommends that representatives of the judiciary, bar, law enforcement agencies and the news media meet annually to review those principles and guidelines and to promote the understanding of these principles by the public and by all directly involved persons, agencies and organizations.

These recommended principles and guidelines have been submitted to achieve understanding and cooperation among the press, the judiciary, the bar and law enforcement agencies in Wisconsin. They are not binding on anyone, including those who may accept, approve or endorse them, and



are not to be applied or used against anyone, or to otherwise restrict rights afforded by the U.S. or Wisconsin Constitution and Statutes.

### **Principles to Insure Free Press and Fair Trial**

1. The judiciary, bar, news media and law enforcement agencies are obliged to preserve the principle that any person suspected or accused of a crime is innocent until found guilty in a court under competent evidence fairly presented. Parties to civil court proceedings likewise are entitled to have their rights adjudicated in court according to due process.

2. Access to legitimate information involving the administration of justice in criminal or civil cases and a fair trial, free of prejudicial information and conduct, are both vital rights that should be carefully protected. Within their codes of professional responsibility and ethics, members of the bar, judiciary and law enforcement agencies should cooperate with the news media in reporting the administration of justice.

3. The bar, judiciary, news media and law enforcement agencies share the responsibility to assure that the outcome of a trial not be influenced by publicity or by the public.

4. Freedom for the news media to report proceedings in open court is recognized. However, all concerned should cooperate with the court to ensure that a jury's deliberations are based only on evidence presented to the jury in court. News media should use care in reporting portions of jury trials that take place in the absence of the jury. Publicizing court rulings made or evidence rejected in the absence of a jury may cause prejudice. There may be other specific instances where cooperation between the court and news media is appropriate.

5. All news media should strive for accuracy, balance, fairness and objectivity. They should remember that readers, listeners and viewers are potential jurors. They should fairly report both sides of court proceedings; reporting only one side of a case may give the public a distorted view.

6. A court of law is intended to serve as a forum in which questions of guilt or innocence, rights and liabilities are determined pursuant to procedures relating to the admissibility of evidence, burden of proof and other established principles of law. The procedures are designed to provide fairness to the parties and permit the court to reach a just verdict. The judge has a responsibility to see that the court serves this intended purpose and to provide timely, accurate information consistent with the law and these guidelines.

7. Law enforcement agencies have the responsibility to provide timely, accurate information consistent with the law and these guidelines.

8. Lawyers should observe the code of professional responsibility and these guidelines. Lawyers should not use publicity to promote their sides of pending cases. Public prosecutors should not take unfair advantage of their positions as an important source of news. These cautions shall not be construed to limit a lawyer's obligation to make available information to which the public is entitled.

9. Journalistic, law enforcement and legal training should include instruction in the meaning of constitutional rights to a fair trial and freedom of the press and their roles in guarding these rights. Lawyers should accept all invitations possible to help inform journalists and law enforcement personnel of these principles.

### **Guidelines for Criminal Proceedings**

10. Subject to professional codes of ethics, in the investigation of a criminal matter there should be no restraint on making public information that:

- a. is contained in a public record;
- b. indicates an investigation is in progress;
- c. presents the general scope of the investigation, including a description of the offense and, if permitted by law, the identity of the victim;
- d. is necessary to communicate a request for assistance in apprehending a suspect or in other matters;
- e. is a warning to the public of any dangers.

11. Subject to professional codes of ethics, there should be no restraint on making public the following information concerning a defendant:

- a. the defendant's name, age, residence, employment, marital status and other nonprejudicial factual background information;
- b. the identity of the investigating and arresting officers or agencies and the status of the investigation where appropriate;
- c. the circumstances surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of the physical evidence seized at the time of arrest. Concerning crimes against property, an officer can factually report the property destroyed, damaged or stolen and release a general description of the items recovered;
- d. the nature, substance or text of the charge, such as complaint, indictment and information or other matters of public record;



- e. the scheduling or result of any step in the judicial proceedings;
- f. information that the accused denies the charges made against him or her.

12. The broadcast or publication through the news media of certain types of information may create dangers of prejudice to the defense or prosecution without serving a significant law enforcement or public interest function. Lawyers are prohibited by their code of professional responsibility from releasing the following information until the commencement of the trial or disposition without trial:

- a. comments on the character, reputation or prior criminal record (including arrests, indictments or other charges of crime) of the accused;
- b. the possibility of a plea of guilty to the offense charged or to a lesser offense;
- c. the existence or contents of any confession, admission or statement given by the accused, or a refusal or failure to make a statement;
- d. the performance or results of any examination or tests, or the refusal of the accused to submit to examinations or tests;
- e. the identity, testimony or credibility of a prospective witness;
- f. any opinion as to the guilt or innocence of the accused, the evidence or the merits of the case.

Law enforcement agencies and news media should be aware of the dangers of prejudice in making pretrial disclosures concerning these matters.

13. Prior criminal charges and convictions are matters of public record, available through police agencies or court clerks. Law enforcement agencies should make such information available upon legitimate inquiry, but the public disclosure of it may be prejudicial. When there has been a disclosure of a prior arrest or charges, the news media and law enforcement agencies have a special duty to report the disposition or status of the arrest or prior charges.

14. Law enforcement and court personnel should not prevent the photographing of defendants or suspects when they are in public places outside the courtroom. The Wisconsin Supreme Court standards for use of cameras and recorders for news coverage of judicial proceedings should be followed in the courtroom. Law enforcement agencies should, if possible, make available a suitable, nonprejudicial photograph of a defendant or a person in custody.

15. Information about a suspect not in custody may be released by law enforcement personnel, provided it serves a valid law enforcement function. To that end, it is proper to disclose information necessary to enlist public assistance in apprehending suspects, including photographs and records of prior arrests and convictions.

### **Guidelines for Juvenile Proceedings**

16. When news media attend sessions of the juvenile court, they may not disclose names of or data revealed at the hearing that identifies the juvenile or the juvenile's family unless it is a public fact-finding hearing. News media should make every effort to observe and report such sessions and the disposition fully but with regard for the juvenile's rights and the public interest. When a juvenile is regarded as an adult under criminal law, the confidentiality no longer applies, but the media should be guided by the foregoing guidelines for criminal proceedings.

17. Whenever nonpublic juvenile records are reviewed by the news media, the identity of the juvenile should not be reported.



## **Guidelines for Civil and Administrative Proceedings**

18. Except where prohibited by law, records in civil and administrative proceedings, including pleadings, depositions, interrogatories, verdicts, orders and judgments, are public records available to the news media. The media should be mindful, however, that reporting on a deposition or written interrogatories prior to presentation at trial may prejudice jurors and one or more of the litigants. Prematurely reporting such matters may be unfair if, on the presentation of the deposition or interrogatory in open court, portions are not admitted into evidence. Also, only one side of the issue may be presented in a deposition or in answers to interrogatories.

19. Pleadings are only allegations. Attorneys and the news media should be mindful of possible injustice that may result from one-sided publication of such allegations.

20. Adoption, mental illness, paternity and certain family court proceedings, by their nature and by law, deserve special treatment as to public disclosure. Investigative reports in such proceedings usually are confidential. Statutes provide that, in certain circumstances, the court may grant the news media access to such records.

21. Personal and financial data often must be revealed to the court. The public's need to know such information should be balanced against the potential negative effects on persons involved.

22. Lawyers are prohibited by their code of professional responsibility from releasing the following information, other than a quotation from or reference to public records:

- a. evidence regarding the occurrence or transaction involved;
- b. the character, credibility or criminal record of a party, witness or prospective witness;
- c. physical evidence, the performance or results of any examinations or tests or the refusal or failure of a party to submit to such;
- d. an opinion as to the merits of the claims or defenses of a party except as required by law or administrative rule; or
- e. any other matter reasonably likely to interfere with a fair trial of the action.

