

JUDGES AND JOURNALISTS: ACCURACY AND ACCESS

Supplementary Materials

***Sponsored by the University of Pittsburgh School of Law, the United States Court of Appeals
for the Third Circuit, and the United States District Court for the Western District of
Pennsylvania***

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All materials available at:

<http://law.pitt.edu/events/new-event/judges-and-journalists-accuracy-and-access>

REFERENCE MATERIALS

I. Sealing of Filings and Proceedings in Civil and Criminal Cases

United States District Court for the Western District of Pennsylvania, Local Rules of Court

The Western District's local rules has sections that discuss the policies and procedures related to the sealing of documents. For instance, "a party wishing to file any document under seal must obtain prior leave of Court for each document that is requested to be filed under seal." LCvR 5.2(H). LCvR 5.2(H) implements an order from former Chief District Judge Donetta W. Ambrose, effectively voiding any agreement between counsel allowing for the automatic sealing of court documents.

***United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008).**

In *Wecht*, the district court invoked a local rule, W.D. Pa. Crim. R. 83.1, that limited attorneys from publicly speaking about the case. Defendant and various media outlets challenged the rule as unconstitutional. The court ruled that the media outlets had standing to challenge the rule, but found it unnecessary to reach the parties' constitutional arguments. Instead, the court invoked its supervisory authority and modified the rule so that it would prohibit only speech that was substantially likely to materially prejudice ongoing criminal proceedings, as opposed to the reasonable likelihood standard that had been in the rule. With respect to a ruling that unsealed certain records provided by the government, the court found that the public had a common law right to the records and that the decision to unseal was proper.

***LEAP Systems, Inc. v. MoneyTrax, Inc.*, 638 F.3d 216 (3d Cir. 2011).**

In *LEAP Systems*, a licensor claimed that a transcript memorializing the terms of the parties' settlement agreements contained "sensitive business information." The district court entered an order sealing those portions of the transcript. The licensor pursued a misappropriation claim against the licensee's colleague in state court. The colleague sought to unseal portions of the transcript pursuant to his common law right of access to judicial proceedings and judicial records. The appellate court determined that the transcript was a judicial document subject to the "right of access" doctrine because the transcript was filed with the Clerk of Court and listed as a document on the district court's docket, and the parties specifically requested that the district court retain jurisdiction to interpret and enforce the terms of the settlement agreements. However, the district court did not abuse its discretion in finding that the presumption in favor of public accessibility had been rebutted because the licensor's reliance on the district court's assurances of confidentiality was entirely reasonable and sufficient to outweigh the public's common law right of access.

***Jersey Media Group Inc. v. United States*, 836 F.3d 421 (3d Cir. 2016).**

In *Jersey Media Group*, a letter identifying unindicted co-conspirators, produced to defendants in a criminal case arising from an alleged political payback scheme, was not subject to the First Amendment right of access because the letter was a matter of discovery and not a bill of particulars. The government did not regard the letter as a bill of particulars, the court did not order one, defendants did not behave as though they had

received one, and the letter did not serve the purpose of one. Further, the letter was not subject to the common law right of access because it was not a judicial record. Even if the letter was "filed" by emailing it to the judge, discovery materials that were part of judicial filings were generally not judicial records, and the letter played no part in the judicial function or process.

Honorable Jay B. Rosman, *A Reporter's Privilege in Florida: Has the Conflict Between the First Amendment and Sixth Amendment Been Reconciled*, 19 BARRY L. REV. 93 (2013).

Judge Rosman of Florida's 20th Judicial Circuit writes an article describing the constitutional relationship between the First and Sixth Amendments. It discusses the history of journalists' privilege and analyzes the results of a survey that compared the current statutory law with the public's perception of the journalist privilege and the freedom of the press in the courtroom.

Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367 (2015).