News media should be aware of the dangers of prejudice in making pretrial disclosures concerning the above matters.

## **Cameras in the Courtroom**

Rule 14 of the Wisconsin Code of Judicial Ethics, as adopted Nov. 14, 1967, stated that a judge shall not "permit any radio or TV reproductions or taking of pictures in the courtroom at any time during judicial proceedings." 36 Wis. 2d 252, 262 (1967). Following a suspension of the rule and a 15-month "experimental period," the Wisconsin Supreme Court on June 21, 1979, rescinded rule 14 and adopted new rules in Wisconsin effective July 1, 1979. 90 Wis. 2d xix (1979). Those rules, now published as Supreme

Court Rule, Chapter 61, and a partial dissent by Justices Abrahamson and Heffernan from the order establishing the rules, 90 Wis. 2d at xxiii, are reproduced here in full. Excerpts from an April 21, 1978, memorandum from then Chief Justice Bruce F. Beilfuss of the Wisconsin Supreme Court on the standards used during the experimental period also are reproduced as an aid in interpreting the rules since they evolved from those standards.

#### **RULES GOVERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF JUDICIAL PROCEEDINGS**

**SCR 61.01 Authority of Trial Judge.** (1) These rules of conduct in this chapter do not limit or restrict the power, authority or responsibility otherwise vested in the trial judge to control the conduct of proceedings before the judge. The authority of the trial judge over the inclusion or exclusion of the press or the public at particular proceedings or during the testimony of particular witnesses is applicable to any person engaging in any activity authorized by this chapter.

(2) In this chapter, “trial judge” includes any judicial officer who conducts a public proceeding.

**SCR 61.02 Media Coordinator.** (1) The Wisconsin Freedom of Information Council shall designate for each judicial administrative district a coordinator who shall work with the chief judge of the judicial administrative district and the trial judge in a court proceeding in implementing this chapter. Geographically large judicial administrative districts shall be subdivided by agreement between the council and the chief judge, with a coordinator designated for each subdistrict.

(2) If possible, the trial judge shall be given notice at least three days in advance of the intention of the media to bring cameras or recording equipment into the courtroom. In the discretion of the trial judge, this notice rule may be waived if cause for the waiver is demonstrated.

**SCR 61.03 Equipment and Personnel.** (1) Except as otherwise provided in sub. (2), three television cameras, each operated by one person and three still photographers, each using not more than two cameras, are authorized in any court proceeding. Priority consideration shall be extended to one of the three cameras to televise an entire proceeding from beginning to end.

(2) The trial judge may authorize additional cameras or persons at the request of the media coordinator or may limit the number of cameras if circumstances permit the increase or require such limitation.

(3) One audio system for radio-broadcast purposes is authorized in any court proceeding. Audio pickup for all media purposes shall be made through any existing audio system in the court facility, if practical. If no suitable audio system exists in the court facility, microphones and related wiring shall be as unobtrusive as possible.

(4) The media coordinator shall be responsible for receiving requests to engage in the activities authorized by this chapter in a particular court proceeding and shall make the necessary allocations of authorizations among those filing the requests. In the absence of advance media agreement on



disputed equipment or personnel issues, the trial judge shall exclude all audio or visual equipment from the proceeding.

**SCR 61.04 Sound and Light Criteria.** Only audio or visual equipment which does not produce distracting light or sound may be used to cover a court proceeding. Artificial lighting devices shall not be used in connection with any audio or visual equipment. Only equipment approved by the trial judge in advance of the court proceeding may be used during the proceeding.

**SCR 61.05 Location of Equipment and Personnel.** (1) The trial judge shall designate the location in the courtroom for the camera equipment and operators. The trial judge shall restrict camera equipment and operators to areas open to the public, but the camera equipment and operators shall not block the view of persons seated in the public area of the courtroom.

(2) Camera operators shall occupy only the area authorized by the trial judge and shall not move about the courtroom for picture taking purposes during the court proceeding. Equipment authorized by these rules shall not be moved during the proceeding.

**SCR 61.06 Courtroom Light Sources.** Modifications in the lighting of a court facility may be made only with the approval of the trial judge. Approval of other authorities may also be required.

**SCR 61.07 Conferences.** Audio pickup, broadcast or recording of a conference in a court facility between an attorney and a client, co-counsel, or attorneys and the trial judge held at the bench is not permitted.

**SCR 61.08 Recesses.** Audio or visual equipment authorized by this

chapter shall not be operated during a recess in a court proceeding.

**SCR 61.09 Official Court Record.** Notwithstanding any film, videotape, photography or audio reproduction made in a court proceeding as a result of this chapter, the official court record of the proceeding is the transcript of the original notes of the court reporter made in open court or pursuant to an order of the court.

**SCR 61.10 Resolution of Disputes.** A dispute as to the application of this chapter in a court proceeding may be referred only to the chief judge of the administrative district for resolution as an administrative matter. An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any person or organization seeking to exercise a privilege conferred by this chapter any order or ruling of a trial judge or chief judge under this chapter.

**SCR 61.11 Prohibition of Photographing at Request of Participant.**

(1) A trial judge may for cause prohibit the audio recording and the photographing of a participant with a film, videotape or still camera on the judge's own motion or on the request of a participant in a court proceeding. In cases involving the victims of crimes, including sex crimes, police informants, undercover agents, relocated witnesses and juveniles, and in evidentiary suppression hearings, divorce proceedings and cases involving trade secrets, a presumption of validity attends the requests; the trial judge shall exercise a broad discretion in deciding whether there is cause for prohibition. This list of requests which enjoy the presumption is not exclusive; the judge may in his or her discretion find cause in comparable situations.

(2) Individual jurors shall not be photographed, except in instances in which a juror or jurors consent. In courtrooms where photography is impossible without including the jury as part of the unavoidable background, the photography is permitted, but close-ups which clearly identify individual jurors are prohibited. Trial judges shall enforce this subsection for the purpose of providing maximum protection for jury anonymity.

**SCR 61.12 Inapplicability to Individuals; Use of Material for Advertising Prohibited.** The privileges granted by this chapter to photograph, televise and record court proceedings may be exercised only by persons or organizations which are part of the news media. Films, videotape, photography and audio reproductions shall not be used for unrelated advertising purposes.

**Justice Shirley S. Abrahamson  
(Dissenting in Part)**

I agree with the order except as to the dissent noted below. And I would add the following caveat: The rules do not require the trial judge or the attorneys to advise participants in the proceeding of these rules. I believe it would be good practice for the trial judge who knows that the proceeding will be covered by radio, TV or still photographers to advise the attorneys in the proceeding of this fact and to call these rules to the attention of the

attorneys and to the attention of the media. I believe it is also good practice for the attorney to discuss the rules with the participants in the trial. An understanding of these rules by the trial judge, attorneys, participants in the trial and the media is important for the successful implementation of these rules and the administration of justice in this state.

Although I am sympathetic with the court's attempt to curb a perceived abuse, I do not favor the adoption of the last sentence of Rule 12 [SCR 61.12]. This language stems directly from an incident reported to the court during the public hearing on these rules, namely, the use of a witness' courtroom testimony by a radio station in its advertisements promoting its news department. While I disapprove of this commercial exploitation of a trial participant, I dissent from the adoption of this part of Rule 12 for several reasons. The media's activities outside the courtroom have not previously been viewed as within the scope of the rules. All the court's rules, except this one, focus on the media's behavior in the courtroom; no other rule is concerned with the media's use of pictures or the printed or spoken word outside the courtroom. The court has not had the opportunity to consider carefully its power, and the limitations thereon under the United States Constitution or under the Wisconsin Constitution and statutes, to regulate the media's use of material obtained during coverage of public judicial proceedings. Nor has the court given consideration to how it will enforce this rule. Furthermore, the rule is written so broadly that newspapers, radio and TV stations will have a difficult time determining whether a particular use of film or audio clips is prohibited. For the foregoing reasons, I do not favor the adoption of the last sentence of Rule 12.

I am authorized to state that Mr. Justice Heffernan joins in the dissent to the portion of Rule 12.

**Chief Justice Beilfuss' Explanatory  
Memorandum, April 21, 1978**

Standard No. 1 is intended to point out that the rights granted under the Standards to the news media are not superior to those of the public or reporters for the news media to attend court proceedings. Thus, if the presiding judge under existing law can exclude the public and representatives of the news media from a court proceeding, then persons operating audio or visual equipment under the standards can also be excluded.

Standard No. 11, on the other hand, is intended only to permit the presiding judge for cause in the exercise of discretion to prohibit the photographing of an individual participant in a trial (including parties, witnesses, jurors, counsel or court personnel) either at the request of a participant or on the judge's own motion. It is not intended to permit the judge to ban all cameras and audio equipment from a trial except as may be authorized under Standards No. 1 and 10. It is not intended to give a witness or other participant the right to prohibit the photographing of the witness while testifying. It is not intended to permit the presiding judge to prohibit the recording of the testimony of a witness, except as may be authorized under



Standards No. 1 and 10.

“Cause” as used in Standard No. 11 is intended to require that there be some reasonable basis other than the desire not to be photographed to justify prohibiting the photographing of a participant. Cause may include a reasonable fear of physical harm, the protection of a minor’s reputation, a reasonable fear of undue embarrassment or the like. The trial judge may require requests under Standard No. 11 to be filed with the clerk of the court.

Standard No. 3(d) requires that any request to engage in an activity authorized by the Standards be made through the media coordinator. A request should not be made to the presiding judge. The fact that only one request is received initially does not mean that additional requests will not be filed later, and thus all should go to the coordinator. The presiding judge should not be involved in the granting of a request to use audio or

visual equipment unless the media coordinator is unable to obtain agreement among media personnel.

Standard No. 4 requires that only equipment which is approved by the presiding judge may be used in the courtroom. The presiding judge must check prior to trial each item of equipment, including both TV and still cameras, to determine whether the item produces distracting light or sound. Once a judge has approved a certain type of equipment, it need not be reinspected for each trial.

Standard No. 5(a) provides that the presiding judge must restrict camera equipment to areas open to the public. This means the spectator area behind the rail. It has come to my attention that some judges have permitted cameras to be placed in the jury box or other locations in front of the rail. This is not permissible under the Standards.

Standard No. 12 limits the right to use audio or visual equipment in the courtroom to representatives of the news media. Individuals who are simply spectators, relatives, tourists or curiosity seekers may not use audio or visual equipment in the courtroom.

## Rules of Professional Conduct for Attorneys

To deal appropriately with the news media, lawyers must be familiar with those portions of the Rules of Professional Conduct for Attorneys that govern media relations.

The Wisconsin Supreme Court, on June 10, 1987, adopted Rules of Professional Conduct for Attorneys, which became effective on Jan. 1, 1988. 139 Wis. 2d xiii (1987). The rules were modeled after the American Bar Association's Model Rules of Professional Responsibility.

**Trial publicity.** Supreme Court Rule 20:3.6 probably is the most important rule governing attorney communication with the media. The rule is designed to prevent inadmissible evidence from coming to the attention of judges and jurors. Many of its provisions are reflected in the *Wisconsin Fair Trial and Free Press Guidelines*, reproduced in Chapter 4 of this guide.

The rule regulates certain out-of-court statements by lawyers; namely, statements that could reasonably be expected to be published or broadcast, whether or not the statements are made directly to the media. Specific provisions govern statements at various stages of criminal cases, in civil suits and in quasi-judicial administrative proceedings.

SCR 20:3.6 does not expressly deal with appellate proceedings and clearly is not meant to limit lawyers' statements about pending legislative or quasi-legislative proceedings.

The validity under the First Amendment of some of the rules' restrictions on statements by lawyers involved in pending criminal and civil trials is not completely clear.

Because of its importance, SCR 20:3.6 is printed in its entirety along with comments to the ABA's Model Rules of Professional Responsibility and the committee comments of the Wisconsin Code of Professional Responsibility Review Committee.

### SCR 20:3.6 TRIAL PUBLICITY

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in deprivation of liberty, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in deprivation of liberty, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal

or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in deprivation of liberty;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in the public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case;

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;



- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

**ABA Comment:** *It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.*

*No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.*

*Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.*

**Wisconsin committee comment:** *The committee has substituted the words “deprivation of liberty” for the word “incarceration.”*

**Attorneys’ Statements About Their Clients.** SCR 20:1.16 governs the lawyer’s duty to maintain his or her client’s confidences. The lawyer is prohibited from disclosing information relating to representation unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.

An attorney is required, however, to disclose information reasonably believed necessary to prevent a crime or fraudulent act likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another. Presumably, however, such disclosure would properly be made to authorities able to rectify or prevent the crime or fraud and not necessarily to the media.

In any case, the attorney may disclose information that is neither confidential nor secret and such disclosures often will benefit the client.

When an attorney is uncertain about the wisdom or propriety of conveying certain information to the media, the client should be consulted. Once a client has been fully informed of the possible consequences and, under SCR 20:1.6, consents to it, the lawyer may communicate with the media.

**Attorneys’ Statements About Judges and Judicial Candidates.** The

public has an obvious interest in the administration of justice and in receiving information about the qualifications of judicial candidates and the performance of judges. Lawyers often are well qualified to provide the media with information on these subjects and should be encouraged to do so. SCR 20:8.2 prohibits a lawyer from making a statement the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public officers, or of a candidate for election or appointment to judicial or legal office.

**Attorneys' Statements About Themselves.** Recent constitutional decisions give First Amendment protection to commercial speech and emphasize the value to consumers of information about lawyers and legal services. As a result, the long-standing rules against lawyers advertising or otherwise publicizing themselves have been liberalized.

Advertising rules may vary considerably from state to state. In Wisconsin, SCR 20:7.2 permits a lawyer to advertise the lawyer's availability to provide legal services provided the lawyer does not make "a false or misleading communication about the lawyer or the lawyer's services." SCR 20:7.1.

Because Wisconsin has no specialty certification plan for lawyers, an ad generally will be considered misleading if it describes a lawyer as a "specialist" or implies that he or she has certified expertise in any particular field. There are exceptions for patent and admiralty law practitioners. SCR 20:7.4.

It also seems clear that a lawyer now may cooperate with journalists who are preparing a story that will give the lawyer publicity. However, a lawyer may not compensate media representatives in anticipation of or in return for professional publicity in a news item. SCR 20:7.2(b).

Finally, lawyers are sometimes asked to speak or write publicly on legal topics. This activity is highly desirable for purposes of public and professional education. Rule 20:7.3(e) makes it clear that lawyers may accept employment resulting from such activity.

For clarity, the Supreme Court Rule on lawyer advertising, the ABA's Comment and the Wisconsin Committee's Comment are set out in full.

#### **SCR 20:7.2 ADVERTISING**

(a) Subject to the requirements of Rule 7.1 [SCR 20:7.1], a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other

legal service or organization.