Student note analyzing the differences between traditional media and social media, as well as how those differences impact the effect of prosecutors' extrajudicial speech on pending matters, the reputation of the accused, and public perception of prosecutors and the justice system. This note argues that the increased risks of harm presented by prosecutors' use of social media necessitate new restraints to restore the free speech-fair trial balance and promote professionalism in the social media age.

Reporters Committee for Freedom of the Press, Reporters Committee amicus brief: Public's First Amendment right to access judicial proceedings prohibits overbroad sealing of court records, September 20, 2017 (<https://www.rcfp.org/browse-media-law-resources/news/reporters-committee-amicus-brief-publics-first-amendment-right-access>).

Short article discussing an amicus brief submitted to the U.S. Court of Appeals, Second Circuit, by the Reporters Committee for the Freedom of the Press in *Guiffre v. Maxwell*. The brief discusses the importance of court records as a source of information for journalists to inform the public. The article includes a link to the brief.

II. Disclosure vs. Sealing of Juror Identities

***United States v. Shkreli*, No. 15-CR-637 (KAM), 2017 U.S. Dist. LEXIS 140030, at *1 (E.D.N.Y. Aug. 18, 2017).**

Memorandum opinion in the criminal trial of former pharmaceutical executive Martin Shkreli regarding a letter from the E.D.N.Y. press pool requesting a reporter be present at side bar discussions with individual jurors during *voir dire*. The *Shkreli* court applied a presumption of openness in judicial proceedings, breaking away from a trend seen in some courts of finding that jurors' interests in privacy outweigh the presumption of disclosure in cases that garner much media attention.

David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1 (1997).

Weinstein's article examines the constitutional requirements and policy issues of disclosure. It is one of the most frequently cited law review articles on these issues. His article has been cited in the aforementioned *United States v. Wecht*, 537 F.3d 222 (3d Cir. 2008) as well as in *United States v. Blagojevich*, 614 F.3d 287 (7th Cir. 2010).

III. New-age "Press" and the Court System's Treatment of Them

Eugene Volokh, *Freedom For The Press as an Industry, or For The Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

In his article, Volokh argues that people of the Framing era most likely understood the freedom of the press as something akin to the modern "press as a technology model," rather than a "right belonging exclusively to members of the publishing industry." Under the "press as a technology model" everyone has a right to freedom of the press to use communication technology for gathering and relaying information.

Kristin R. Brown, Note & Comment, *Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality*, 19 TEX. WESLEYAN L. REV. 809 (2013).

This note examines the role of Facebook in recent court cases, and discusses potential ways to mitigate negative impacts social media has on the ability of juries to remain impartial and give defendants a fair trial.

Jack M. Balkin, *Freedom of the Press: Old School/New School Speech Regulation*, 127 HARV. L. REV. 2296 (2014).

This article discusses three new features of speech regulation in the digital age: (1) collateral censorship; (2) Public/private cooperation and co-optation; and (3) new, government-devised forms of digital prior restraint.

Mark Arsenault, *Ruling Widens the Meaning of "Media"*, BOS. GLOBE (July 5, 2010), http://www.boston.com/news/nation/washington/articles/2010/07/05/fec_finds_partisan_fil_m_group_free_from_disclosure_rules

The Campaign Legal Center warns of a proliferation of partisan advocates undermining the law by producing 'documentaries' that are merely long campaign ads, then advertising them without disclosing their activities.

IV. Cameras in the Courtroom

***Solid v. Eight Judicial District Court*, 393 P.3d 666 (Nev. 2017).**

Here, the Supreme Court of Nevada interpreted the rules governing media in the courtroom. The case arose from My Entertainment TV (MET) filming Michael Solid's first-degree murder trial for use in the television show *Las Vegas Law*. Solid contended that MET was not a "news reporter" under the relevant rule, that MET's footage would not be used for solely educational or informational purposes but may instead be used for unrelated advertising purposes, that the district court erred by allowing MET to film the trial, and that the terms of MET's television series agreement with the Clark County

District Attorney required the Special Public Defenders assigned to Solid's case to give written consent to allow filming. The court rejected each of these arguments. The Supreme Court of Nevada concluded that MET is a "news reporter" under the relevant rule because it met the plain language of the news reporter definition of "any person who gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." Also, the court held that MET was using the footage for educational or informational purposes because the show focused on criminal justice. The court held that the district court did not err in allowing MET to film Solid's trial under the relevant rule because Solid failed to overcome the presumption allowing electronic recording in the courtroom. Finally, the court held that the television series agreement between the Clark County and MET did not require the consent of Solid's trial counsel.