**ABA Comment:** *To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.*

*This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.*

*Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.*

*Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.*

**Paying Others to Recommend a Lawyer** – *A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs.*

**Wisconsin committee comment:** *The last clause of paragraph (a), concerning direct-mail advertising, is rewritten to better express the relation between this rule and Rule 7.3. Also, the rule and comment concerning the requirements that a copy or recording of any advertisement or written communication be kept by the lawyer for two years and that a communication include the name of at least one lawyer responsible for its content have been moved to proposed Rule 7.1.*



**Transactions with Persons Other Than Clients.** The lawyer's rules also restrict what he or she can state to and about others. Rule 20:4.1 and the accompanying ABA Comment provide:

**SCR 20:4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person;

or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

**ABA comment: Misrepresentation** – A lawyer is required to be truthful when dealing with others on a client's behalf but generally has no

affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

**Statements of Fact** – This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

**Fraud by Client** – Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

**Non-Ethics Considerations.** The foregoing discussion relates primarily to the ethical considerations involved in a lawyer's communications to the press. It should be kept in mind, of course, that even though communications are ethically permissible, the lawyer can be liable for those communications for other reasons. For example, unless the lawyer is making the statements

in circumstances that are privileged under the law of defamation, he or she can be held liable if statements are defamatory.

## Communicators' Ethics

There is considerable difference of opinion among journalists about ethics codes. These codes, created by professional communication organizations or by individual news media organizations, do not bear the authority or sanctions of the Rules of Professional Conduct for Attorneys and apply only to members of the organization. Nevertheless, these codes represent the obligation that journalists feel to be responsible, truthful and fair in their communications. Representative professional ethics codes are provided below.

### Code of Ethics

*The Society of Professional Journalists, Sigma Delta Chi.*

THE SOCIETY of Professional Journalists, Sigma Delta Chi, believes the duty of journalists is to serve the truth.

WE BELIEVE the agencies of mass communication are carriers of public discussion and information, acting on their constitutional mandate and freedom to learn and report the facts.

WE BELIEVE in public enlightenment as the forerunner of justice, and in our constitutional role to seek the truth as part of the public's right to know the truth.

WE BELIEVE those responsibilities carry obligations that require journalists to perform with intelligence, objectivity, accuracy and fairness.

To these ends, we declare acceptance of the standards of practice here set forth:

**RESPONSIBILITY:** The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare. Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

**FREEDOM OF THE PRESS:** Freedom of the press is to be guarded as an inalienable right of people in a free society. It carries with it the freedom and the responsibility to discuss, question and challenge actions and utterances of our government and of our public and private institutions. Journalists uphold the right to speak unpopular opinions and the privilege to agree with the majority.

**ETHICS:** Journalists must be free of obligation to any interest other than the public's right to know the truth.

1. Gifts, favors, free travel, special treatment or privileges can compromise the integrity of journalists and their employers. Nothing of value should be accepted.

2. Secondary employment, political involvement, holding public office and service in community organizations should be avoided if it compro-

mises the integrity of journalists and their employers. Journalists and their employers should conduct their personal lives in a manner that protects them from conflict of interest, real or apparent. Their responsibilities to the public are paramount. That is the nature of their profession.

3. So-called news communications from private sources should not be published or broadcast without substantiation of their claims to news value.

4. Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business is conducted in public and that public records are open to public inspection.

5. Journalists acknowledge the newsman's ethic of protecting confidential sources of information.

ACCURACY AND OBJECTIVITY: Good faith with the public is the foundation of all worthy journalism.

1. Truth is our ultimate goal.

2. Objectivity in reporting the news is another goal, which serves as the mark of an experienced professional. It is a standard of performance toward which we strive. We honor those who achieve it.

3. There is no excuse for inaccuracies or lack of thoroughness.

4. Newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight a minor incident out of context.

5. Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free of opinion or bias and represent all sides of an issue.

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.

7. Journalists recognize their responsibility for offering informed analysis, comment and editorial opinion on public events and issues. They accept the obligation to present such material by individuals whose competence, experience and judgment qualify them for it.

8. Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such.

FAIR PLAY: Journalists at all times will show respect for the dignity, privacy, rights and well-being of people encountered in the course of gathering and presenting the news.

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.

2. The news media must guard against invading a person's right to privacy.

3. The media should not pander to morbid curiosity about details of vice and crime.

4. It is the duty of news media to make prompt and complete correction of their errors.



5. Journalists should be accountable to the public for their reports, and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers and listeners should be fostered.

PLEDGE: Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all news people. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people.

Adopted 1926, revised 1973.

#### **Code of Broadcast News Ethics**

##### *Radio-Television News Directors Association*

The responsibility of radio and television journalists is to gather and report information of importance and interest to the public accurately, honestly and impartially.

The members of the Radio-Television News Directors Association accept these standards and will:

1. Strive to present the source or nature of broadcast news material in a way that is balanced, accurate and fair.
  - A. They will evaluate information solely on its merit as news, rejecting sensationalism or misleading emphasis in any form.
  - B. They will guard against using audio or video material in a way that deceives the audience.
  - C. They will not mislead the public by presenting as spontaneous news any material which is staged or rehearsed.
  - D. They will identify people by race, creed, nationality or prior status only when it is relevant.
  - E. They will clearly label opinion and commentary.
  - F. They will promptly acknowledge and correct errors.
2. Strive to conduct themselves in a manner that protects them from conflicts of interest, real or perceived. They will decline gifts or favors which would influence or appear to influence their judgments.
3. Respect the dignity, privacy and well-being of people with whom they deal.
4. Recognize the need to protect confidential sources. They will promise confidentiality only with the intention of keeping that promise.
5. Respect everyone's right to a free trial.
6. Broadcast the private transmissions of other broadcasters only with permission.
7. Actively encourage observance of this Code by all journalists, whether members of the Radio-Television News Directors Association or not.

## Chapter 5

### The Law

#### Wisconsin's Open Meetings Law

The broad policy of Wisconsin state and local government is openness. The legislature in the Wisconsin Open Meetings Law, effective July 2, 1976, stated that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. secs. 19.81-19.85.

To implement this policy, the legislature mandated that all meetings of state and local government bodies be publicly held in accessible places open to all citizens and at all times unless otherwise expressly provided by law. The legislature directed that the law be liberally interpreted by courts to achieve the stated policy objective of openness. Some exceptions are allowed but are narrowly drawn to achieve the major goal of open meetings.

Portions of the law are reviewed here to give lawyers an understanding of those meetings to which the news media clearly have access.

**Requirements for Meetings.** Every meeting of a governmental body must be preceded by a prescribed public notice and must be held in open session. This requires that a meeting, whether or not it includes a closed session as permitted by the law, must be convened initially as an open meeting.

"Governmental body" refers to any state or local agency, board, commission, committee, council, department or other public body. Any body, committee or subunit formed or meeting for the purpose of collective bargaining under provisions of the Wisconsin Employment Relations Act is excluded.

A "meeting" means convening members of the governmental body to exercise its responsibilities. A meeting is presumed to occur if one-half or more of the members of a governmental body are present; however, it does not include a social or chance gathering not intended to avoid the law. The presence or absence of a quorum does not, by itself, define a "meeting" under chapter 19. If public officials gather for the purpose of exercising the responsibilities of government and, in addition, they are of sufficient numbers to determine the outcome of a vote on the proposal being considered (through a negative quorum, rolling quorum, etc.), then they meet the supreme court's definition of a "meeting." See *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

"Open session" means a meeting held in a place reasonably accessible to members of the public and open to all citizens at all times.



**Public Notice.** The law requires giving public notice by specified means. In addition to complying with any other public notice requirements applicable to the governmental body, the chief presiding officer (or designee) is obliged to provide a “communication” 1) to the public, 2) to those news media that have filed a written request, and 3) to the official state, municipal or city newspaper, as applicable (or if there is none, to a news medium likely to give notice in the area). Notice to the public can be given by posting in one or more public places, by timely newspaper publication or by other appropriate means. Notice to the news media or the official newspaper may be in writing or by telephone.

Notice must include the time, date, place and subject matter of the meeting (including the subject intended for consideration at any contemplated closed session). In most cases, the public notice must be given at least 24 hours before the meeting. In emergencies, where “for good cause such notice is impossible or impractical,” at least two hours notice is required. A separate and complete notice must be provided for each meeting of the governmental body. The law has special notice rules for departments and other “subunits” of the state universities. The governmental body may not charge for the cost of issuing the notice.

**Exemptions from Open Meeting Requirement.** Section 19.85 provides that closed sessions may be held by a governmental body only for the following purposes:

- (a) To deliberate after any judicial or quasi-judicial trial or hearing conducted by the body;
- (b) To consider certain negative or disciplinary personnel matters or the grant or denial of tenure for a university faculty member (unless the subject of the discussion requests an open session for an evidentiary hearing);
- (c) To consider personnel employment, promotion, compensation or performance evaluation data;
- (d) To consider specific applications of probation or parole (not broad policy discussions), and strategy for crime detection or prevention;
- (e) To deliberate or negotiate the purchase of public properties or the investment of public funds, or to conduct other specified public business whenever competitive or bargaining reasons require a closed session;
- (ee) To deliberate in a council on unemployment compensation meeting which excludes all employer members or all employee members;
- (eg) To deliberate in a council on worker's compensation meeting which excludes all employer members or all employee members;
- (em) To deliberate in a burial site preservation board meeting about burial sites where public discussion of the location likely would result in disturbance of the burial site;
- (f) To consider financial, medical, social or personal histories or disciplinary data about specific persons which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of that person (unless paragraph (b) above applies and the subject requests an open session for an evidentiary hearing);
- (g) To confer with the governmental body's legal counsel who is rendering oral or written advice concerning litigation strategy;
- (h) To consider requests for confidential written advice from the State Ethics Board or from any local governmental ethics board;
- (i) To consider certain business acts (lay-off, closing) where public discussion could adversely affect the business, its employees or former employees; and
- (j) To consider certain financial information about personal support of a nonprofit corporation operating a state-owned ice rink.

There also is a specific exemption in the law for partisan caucuses of the senate and assembly (except as provided by legislative rule) and for a meeting conducted in compliance with any legislative rule that conflicts with the Open Meetings Law.

**Closed Sessions – Procedures.** When permitted by one of the exceptions, a governmental body may, but is not required to, close its meeting to the public upon a motion carried by majority vote. The chief presiding officer must announce to those present the nature of the business that will be considered in closed session and the specific statutory exemption which authorizes the closed session. The announcement and the vote to close become part of the public record of the meeting.

No business may be taken up at any closed session unless it relates to matters included in the announcement. A closed session cannot be fol-

lowed by an open session unless 12 hours have lapsed or unless the open session was announced at the same time and in the same manner as the closed session.

**Miscellaneous Provisions.** Except for the election of officers, no secret ballot may be used in any election or decision of a governmental body unless another statute provides otherwise. Any member may require that the vote of each member is ascertained and recorded.

The motions and roll call votes of each meeting, both open and closed sessions, must be recorded, preserved and open to inspection as a public record (subject to certain limitations if the need for secrecy continues).

Any person may request advice from the attorney general as to the applicability of the Open Meetings Law under any circumstances.

**Enforcement and Penalties.** Wisconsin's Open Meetings Law is enforced by the attorney general or the district attorney of any county where a violation may occur. If a district attorney fails to begin a lawsuit upon request and sworn complaint, the person making the complaint is permitted to start the legal action and, if he or she prevails, be awarded the costs of prosecution, including reasonable attorneys' fees. Penalties for knowing participation in an illegally closed meeting range from \$25 to \$300 for each violation and are not reimbursable by the governmental body. These forfeitures are paid to the state in suits brought by the attorney general and to the county in those brought by the district attorney or a complainant. Members who voted not to go into closed session cannot be held liable even if they attended the closed session.

The court may void any action taken at a meeting of a governmental body held in violation of the Open Meetings Law.

## Wisconsin Open Records Law

The Wisconsin Open Records Law establishes a presumption of openness that gives the public, including the news media, access to most government records.

**Policy.** In recognition of the fact that a representative government is dependent upon an informed electorate, section 19.31 declares it to be the public policy of this state that all persons are entitled



to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, sections 19.32 to 19.37 should be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest and only in an exceptional case may access be denied.

**Definitions.** The Open Records Law defines its operative terms broadly. An “authority” covered by the law means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation; any court of law; the assembly or senate; a nonprofit corporation that receives more than 50 percent of its funds from a county or a municipality and that provides services related to public health or safety to the county or municipality; or a formally constituted subunit of any authority.

“Records” covered by the law include any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, that has been created or is being kept by an authority. “Record” includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tape (including computer tapes), and computer printouts.

“Record” does not include drafts, notes, preliminary computations and like materials prepared for the originator’s personal use or prepared in the name of a person for whom the originator is working; materials that are the purely personal property of the custodian and have no relation to his or her office or materials to which access is limited by copyright, patent or bequest; and published materials that are available for sale or for inspection at a public library. A governmental body cannot circumvent the Open Records Law by stamping a document “draft” and calling it preliminary if the document actually was used by someone besides the originator. *Fox v. Bock*, 149 Wis. 2d 403, 438 N.W. 2d 589 (1989).

**Access.** Each government body must designate a custodian of its records. Wis. Stat. sec. 19.33. Elected officials are legal custodians of their records although they may designate staff members to act for them.

Section 19.34 outlines procedures for access to records. Each governmental unit must prominently display a notice stating the times and places that the public may obtain access to its records, a place to copy them and a list of copying costs.

Generally, the public has access to records during regular office hours. If there are no regular office hours, records can be inspected on 48 hours’ written or oral notice or by designation of two consecutive hours per week

for access. The law requires that records be provided as soon as practicable and without delay.

The public has the right, in most circumstances, both to inspect and copy or photograph any public record. The facilities provided the public for copying must be comparable to those used by the office's employees. Transcripts may be provided of records in nonwritten or audio formats. The public also can request paper printouts of computer records. In addition, the government body must allow inspection of records of contractors providing service to the government.

A request may be made orally, but it must be in writing before an action to enforce the request can be commenced under section 19.37. The requester does not have to provide identification or state a purpose for inspecting the records unless the records are kept at a private residence or unless required by law. The legal custodian may, however, impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged. Finally, the law does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

An authority may deny an oral request for records orally unless the requester demands a written statement of reasons denying the request. The requester must ask for reasons within five business days of the oral denial. If an authority denies a written request in whole or in part, the requester is entitled to a written statement of reasons for denial. A refusal is subject to review upon petition for a writ of mandamus under section 19.37(1) or upon application to the attorney general or a district attorney.

Copying fees may not exceed the actual, necessary and direct cost of reproduction and transcription, unless a fee is otherwise specifically established by law. The legal custodian cannot charge for locating a record unless the actual, direct cost is \$50 or more. There may be a mailing or shipping charge, however. Fee prepayment may be required if the total amount exceeds \$5.