V. **Tweeting and Blogging by Reporters from the Courtroom During Trials**

David Russell, Christopher C. Chiou, and Sean D. Nelson, *Litigation in Twitter Nation: When You Can and Can't Tweet in #Court*, LAW.COM (February 6, 2017), <https://jenner.com/system/assets/publications/16532/original/Russell%20Chiou%20Nelson%20Law.com.pdf?1486666402>.

This article discusses how the Ninth Circuit, various U.S. District Courts, and California State Courts have applied Federal Rule of Criminal Procedure 53's constraints to tweeting. The article provides a high-level overview of the current issues facing courts in evaluating social media's fit within Rule 53 as well as a brief case study of how the various jurisdictions in California have tackled such issues.

***Reporter's twitter photo results in mistrial in Kansas murder case*, CBS Interactive Inc., (April 12, 2012), <https://www.cbsnews.com/news/reporters-twitter-photo-results-in-mistrial-in-kansas-murder-case/>.**

Article demonstrating one example of the serious consequences of improper social media use by reporters in the courtroom.

Caleb Segrest, *Use of Twitter to Broadcast Courtroom Proceedings*, Norton Rose Fulbright LLP Social Media Law Bulletin, (June 1, 2017), <http://www.socialmedialawbulletin.com/2017/06/use-twitter-broadcast-courtroom-proceedings/>.

This article discusses the recent advisory opinion of the Indiana Commission on Judicial Qualifications which exempts microblogging platforms (such as twitter) from the ban on certain electronic broadcasting, televising, recording, or taking photographs in Indiana state courts.

VI. **Reporters' Role as a Conduit Between Courts and the Public**

Demi Vitkute, *Reporters Committee Plays Key Role in Transparency, Right to Record Cases*, July 21, 2017 www.rcfp.org; <https://www.rcfp.org/browse-media-law-resources/news/reporters-committee-plays-key-role-transparency-right-record-cases>.

This article discusses the Reporters Committee for Freedom of the Press' filing of three amicus briefs in important victories for proponents of the access of public records and increased transparency. The cases implicated "the right to record police officers in public spaces, public access to dashboard videos of fatal encounters with police, and a ruling overturning Utah's 'ag-gag' law."

VII. Judges' Discussion of Press' Importance and the Court's Role in Protecting Free Press

***Bartnicki v. Vopper*, 532 U.S. 515 (2001).**

Petitioners alleged that an unknown person intercepted petitioners' telephone conversation regarding a matter of public concern and that respondent media representatives published the contents of the conversation knowing that the recording had been obtained illegally, in violation of federal and state wiretapping statutes. In petitioners' suit against respondents for damages, the appellate court determined that the statutes were invalid. On writ of certiorari, the court affirmed the judgment, determining that the application of the statutes under the circumstances violated the First Amendment. Petitioners and the Government identified two interests served by the federal and state statutes, the interest in removing an incentive for parties to intercept private conversations and the interest in minimizing the harm to persons whose conversations have been illegally intercepted. However, the court determined that the interests could not justify the statutes' restrictions on speech.

***Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937 (7th Cir. 2015).**

The prohibition in the Driver's Privacy Protection Act (DPPA), 18 U.S.C.S. § 2721 et seq., on disclosing the police officers' personal information did not violate the publishing company's First Amendment rights. As this was an as-applied challenge, the court's holding was limited to the facts and circumstances of the case; [2]-The court held only that, where members of the press unlawfully obtain sensitive information that, in context, is of marginal public value, the First Amendment does not guarantee them the right to publish that information. The district court therefore did not err in denying the publishing company's motion to dismiss the officers' claim that it violated their rights under the DPPA.