An authority may provide copies of a record, without charge or at a reduced charge, where the authority determines that waiver or reduction of the fee is in the public interest.

**Limitations.** There are only a few limitations on record access in chapter 19. *See* sec. 19.36. Records may be withheld whenever state or federal law exempts their disclosure. Although computer programs cannot be copied, the material used as input for the program or the material produced as a product of the program is subject to examination and copying. An authority may withhold access to any record or portion of a record containing information qualifying as a common law trade secret.

Common law exemptions still apply, and the public policies underlying the exemptions for open meetings contained in section 19.85 may form the grounds for denial of access to public records. However, if an authority relies on any of the grounds identified in section 19.85 to close meetings, it may deny access only if the authority "makes a specific demonstration

that there is a need to restrict public access at the time that the request to inspect or copy the record is made.” Sec. 19.35(1).

If a record contains information that may be made public and information that may not be made public, the authority shall provide the information that may be made public and delete the information that may not be. Sec. 19.36(6).

**Enforcement and penalties.** To enforce the Open Records Law, a requester may commence a mandamus action or ask the attorney general or the district attorney to do so.

If the requester prevails in a court action, the court must award reasonable attorney fees, damages of not less than \$100, and other actual costs. If a court finds that an authority or legal custodian under section 19.33 arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court also may award the requester punitive damages. Any authority whose legal custodian arbitrarily and capriciously denied or delayed response to a request or charged excessive fees may be required to forfeit not more than \$1,000.

As under the Open Meetings Law, any person may request the attorney general to interpret the law.

**Woznicki Notice and Review Procedures.** The legislature amended Wis. Stat. chapter 19, narrowing and clarifying the notice and review procedures created by *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). In that case, the Wisconsin Supreme Court added procedural steps that custodians must take before releasing certain public records implicating the privacy or reputational interests of an individual. The *Woznicki* court held that before a district attorney may release a record implicating such interests, the district attorney must notify the subject of the record and give the subject a reasonable opportunity to seek court review of the district attorney’s decision to release the record. Now, under the revisions to chapter 19, the statutes explicitly confine *Woznicki* to limited categories of records. Unless a record falls within those defined categories, the subject of the record is not entitled to *Woznicki* notice and review rights.

In general, only employees are entitled to *Woznicki* notice with respect to any records. The definition of employee in Wis. Stat. section 19.32(1bg) includes both public employees and employees of an employer operating under a government contract. This means that private employees working under a government contract, such as school bus drivers, nursing home workers, and government contract lawyers, have *Woznicki* rights to the extent their records are subject to request under the Open Records Law.

The statute carves out high-ranking state and local public officials and does not provide them with *Woznicki* rights. Under section 19.32(1dm), officials holding local public office include those already defined in section 19.42(7w), as well as other individuals serving as the head of a department, agency or division of the local government unit.

An authority is not required to notify a record subject before releasing a record, *unless* mandated by section 19.356(2). Subsection (2) lists the



types of records that require the authority to provide *Woznicki* notice to the record subject before releasing the record. For public employees (excluding those holding high office as defined above), the list is confined to disciplinary records. Private employees working under government contracts are entitled to *Woznicki* notice before any records containing personally identifiable information may be released. Finally, *any person* is entitled to *Woznicki* notice before a record may be released that identifies them and that the authority obtained using a subpoena or search warrant. No other records are subject to the *Woznicki* procedure.

To limit the delay resulting from the *Woznicki* process, the new statutes establish strict time limits for notice and judicial review. First, if a *Woznicki* notice is required, under Wis. Stat. section 19.356(2)(a), the authority shall give notice to the record subject within 3 days after making the decision to release the record. Within 5 days of receiving the notice, the record subject must provide written notice to the authority of his or her intent to seek judicial review of the authority's decision to release the record. Within 10 days of receiving the notice, the record subject must actually commence an action in state circuit court. Then, under section 19.356(7), the court must issue a decision within 10 days after the filing of the complaint. The process can be delayed only if a party demonstrates cause for an extension and, even then, the court must issue its decision within 30 days. The circuit court's decision may be appealed, within 20 days, under section 808.04(1m). Section 19.356(8) requires the court of appeals to grant precedence to the appeal.

### **Access to the Courts**

The openness that Wisconsin espouses for records and meetings of governmental bodies applies to the courts as well. Except for a very few statutory and other exceptions (juvenile court, some preliminary hearings, etc.), all "sittings" of the courts in Wisconsin are public, and all citizens,

including reporters, may attend them. Wis. Stat. sec. 757.14. In a jury voir dire closure case, the Wisconsin Supreme Court said that, under section 757.14 no court “sitting,” whether during trial or otherwise, may be closed unless the court first makes findings, after a hearing at which members of the public have the right to be heard, that overwhelming public values connected with the administration of justice will be subverted by a public session. *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 340 N.W.2d 460 (1983). The United States Supreme Court has ruled that the First Amendment, too, guarantees the openness of jury voir dires and most other court proceedings unless the court makes findings justifying closure. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984).

Wisconsin trial courts no longer are permitted to close the courtroom during a preliminary hearing solely on the request of a sexual assault victim under Wis. Stat. section 970.03(4). As a result of the supreme court’s decision in *State ex rel. Stevens v. Circuit Court*, 141 Wis. 2d 239 414 N.W. 2d 832 (1987), striking down part of section 970.03(4), the trial judge now must balance the compelling public interest in openness against the adverse effect of public scrutiny, taking into consideration the victim’s age and psychological maturity, the nature of the crime and the desires of the victim, the parents and the relatives.

While juvenile proceedings typically are conducted in a closed courtroom, trial courts have discretion under Wis. Stat. section 48.299(1)(a), to permit reporters to attend chapter 48 juvenile proceedings. The statute permits attendance by persons having a direct interest in the work of the court and that, the courts have said, includes reporters. *State ex rel. E.R. v. Flynn*, 88 Wis. 2d 37, 276 N.W. 2d 313 (Ct. App. 1979).

Court records, like court sittings, are presumptively open to public inspection. *State ex rel. Bilder v. Delavan Township*, 112 Wis. 2d 539, 334 N.W.2d 252 (1983); *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 168 N.W.2d 836 (1969).

Courts are included within the Open Records Law and, before a judge seals court records, even at the request of the parties, he or she must determine that there is a need to restrict public access to court documents. *C.L. v. Edson*, 140 Wis. 2d 168, 409 N.W. 2d 417 (Ct. App. 1987) (affirming disclosure of settlement documents involving minor victims of sexual assault); *WISC-TV v. Mewis*, 151 Wis. 2d 122, 442 N.W. 2d 578 (Ct. App. 1989).

## Defamation

Both for legal protection and as a matter of journalistic policy, newspapers and broadcast media make a substantial effort to report accurately. However, it is difficult to achieve 100 percent accuracy. Much of what the media reports necessarily is obtained from others – from “sources” – and even reliable sources can be wrong. Sometimes information thought to be complete is incomplete; sometimes, although most concerned act reasonably and in good faith, there is misunderstanding or misidentification. In addition, journalists have to work under deadlines and usually don’t have

time to do in-depth analysis of every story. If an inaccurate story also is defamatory – that is, it may harm the subject’s reputation or standing in the community – the publisher may face a defamation claim.

The law recognizes the importance of not having the news media unduly burdened and restricted by exposure to defamation suits, and gives them certain “privileges” (for example, freedom from liability under certain circumstances even though what is published is false and defamatory). These privileges recognize that having free and robust communication in some circumstances is of such great public benefit that it outweighs damage to individuals who might be injured by a defamatory communication.

Such privileges have long existed for the bench and bar. Judges and lawyers, for example, are absolutely privileged (exempt from defamation suits) for statements in trials and hearings, in briefs, pleadings and other pretrial communications (even if said with knowledge of falsity and maliciously) so long as the statements are reasonably germane to the issues.



This privilege exists because it is recognized as a matter of policy that the harm done an individual (who is thus prevented from suing a judge or lawyer for defamation) is outweighed by the benefit of allowing judges and lawyers to speak freely in court.

Wisconsin's news media have a privilege under Wis. Stat. section 895.05(1) to publish true and fair reports of any "judicial, legislative or other public official proceeding" or any "public statement, speech, argument or debate in the course of such proceeding." Thus, the news media, if they publish a true and fair report of a trial, have the same protection as the witnesses, judge and lawyers in the trial. In fact, the media's protection is potentially greater because the participants can lose the protection if their comments are wholly unrelated to the subject matter, while the press presumably is free to publish whatever is said in the trial. The rationale is that it is important that the public be freely informed of the activities of judges, legislators and other public officials. Free reporting of such events would suffer if, for example, the news media could be sued for defamation because what a witness says in a trial turns out to be false and defamatory. (This privilege is limited to "proceedings," which the statute does not define.)

In addition to this statutory privilege (derived from the common law), the news media enjoy the constitutional privilege announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and following cases. This privilege provides immunity from a defamation suit by a public official, candidate for public office or public figure unless the defamation was published with actual malice – not the common law, ill-will type of malice, but a constitutional malice defined as (i) knowledge that what was being said or written was false, or (ii) reckless disregard as to whether or not it was false.

The "actual malice" standard was reaffirmed in *Hustler v. Falwell*, 485 U.S. 46 (1988), where the court also unequivocally rejected alternative legal theories, such as intentional infliction of emotional distress, which the public figure plaintiff there had advanced to try to avoid the constitutional defenses to defamation claims.

Under the common law – and this was true in Wisconsin – a defendant who published a defamation without some privilege was strictly liable. That is, liability existed regardless of the defendant's honest belief that the statement was true or his or her lack of negligence, etc. This was drastically changed, of course, by the *Sullivan* rule covering defamation of public officials and public figures. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the U.S. Supreme Court reaffirmed the rule for suits by public officials, candidates and public figures, but the Court also rejected strict liability for defamation of private plaintiffs. As a matter of constitutional law thereafter, in a suit by a private plaintiff (one who is neither a public official nor a public figure), there could no longer be strict liability – there must be some fault on the part of the defendant. The court allowed the states to determine the standard of liability – that is, the degree of fault

– so long as it was not less than negligence.

*Gertz* also held that presumed or punitive damages are no longer allowable in defamation cases *unless* the plaintiff proves “constitutional actual malice.” To recover punitive damages in Wisconsin, a defamation plaintiff also must satisfy the punitive damage standard in Wis. Stat. section 895.85(3). Actual damages would have to be proved, not presumed, but they could include, as well as “special” damages, loss of reputation or mental suffering.

Thus, negligence or lack of due care whether a statement is true appears to be the minimum permissible fault requirement. Some states have adopted negligence as the standard in private-plaintiff cases; others have required a higher degree of fault, particularly where the matter involved is of public interest and concern; and some states have applied the *Gertz* minimum requirement of fault to both non-media defendants as well as media defendants.

The Wisconsin Supreme Court, in *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), however, read the *Gertz* “fault” rule in private-plaintiff cases as applying only to suits against the news media. And rejecting more defendant-oriented decisions in some other states, Wisconsin adopted “negligence” as the standard of liability in suits alleging defamation of private plaintiffs, at least in cases not involving matters of public interest and concern.

The Wisconsin Court of Appeals applied the “actual malice” standard to limited-purpose public figures in *Wiegel v. The Capital Times Co.*, 145 Wis. 2d 71, 426 N.W.2d 43 (Ct. App. 1988). It held that a plaintiff involved in a public controversy need not actually seek publicity to become a limited purpose public figure subject to the constitutional protections afforded the news media. Thus, the *Wiegel* court modified the public figure test developed in *Denny v. Mertz*, which had required voluntary participation in the controversy as a precondition to public figure status and then fashioned a standard that focused on the plaintiff’s role in the controversy without regard to any desire for publicity.

A defamation plaintiff now, under *Wiegel*, becomes “an involuntary public figure” if he or she was a central participant in a legitimate public controversy and the alleged defamatory statements are germane to that participation. The media defendant that defames such a public figure enjoys the actual malice defense.

A private plaintiff suing a media defendant for defamation has the burden of showing that the speech is false. *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986). That reverses Wisconsin’s common law rule that made truth an affirmative defense.

Wisconsin law requires a plaintiff to give written notice to those alleged to be responsible or liable before suing for libelous statements contained in a newspaper, magazine or periodical. Wis. Stat. sec. 895.05(2). This requirement is a prerequisite to suits both against a media defendant and against a nonmedia defendant whose defamatory statements were published if the

plaintiff wants to recover the damages caused by that publication.

In addition to statutory and constitutional privileges, the news media also may be protected in defamation suits by common law absolute and “conditional” privileges. See *Vultaggio v. Yasko*, 215 Wis. 2d 326, 572 N.W.2d 450 (1998). A communication is conditionally privileged, for example, if it is between persons sharing a common interest supported by public policy (e.g., communications between the former and prospective employer of a job applicant).

The privileges discussed above rest on the premise that it is essential in our system that communication to the public about certain matters (for example, court proceedings) and about public officials and public figures be free and open. This requires protection from the chilling effect of defamation liability. The statute requiring presuit notice is in recognition of the fact that a prompt correction or retraction can mitigate damages. It recognizes also that such a procedure eliminates the basis for punitive damages.

Obviously, this discussion is not a full analysis of defamation law. Its purpose is to discuss the relationship between the news media and the law. It reflects some of the accommodations made by our law to the news media, in the interest of free communication to the public, while at the same time keeping a reasonable balance between the news media and public on one side and individuals’ reputation rights on the other.

## Privacy

The claim of invasion of privacy stems from the notion that every person has a right to be left alone while, on the other hand, the news media represent the public’s need to know about certain activities. An invasion of privacy can subject a person to mental pain and distress. Thus, violating this right has come to be an actionable tort. While lawyers rarely need to be cautioned to protect clients’ rights to privacy, the parameters of the Wisconsin law are provided in this handbook to help attorneys strike the careful balance between protecting clients and providing the news media with information to which they have a right.

**Statutory right of privacy.** For most of this state’s history, the courts and legislature refused to recognize a legal right of privacy although the courts allowed limited recovery in cases involving intentional infliction of emotional harm. See *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974); *Schaefer v. State Bar of Wisconsin*, 77 Wis. 2d 120, 252 N.W.2d 343 (1977). The Wisconsin legislature enacted a statutory right of privacy in 1978. See Wis. Stat. sec. 895.50. Ambiguities in the law are to be resolved by the courts in accordance with the developing common law of privacy.

Invasion of privacy occurs under section 895.50 in three instances:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place a reasonable person would consider private or in a manner actionable for trespass.

Intrusion is not dependent upon publicity given the person whose privacy is intruded upon. The statute, however, does not define “intrusion”

or “of a nature highly offensive to a reasonable person.” According to the Restatement (Second) of Torts, section 652D (1977), intrusion includes the use of a defendant’s senses with or without mechanical aids to oversee or overhear the plaintiff’s private affairs, as well as physical intrusion.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person without having first obtained the written consent of the person or the person’s guardian.