***Fields v. City of Philadelphia*, 862 F.3d 353 (3rd Cir. 2017).**

In *Fields*, the Third Circuit recently dealt with the importance of first amendment rights to record and share police activity. In a § 1983 case where plaintiffs alleged that police officers illegally retaliated against them for exercising their First Amendment right to record public police activity, the Third Circuit held that private individuals have a First Amendment right to observe and record police officers engaged in the public discharge of their duties; [2]-The district court erred by concluding that plaintiffs engaged in conduct only and not expressive conduct when making a recording of the officers' actions; [3]-The officers were entitled to qualified immunity, because the constitutional right to record police activity was not clearly established at the time of the events giving rise to the lawsuit.

***Obsidian Fin. Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014).**

Case holding that in defamation cases, the public-figure status of a plaintiff and the public importance of the statement at issue provide First Amendment touchstones, and the court holds that the *Gertz v. Robert Welch, Inc.* negligence requirement for private defamation actions is not limited to cases with institutional media defendants. Further, even assuming that *Gertz* was limited to statements involving matters of public concern, the blog post in this case qualified, as the allegations against the bankruptcy trustee and his business raised questions about whether they were failing to protect defrauded investors, the post was published to the public, and the blogger's speech was not like advertising. Lastly, as the blog addressed a matter of public concern, the district court should have instructed the jury that it could not find the blogger liable for defamation unless she acted negligently.

***Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).**

Packingham is a recent U.S. Supreme Court decision where the Court touched on social media and the First Amendment, striking down a North Carolina law prohibiting registered sex offender from using all commercial social networking websites

Elizabeth E. Joh, *Bait, Mask, and Ruse: Technology and Police Deception*, 128 HARV. L. REV. F. 246 (2015).

This article discusses newer police tactics of purporting to be members of the press or individuals on social media in order to investigate criminal activity. As technological developments increase police capabilities, courts will have to address the impact of law enforcement strategies on freedom of the press.

VIII. Innovative Approaches to Making Courts Accessible to the Public

Kathryn Holt and Shelley Spacek Miller, *Tailoring Innovation for Today's State Courts*, The Council of State Governments, (2016),

<http://knowledgecenter.csg.org/kc/system/files/Holt%20Miller%202016.pdf>.

This article discusses recent innovative uses of technology by several state courts to provide efficient and streamlined access to the courts through digital platforms. Online platforms to facilitate conservatorship account auditing, protective orders, and dispute resolution provide ways for the public to learn about court proceedings in those areas and resolve legal issues without being physically in court.

***Programs for Self-Represented Litigants*, Judicial Council of California, (May 2015),**

http://c.ymcdn.com/sites/ncbp.org/resource/collection/9694E39C-3A12-4E0C-9325-D80F6A01BD98/2B-Self-RepLits_Fact_Sheet-.pdf.

The Fact Sheet provides a list of programs for pro se litigants in California state courts, including services designed to educate pro se litigants in areas of family law, landlord/tenant disputes, criminal record expungement, appeals, and general civil assistance. The programs have received special recognition for their multilingual services and self-help centers, which are staffed by attorneys to provide information and education to pro se litigants in managing their cases.

Teachers' Courthouse Seminar, Superior Court of Los Angeles County,
http://www.courts.ca.gov/documents/KlepsBrief_TeachCourthouse.pdf

The Teachers' Courthouse Seminar program educates high school teachers about the court system in general and also includes a one-day criminal justice process seminar, covering arraignments, preliminary hearings, suppression motions, plea bargains, trials, and sentencing. The program is designed to provide teachers with greater understanding of the judicial process and specific materials and lesson plans to be used in California's mandatory government class in high school.