Because of First Amendment principles, this subsection would not apply to the use of a name or picture for news purposes, even though arguably it is for “trade” because the income is derived from the news publication. This subsection would apply, however, to the media’s non-news use of a person’s name, portrait or picture in a promotion or advertisement of itself. It is not clear whether the news media, in addition to the advertiser, would be held liable under this subsection for publishing a paid advertisement for which the advertiser had failed to get the person’s consent. The news media itself could be liable under some circumstances if it is held to be itself “using” the name or picture, and libel concepts apply. See *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 297 N.W.2d 500 (1980); 1978 Wis. L. Rev. 1029.

c) Publicity given to a matter concerning another’s private life that is highly offensive to a reasonable person, if the defendant acted unreasonably or recklessly as to whether there was legitimate public interest in the matter or with actual knowledge that none existed.

The Restatement, section 652D, defines publicity as matter made public by communicating, in written or oral form, to the public at large.

Lawyers dealing with news media should note that this subsection protects only the private life of a client. There is no liability for giving further publicity to information already public, to what is open to the public eye, or to a business or activity that deals with the public. There is no liability attached to a public official who discloses public records in good faith or to a member of the news media who accurately reports on public records. The protection afforded by this subsection applies to activities and qualities of a person that she or he does not expose to the public eye but keeps to himself or herself or at most reveals only to family or close personal friends.

In addition to “private,” the publicity also must be “highly offensive to a reasonable person.” The Restatement suggests that liability must take into account customs of the time and place, the occupation of the plaintiff and the habits of neighbors and fellow citizens. Minor and moderate annoyances would be insufficient.

Finally, liability cannot be found if there is a legitimate public interest in the matter. Constitutional law, as well as common law, recognizes this requirement. To a considerable degree, the media has defined what is newsworthy and of public interest by what it generally communicates to the public. Moreover, the public generally is considered to have a legitimate interest in information regarding some aspects of the private lives of public figures, voluntary or involuntary.

In *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979), the Wisconsin Supreme court concluded that the release of arrest records would not constitute an invasion of privacy under that section. In *Zinda v. Louisiana Pacific Corp.*, 149 Wis. 2d 913, 440 N.W. 2d 548 (1989), the court affirmed a jury finding against an employer that published a statement that an employee had been terminated for falsifying his employment application. Relying on the Restatement, the court held that a jury reasonably could conclude that the story was highly offensive and did not involve a matter of public concern. It remanded, however, to let the jury decide whether the employer remained protected by a conditional privilege.

**Limitations and Privileges.** To recognize the rights of the news media, lawyers will want to clarify their clients' right to privacy. Some limitations on that right are outlined in the statute: the invasion needs to be serious and outrageous or beyond the limits of common ideas of decent conduct; the language precludes application to a corporation; the right may be asserted only by the person whose privacy is invaded; and the right does not apply to electronic surveillance under sections 968.27-968.33.

Limitations are found in other statutes as well. Section 893.57 imposes a two-year statute of limitations, while section 895.01 provides that the cause of action survives the death of the parties. Section 895.02 prohibits recovery of damages for alleged outrage to the feelings of the injured party if an executor or an estate is or becomes the defendant.

Other limits flow from the First Amendment. *Time Inc. v. Hill*, 385 U.S. 374 (1967), held that the New York privacy statute could not be used to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or acted in reckless disregard of the truth. A constitutional right to speak truth without liability might be asserted in a suit based on publicizing private matter, and it remains to be seen how far constitutional protections will go.

Section 895.50(3) provides that the statutory right of privacy, interpreted in accordance with the developing common law of privacy, includes the news media's "defenses of absolute and qualified privilege with due regard for maintaining freedom of communication, privately and through the public media." Sections 652F and 652G of the Restatement indicate that where an absolute or qualified privilege exists under the law of defamation, one also exists under the right of privacy. See *Zinda, supra*, addressing an employer's privilege.

Unlike defamation claims, privacy suits are not barred by the defense of truth. Although section 895.50(2)(a) allows a court to grant equitable relief to prevent and restrain an invasion of privacy, equity may not be used to enjoin or restrain constitutionally protected expressions of communication.

## Trespass

Closely related to invasion of privacy is trespass, the intentional entry without consent onto property that another person has a right to possess. Restatement (Second) of Torts sec. 158 (1965). In addition to possible criminal liability, trespass can expose journalists to liability for compensatory and punitive damages, including nonphysical harm caused by even the truthful publication or broadcast of the information acquired through the trespass. *Prahl v. Brosamle*, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980).

A journalist can defeat a civil claim for trespass with the affirmative defense of consent. Consent may be given expressly or impliedly from the conduct of the property owner, the relationship of the parties or from custom. *Prahl*, 98 Wis. 2d at 147. Implied consent to enter a business establishment creates a privilege to enter for business purposes only, however, and a journalist who enters a public place for investigatory or newsgathering purposes may be committing a trespass even though the place may be a public accommodation.

Most courts have refused to find implied consent from the custom or practice of journalists accompanying public officials onto private property to cover news events, *Prahl v. Brosamle*, 98 Wis. 2d at 147-49, and journalists who follow this practice risk liability for trespass. See also *Wilson v. Layne*, 526 U.S. 603 (1999). Moreover, a newsgatherer has no special right of access to an emergency site where the public has been reasonably excluded. *Oak Creek v. Ah King*, 148 Wis. 2d 532, 436 N.W.2d 285 (1989).





### Limitations on Obtaining Information from the News Media

A reporter does not have an absolute, First Amendment right to refuse to disclose information obtained while newsgathering. *Branzburg v. Hayes*, 408 U.S. 665 (1972). From the *Branzburg* decision and concurring opinions, however, emerged the notion of a qualified privilege not to reveal confidential information. Unlike many other states, Wisconsin has not enacted a shield law protecting news reporters who refuse to reveal confidential sources. But the Wisconsin Supreme Court in *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 113 Wis. 2d 411, 335 N.W.2d 367 (1983), established a standard the subpoenaing party must meet to compel disclosure of confidential information. *See also Kurzynski v. Spaeth*, 196 Wis. 2d 182, 538 N.W.2d 554 (Ct. App. 1995).

To resist a reporter's motion to quash a subpoena, the subpoenaing party must show: 1) that there is a reasonable probability that the reporter's testimony will be competent, relevant, material and favorable to his defense; and 2) that the subpoenaing party has investigated other sources for the information and that there are no reasonable and adequate less-intrusive sources. If the subpoenaing party persuades the trial court on both points, the journalist then must disclose the sources to the court *in camera*. After the *in-camera* disclosure, the court decides: 1) whether the sources can provide competent, material, relevant and exculpatory evidence; and 2) whether the information is necessary to the defense. Only if the court finds that both of these criteria are met can it order the journalist to disclose to the subpoenaing party.

Lawyers should not rely on subpoenas to obtain reporters' notes or broadcasters' outtakes even when seeking only nonconfidential information. Journalists may destroy notes and outtakes after publication or broadcast and, in any case, will vigorously oppose subpoenas seeking any information obtained while newsgathering. Subpoenas necessarily intrude upon editorial decisions and seriously impair newsgathering. Members of the news media respect lawyers and the job they have to do, but they do not feel compelled to assist the lawyer in his or her job of factgathering.

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## Wisconsin Professional Communications Organizations

Lawyers who have questions about certain legal/media issues may find these contacts helpful, although many of these names and addresses change periodically. You also may wish to contact the State Bar's Media-Law Relations Committee on broad issues by writing to the committee, c/o State Bar of Wisconsin, P.O. Box 7158, Madison, WI 53707-7158.

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